

LAW REVIEW 14028  
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## I Volunteered for Active Duty— Am I Eligible for Differential Pay as a Federal Civilian?

By Captain Samuel F. Wright, JAGC, USN (Ret.)

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**

**Q: I am a Sergeant (E-5) in the Army Reserve and a GS-12 for a federal agency. I am currently on active duty in Afghanistan. My Army orders cite as their authority 10 U.S.C. 12301(d).<sup>1</sup> My federal civilian pay as a GS-12 substantially exceeds my Army active duty pay, even when you include the allowances and the hazardous duty pay. I understand that when a federal employee leaves his or her civilian job for active duty and loses pay as a result, the employing federal agency is required to pay differential pay to make up the difference. I applied for the differential pay, and my agency's personnel office turned down my request. The personnel office claims that the differential pay only goes to federal employees who are called to active duty *involuntarily* as members of the Reserve or National Guard. Because orders citing section 12301(d) are considered voluntary, I am not entitled to the differential pay, according to the personnel office. The personnel office cited Office of Personnel Management (OPM) regulations in support of the proposition that the right to differential pay as a federal civilian employee only applies to *involuntary* periods of military service.**

I have found your “Law Review” articles<sup>2</sup> about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other military-relevant laws. I especially enjoyed reading Law Review 13009 (January 2013) and Law Review 13160<sup>3</sup> (December 2013). In the case discussed in Law Review 13160, the claimant was held to be eligible to receive

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<sup>1</sup> The citation refers to section 12301(d) of title 10 of the United States Code. That subsection provides: “At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, *with the consent of that member*. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State concerned.” (Emphasis supplied.)

<sup>2</sup> We invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 1,019 articles about military-related laws and issues, 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 we add new articles each week. We added 169 new articles in 2013.

<sup>3</sup> Law Review 13160 is by Jennifer Zucker, Scott Felder, Adrienne Johnson, and Greg Marchand. Mr. Marchand is a Major in the Army Reserve and a member of ROA. Ms. Zucker, Mr. Felder, and Ms. Johnson are attorneys at the Washington, DC law firm Wiley Rein LLP. They represented Mr. Marchand in his successful claim for differential pay while on active duty.

**differential pay although his orders (like my orders) cited 10 U.S.C. 12301(d). Does that case establish a precedent that is useful to my case? Do you think that I am entitled to differential pay for my current active duty period?**

**A:** I think that the answer is yes to both questions, but I do not have a magic wand to wave to make OPM change its regulations or to make your federal agency pay you the differential pay. If you are interested in pursuing this matter, I will help you find an attorney to represent you.

On March 11, 2009, President Obama signed into law the Omnibus Appropriations Act, 2009 (Public Law 111-8). Section 751 of that Act added a new section (section 5538) to title 5 of the United States Code (U.S.C.). This new section became effective on the first day of the first pay period beginning on or after March 11, 2009. For Executive Branch employees on the standard bi-weekly payroll cycle, the effective date is March 15, 2009.

The right to differential pay under section 5538 applies to essentially all federal employees, including Legislative Branch and Judicial Branch employees and employees of federal non-appropriated fund activities, like the Army & Air Force Exchange Service (AAFES).

Section 745 of the Consolidated Appropriations Act, 2010 (Public Law 111-117 signed December 16, 2009) amended section 5538. As amended, the section reads as follows:

“(a) 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, for each pay period described in subsection (b), an amount equal to the amount by which—

(1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee’s civilian employment with the Government had not been interrupted by that service, exceeds (if at all)

(2) the amount of pay and allowances which (as determined under subsection (d))—

(A) is payable to such employee for that service; and

(B) is allocable to such pay period.

(b) Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee’s civilian employment had not been interrupted)—

(1) during which such employee is entitled to re-employment rights under chapter 43 of title 38 with respect to the position from which such employee is absent (as referred to in subsection (a)); and

(2) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee is entitled by virtue of such employee's civilian employment with the Government.

(c) Any amount payable under this section to an employee shall be paid—

(1) by such employee's employing agency;

(2) from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and

(3) to the extent practicable, at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted.

(d) The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section.

(e)

(1) The head of each agency referred to in section 2302(a)(2)(C)(ii) [This refers to intelligence agencies, including the Central Intelligence Agency, the Defense Intelligence Agency, the Federal Bureau of Investigation, etc.] shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.

(2) The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.

