

LAW REVIEW 13160

December 2013

Significant Development Regarding Differential Pay for Federal Employees Mobilized Under “Voluntary” Authority

By Jennifer Zucker, Scott Felder, Adrienne

Johnson, and Greg Marchand¹

1.1.1.8—USERRA applies to Federal Government

1.4—USERRA enforcement

1.8—Relationship between USERRA and other laws/policies

2.0—Paid leave for government employees who are Reserve Component members

Reserve Component (RC) members² who are employed (as civilians) by the Federal Government and who have been “voluntarily” mobilized in support of contingency operations should take note of an important recent development regarding entitlement to RC pay differential. Since the differential pay statute went into effect in March 2009, Office of Personnel Management (OPM) policy guidance has declared that personnel mobilized under the “voluntary” authority (10 U.S.C. § 12031(d)) are ineligible for this differential pay. A neutral hearing officer of the Office of Compliance (OOC)³ has now ruled that this policy violates the Uniformed Services

¹ Ms. Zucker, Mr. Felder, and Ms. Johnson are attorneys at Wiley Rein LLP. Mr. Marchand is a federal government attorney. Ms. Zucker, Mr. Felder, and Mr. Marchand are also U.S. Army reservists. The opinions presented here do not represent any government entity.

² The seven Reserve Components are the Army Reserve, Army National Guard, Air Force Reserve, Air National Guard, Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve.

³ The OOC is an independent, non-partisan agency established to administer and enforce the Congressional Accountability Act (CAA). Under section 206 of the CAA, the OOC applies certain rights and protections of the Uniformed Services Employment and Reemployment Rights Act (USERRA) and ten other federal statutes for employees of Legislative Branch agencies. The OOC provides an administrative hearing process for employees bringing claims under the CAA. Please see Law Review 34 (November 2001), by Captain Samuel F. Wright, JAGC, USNR (now USN (Ret.)), for a detailed description of the relationship between USERRA and the CAA. We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 983 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated this column in 1997, and ROA adds new articles each week, including 122 articles in 2012 and another 161 so far in 2013.

Employment and Reemployment Rights Act (USERRA).⁴ In view of the OOC's decision, employees mobilized in support of contingency operations under the so-called "voluntary" mobilization authority of 10 U.S.C. § 12301(d) and denied differential pay by their employing agency should consider revisiting the issue with their employers.

In Law Review 13009, "Differential Pay for Federal Employees Called to Active Duty for Contingency Service," (January 2013), Captain Wright summarized the "reservist differential" provision signed into law in 2009, found in section 5538 of Title 5, United States Code (5 U.S.C. § 5538). As Captain Wright described, the right to differential pay under section 5538 "applies to essentially all federal employees," including those employed by the Legislative Branch, when they meet the requirements of the law with respect to mobilization to active duty for contingency service.

CAPT Wright also noted that OPM has issued policy guidance (available at <http://www.opm.gov/reservist/ReservistDifferentialPolicyGuidance.pdf>) with respect to the application of section 5538. OPM's guidance defines "qualifying active duty" as follows, expressly excluding voluntary mobilizations:

Qualifying active duty means active duty by a covered employee pursuant to a call or order, as described in section 5538(a). (See Part 1 of Appendix D.) (Note: Under section 5538(a), active duty that qualifies for coverage under section 5538 is active duty under a provision of law referred to in 10 U.S.C. 101(a)(13)(B)—i.e., the following specific provisions in title 10 of the United States Code: sections 688, 12301(a), 12302, 12304, 12305, and 12406 and chapter 15 (which includes sections 331, 332, and 333). Thus, qualifying active duty does not include voluntary active duty under 10 U.S.C. 12301(d) or annual training duty under 10 U.S.C. 10147 or 12301(b).)

(Underlining added.) As successfully argued to the OOC, however, OPM's definition is unduly narrow and violates the plain and unambiguous meaning of section 5538.

Section 5538 states that

An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive... [differential pay.]

