

## Duty Performed under 10 U.S.C. 12310 Does Not Count in Qualifying a Reserve Component Member To Receive RC Retirement before Age 60

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

Update on Sam Wright

9.0--Miscellaneous

**Q: I am a Lieutenant Commander in the Navy Reserve and a life member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). I am particularly interested in Law Review 16090 (September 2016), about the 2008 amendment to the Reserve Component retirement law, permitting Reserve Component members like me to start drawing our Reserve Component retired pay prior to age 60 under certain circumstances.**

**I have many years of on-and-off active duty, but I won’t be able to make it to 20 years of full-time active duty to qualify for the immediate retirement benefit under the traditional retirement system. I have, or at least I thought I had, five years of “contingency” service after January 28, 2008, so I thought that I could start drawing my Reserve Component retirement on my 55<sup>th</sup> birthday.**

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1700 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 of the articles.

<sup>2</sup> BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for more than 34 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org) or by telephone at 800-809-9448, ext. 730.

**I was on active duty for three years, from October 1, 2011 to September 30, 2014, and my orders for that period cited section 12310 of title 10. During that time, I served as the Commanding Officer of a Naval Operational Support Center, formerly known as a Naval Reserve Center. I thought and I was told that the 2011-14 period counted toward reducing my eligibility age for Reserve Component retired pay by three years. Now, I am being told that active duty under section 12310 does not count toward reducing the eligibility age. What gives?**

**A:** The pertinent section of title 10 of the United States Code is as follows:

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§ 12731. Age and service requirements

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- **(a)** Except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 12739 of this title, if the person--
  - **(1)** has attained the eligibility age applicable under subsection (f) to that person;
  - **(2)** has performed at least 20 years of service computed under section 12732 of this title;
  - **(3)** in the case of a person who completed the service requirements of paragraph (2) before April 25, 2005, performed the last six years of qualifying service while a member of any category named in section 12732(a)(1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve, except that in the case of a person who completed the service requirements of paragraph (2) before October 5, 1994, the number of years of such qualifying service under this paragraph shall be eight; and
  - **(4)** is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.
- **(b)** Application for retired pay under this section must be made to the Secretary of the military department, or the Secretary of Homeland Security, as the case may be, having jurisdiction at the time of application over the armed force in which the applicant is serving or last served.
- **(c)**
  - **(1)** A person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 12732(a)(1) of this title except a regular component, is not eligible for retired pay under this chapter unless--
    - **(A)** the person performed active duty during World War I or World War II; or
    - **(B)** the person performed active duty (other than for training) during the Korean conflict, the Berlin crisis, or the Vietnam era.

- (2) In this subsection:
  - (A) The term "World War I" means the period beginning on April 6, 1917, and ending on November 11, 1918.
  - (B) The term "World War II" means the period beginning on September 9, 1940, and ending on December 31, 1946.
  - (C) The term "Korean conflict" means the period beginning on June 27, 1950, and ending on July 27, 1953.
  - (D) The term "Berlin crisis" means the period beginning on August 14, 1961, and ending on May 30, 1963.
  - (E) The term "Vietnam era" means the period beginning on August 5, 1964, and ending on March 27, 1973.
- (d) The Secretary concerned [the Service Secretary] shall notify each person who has completed the years of service required for eligibility for retired pay under this chapter. The notice shall be sent, in writing, to the person concerned within one year after the person completes that service. The notice shall include notice of the elections available to such person under the Survivor Benefit Plan established under subchapter II of chapter 73 of this title and the Supplemental Survivor Benefit Plan established under subchapter III of that chapter, and the effects of such elections.
- (e) Notwithstanding section 8301 of title 5, the date of entitlement to retired pay under this section shall be the date on which the requirements of subsection (a) have been completed.
- (f)
  - (1) Subject to paragraph (2), the eligibility age for purposes of subsection (a)(1) is 60 years of age.
  - (2) (A) *In the case of a person who as a member of the Ready Reserve serves on active duty or performs active service described in subparagraph (B) after January 28, 2008, the eligibility age for purposes of subsection (a)(1) shall be reduced, subject to subparagraph (C), below 60 years of age by three months for each aggregate of 90 days on which such person serves on such active duty or performs such active service in any fiscal year after January 28, 2008, or in any two consecutive fiscal years after September 30, 2014. A day of duty may be included in only one aggregate of 90 days for purposes of this subparagraph.*
    - (B)
      - (i) Service on active duty described in this subparagraph is service on active duty pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) or under section 12301(d) of this title. *Such service does not include service on active duty pursuant to a call or order to active duty under section 12310 of this title.*
      - (ii) Active service described in this subparagraph is also service under a call to active service authorized by the President or the

Secretary of Defense under section 502(f) of title 32 for purposes of responding to a national emergency declared by the President or supported by Federal funds.