(f) For purposes of this section—

(1) the terms "employee", "Federal Government", and "uniformed services" have the same respective meanings as given those terms in section 4303 of title 38;

(2) the term "employing agency", as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency referred to in section 2302(a)(2)(C)(ii)) with respect to which such employee has reemployment rights under chapter 43 of title 38; and

(3) the term "basic pay" includes any amount payable under section 5304."

Title 5, United States Code, section 5538 (5 U.S.C. 5538).

The Office of Personnel Management (OPM) has issued definitive guidance about the application of section 5538 to federal agencies and federal employees. This 30-page document is available at:

<http://www.opm.gov/reservist/ReservistDifferentialPolicyGuidance.pdf>

OPM's guidance explicitly precludes paying differential pay to federal employees (like you) who are away from work for *voluntary* mobilizations. The pertinent paragraph of the OPM guidance reads as follows:

*"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)."

Emphasis supplied.

I agree with the authors of Law Review 13160 that the OPM 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 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.*

Emphasis supplied.

I believe that the OPM guidance improperly ignores the "any other provision of law during a war or national emergency" clause. Ignoring a whole phrase (or even one word) is contrary to the "surplusage canon" of statutory construction.

In 2012, Thomson/West Publishing Company published *Reading Law: The Interpretation of Legal Texts* by Supreme Court Justice Antonin Scalia and law professor Bryan A. Garner. This highly regarded book details the *rules of statutory construction* developed by the courts in Great Britain, the United States, Canada, and other common law countries over many centuries. The everyday work of courts includes determining the meaning of words included in contracts, wills, statutes, executive orders, and other legal documents.

At pages 174-79 of their book, Justice Scalia and Professor Garner state and expound upon the “surplusage canon” which is stated as follows: “If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”

Greg Marchand (a Major in the Army Reserve and a member of ROA) left his civilian job at the Government Accountability Office (GAO) for voluntary active duty under 10 U.S.C. 12301(d). His GAO civilian pay exceeded his Army pay while on active duty, so he applied for differential pay under 5 U.S.C. 5538. GAO denied his request for differential pay, based on the OPM guidance to the effect that voluntary active duty under 10 U.S.C. 12301(d) does not qualify an individual for differential pay. Marchand retained legal counsel and brought an action to challenge the denial of differential pay.

GAO is known as “the investigative arm of Congress” and is part of the Legislative Branch of the Federal Government. Accordingly, Marchand’s claim that his rights under USERRA and 5 U.S.C. 5538 were violated was adjudicated by the Office of Compliance (OOC).<sup>4</sup>

Major Marchand argued, through his counsel, 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. 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’

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<sup>4</sup> 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) for a detailed description of the relationship between USERRA and the CAA.

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 Marchand, 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 Marchand 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.

Because you are employed by the Executive Branch, rather than the Legislative Branch, of the Federal Government, your USERRA claim will be adjudicated by the Merit Systems Protection Board (MSPB), rather than the OOC. The MSPB is a quasi-judicial federal executive agency created by the Civil Service Reform Act of 1978 (CSRA).

The CSRA split the former Civil Service Commission (CSC) into three agencies: The Office of Personnel Management (OPM), the MSPB, and the Office of Special Counsel (OSC). OPM inherited the CSC’s administrative functions as the personnel office for the Executive Branch of the Federal Government, along with most of the CSC staff. The MSPB inherited the CSC’s adjudicatory functions, and the OSC inherited the investigative and prosecutorial functions. Congress decided that it was unseemly to consolidate all these diverse functions in a single agency like the CSC.

Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans’ Reemployment Rights Act (VRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men (including my late father) for World War II.

Section 4324 of USERRA provides for the enforcement of USERRA with respect to federal executive agencies, as employers. Section 4324 provides as follows:

“(a)

(1) A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

(2)

(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

(B) Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall--

(i) make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and  
(ii) notify such person in writing of such decision.

(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person--

- (1) has chosen not to apply to the Secretary for assistance under section 4322(a);
- (2) has received a notification from the Secretary under section 4322(e);
- (3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or
- (4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

(c)

(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d) (1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision."

An MSPB case is heard initially by an Administrative Judge (AJ) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law. The losing party at the AJ level (either the claimant or the agency) can appeal the AJ's decision to the MSPB itself. The MSPB has three members, each of whom is appointed by the President with Senate confirmation. The claimant (but not the agency) can appeal an adverse MSPB decision to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court here in our nation's capital.

If you challenge the denial of differential pay in the MSPB, I believe that it is likely that you will prevail. Good luck, and please let me know how this case turns out.