The provision that section 5538 refers to, 10 U.S.C. § 101(a)(13), states the following:

The term 'contingency operation' means a military operation that-- ... (B) results in the call or order to, or retention on, active duty of members of the uniformed services

⁴ See Order Granting Complainant's Motion for Summary Judgment, *Gregory A. Marchand v. Government Accountability Office*, Case No. 12-GA-05 (VT) (Office of Compliance, Dec. 27, 2012). The Order is on file with the authors and with CAPT Samuel F. Wright, JAGC, USN (Ret.), the Director of the Service Members Law Center.

under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.

(Underlining added.) The Complainant argued that OPM's guidance ignores section 101(a)(13)(B)'s broad and inclusive definition of "contingency operations" to include "military operations" for which military personnel are called up under "any other provision of law during a war or during a national emergency declared by the President or Congress." Indeed, 10 U.S.C. 12301(d) is precisely the kind of "other provision of law" contemplated under section 101(a)(13)(B): a mobilization authority used to support contingency operations during national emergencies declared by the President, and which has in fact repeatedly been invoked to support the national emergency declared under Presidential Proclamation 7463.⁵ In short, by interpreting section 5538 to exclude personnel mobilized in support of contingency operations under 12301(d), OPM's policy ignores the plain and unambiguous language of the relevant law.

The OOC Hearing Officer agreed with this argument, finding that OPM's "narrow construction" of section 5538 "is not supported by the broader context of the statute as a whole." In fact, the Hearing Officer went so far as to conclude that OPM's guidance is irrelevant in light of Congress' clear "intent that § 5538 applies to 'any other provision of law during a war or during a national emergency declared by the President or Congress'." The Hearing Officer therefore ruled that the Complainant, who was mobilized under section 12301(d), was entitled to differential pay. Moreover, because the employing agency admitted that its only basis for denying differential pay was that the Complainant had been voluntarily mobilized, and agreed that he would have been afforded differential pay had he been involuntarily mobilized, the Hearing Officer concluded that the agency had violated USERRA by denying the reservist a statutory benefit of employment on the basis of his military service.

Although this Order only applies to a single case involving a legislative branch agency where differential pay was denied, the Hearing Officer's rationale, based on the plain and unambiguous language of the statutes involved, should carry persuasive weight with other agencies.⁶ Thus, any federal entity that has denied differential pay to an employee mobilized in support of contingency operations under 10 U.S.C. § 12301(d) may be susceptible to similar USERRA claims.⁷

⁵ Presidential Proclamation 7463 (September 14, 2001) declared a national emergency in the wake of the terrorist attacks of 9/11, and has been renewed every year since then, most recently on September 10, 2013.

⁶ In the wake of the Hearing Officer's decision, we understand that the agency involved has demonstrated its commitment to appropriately implementing the law by proactively determining reservist differential pay eligibility for all of its potentially affected employees.

⁷ Please see Law Review 0755 (October 2007) for a detailed description of the enforcement mechanism for USERRA complaints against federal agencies in the Executive Branch. Such complaints are adjudicated by the Merit Systems Protection Board (MSPB), with appeal to the United States Court of Appeals for the Federal Circuit. In a USERRA case in the MSPB, the complainant can be represented by the United States Office of Special Counsel

Any federal employee who believes that he or she may have been illegally denied differential pay because of OPM's policy guidance on this issue should contact Captain Samuel F. Wright, JAGC, USN (Ret.) by email at SWRIGHT@roa.org or by telephone at 800-809-9448, extension 730. He is available during regular business hours and until 2200 Eastern Time on Monday and Thursday evenings. The purpose of the evening availability is to make it possible for you to call him from the privacy of your own home, outside your work hours, rather than calling from work to complain about your employer.

or by private counsel that the complainant retains. If the complainant proceeds through private counsel and prevails, the MSPB may award the complainant reasonable attorney fees. 38 U.S.C. § 4324(c)(4).