- **(iii)** If a member described in subparagraph (A) is wounded or otherwise injured or becomes ill while serving on active duty pursuant to a call or order to active duty under a provision of law referred to in the first sentence of clause (i) or in clause (ii), and the member is then ordered to active duty under section 12301(h)(1) of this title to receive medical care for the wound, injury, or illness, each day of active duty under that order for medical care shall be treated as a continuation of the original call or order to active duty for purposes of reducing the eligibility age of the member under this paragraph.
- **(iv)** Service on active duty described in this subparagraph is also service on active duty pursuant to a call or order to active duty authorized by the Secretary of Homeland Security under section 712 of title 14 for purposes of emergency augmentation of the Regular Coast Guard forces.
- **(C)** The eligibility age for purposes of subsection (a)(1) may not be reduced below 50 years of age for any person under subparagraph (A).
- **(3)** The Secretary concerned shall periodically notify each member of the Ready Reserve described by paragraph (2) of the current eligibility age for retired pay of such member under this section, including any reduced eligibility age by reason of the operation of that paragraph. Notice shall be provided by such means as the Secretary considers appropriate taking into account the cost of provision of notice and the convenience of members.<sup>3</sup>

Section 12731(f)(2)(B)(i), italicized above, specifically provides that duty performed under section 12310 of title 10 does not qualify a person for early receipt of Reserve Component retired pay. Section 12310 provides for Reserve Component members to go on active duty, voluntarily, for the purpose of organizing and administering the Reserve Components.

Almost one million Reserve Component personnel have been called to the colors since the terrorist attacks of September 11, 2001, and the Reserve Components have been transformed from a “strategic reserve” that was available only for World War III (which thankfully never happened) to an “operational reserve” that is routinely called up for intermediate military operations like Iraq and Afghanistan. The days when Reserve Component service could be characterized as “one weekend per month and two weeks in the summer” are gone, and probably gone forever.

As the strategic reserve was transformed to the operational reserve, the stark distinction between regular full-time military service and Reserve Component service became much less

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<sup>3</sup> 10 U.S.C. 12731 (emphasis supplied).

stark. Accordingly, ROA and other military associations argued that those Reserve Component personnel who serve far beyond the traditional Reserve Component model of weekend drills and annual training should not have to wait until their 60<sup>th</sup> birthdays to start drawing military retired pay, while Active Component personnel can retire at age 38-42 after 20 years of full-time active duty.

In 2008, Congress partially agreed with the pitch of ROA and other military associations and provided for early receipt (before age 60) of Reserve Component retirement for those Reserve Component personnel who perform “contingency” service. The distinction between “contingency” service that qualifies an individual for early receipt of Reserve Component retired pay and “non-contingency” service that does not qualify is somewhat ambiguous and controversial. It is possible to say, however, that service as the Commanding Officer of a NOSC or other “organize and administer the Reserve Component” service under section 12310 of title 10 is not contingency service and does not qualify the individual for early receipt of retired pay.

**Q: That is very unfair! The main reason that I agreed to perform the three-year period of active duty from 2011 to 2014 was to qualify me for early receipt of Reserve Component retirement. The personnel office told me, orally and in writing, that this period of active duty would count toward qualifying for early receipt. If I had known that the period did not count, I would not have volunteered to serve this three-year period. I want to sue the Navy for breach of contract.**

**A:** Unfortunately, the Supreme Court has held, twice, that the Federal Government is not bound by “bum scoop” from federal employees, even if you reasonably relied upon the bum scoop.<sup>4</sup> The Constitution provides: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>5</sup> You are entitled to Reserve Component retired pay only in accordance with the provisions of title 10 that Congress has enacted. A federal employee cannot change the provision of law just by explaining it incorrectly. The “detrimental reliance” theory works with private corporations, but it does not work with the Federal Government.

You simply cannot rely on what a federal employee (including a service member) tells you about your rights under federal law. You need to read the law yourself, or you need to hire a lawyer to read and interpret the law for you. Through our “Law Review” column, we are trying to inform you about pertinent federal laws that affect your military and civilian careers.

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<sup>4</sup> See *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) and *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947).

<sup>5</sup> United States Constitution, Article I, Section 9, Clause 7. Yes, it is capitalized just that way, in the style of the late 18<sup>th</sup> Century.