

**LAW REVIEW 17082<sup>1</sup>**

**August 2017**

**Differential Pay for Federal Employees Voluntarily on Active Duty as National Guard or Reserve Service Members**

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

Update on Sam Wright

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

***Joshua Marquiz v. Department of Defense, Merit Systems Protection Board Administrative Judge Decision, Docket No. SF-4324-15-0099-I-1, March 12, 2015, affirmed by an equally divided Board July 12, 2016.***

**Q: I am an enlisted member of the Army Reserve and a GS-14 employee of a federal agency. I am currently on military leave from my federal civilian job for one year of voluntary active duty, from October 1, 2016 until September 30, 2017. My Army orders cite as authority section 12301(d) of title 10 of the United States Code. I expect to leave active duty as scheduled at the end of next month and to return promptly to my federal civilian job.**

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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 1500 "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 1300 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 35 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 will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

My federal civilian pay as a GS-14 is substantially greater than my Army active duty pay, even when you consider the allowances and special pays that I receive while on active duty. I learned that in 2009 Congress enacted and President Obama signed into law a provision that gives differential pay to federal employees (like me) who leave federal civilian jobs for military active duty and who receive, while on active duty, less total compensation than they had been receiving as federal civilian employees. Believing myself to be entitled to differential pay under that provision, I applied to my federal agency's personnel office. The personnel office told me that I am ineligible for this differential pay because I volunteered for active duty and because my orders cite section 12301(d) of title 10, and that subsection is not one of the enumerated title 10 subsections for which differential pay is to be awarded.

I have read some of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to military personnel, especially personnel in the National Guard and Reserve. I understand that you have expressed the opinion that a person in my situation is entitled to differential pay. Do you think that I am eligible? What appeal rights do I have now that my federal agency has denied my request for differential pay?

#### The pertinent federal statute

A: You are correct that in 2009 President Obama signed into law a new provision in title 5 of the United States Code providing for federal employees who are away from their civilian jobs for active duty to receive differential pay under some circumstances. Here is the text of that section:

- (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) 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.<sup>3</sup>

Section 5538(a) provides that a federal employee who is away from his or her federal civilian job “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”<sup>4</sup> shall be eligible for differential pay. Here is the text of section 101(a)(13):

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<sup>3</sup> 5 U.S.C. 5538 (emphasis supplied).

<sup>4</sup> Please see the italicized language above. The italics are mine.

(13) The term "contingency operation" means a military operation that--

- (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; *or*
- (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, 12304a, 12305, or 12406 of this title, chapter 15 of this title, section 712 of title 14, *or any other provision of law during a war or during a national emergency declared by the President or Congress.*<sup>5</sup>

Section 12301(d) of title 10 (the section cited by your orders) is not one of the enumerated title 10 sections. The question is whether you qualify for differential pay under the final "catch-all" clause of section 101(a)(13)—"or any other provision of law during a war or national emergency declared by the President or Congress."<sup>6</sup>

In Law Review 14028 (March 2014), I expressed the opinion that a person in your situation is entitled to the differential pay under the "catch-all" clause at the end of section 101(a)(13). I also invite your attention to Law Review 13160 (December 2013). In that article, four distinguished attorneys (Jennifer Zucker, Scott Felder, Adrienne Johnson, and Greg Marchand) express that same opinion definitively and eloquently.

### **The Marquiz case**

Joshua Marquiz was a Technical Sergeant in the Air Force Reserve and (on the civilian side) an information technology specialist for the Department of Defense (DOD). He was on active duty for about six months, from October 2014 until April 2015, to attend classes on intelligence operations. He applied for differential pay under section 5538.

Although Marquiz' pay on active duty was less than his federal civilian pay, DOD (as his civilian employer) denied his claim for differential pay, contending that he was ineligible because he had volunteered for this active duty period and because his orders cited section 12301(d) of title 10, and that section is not one of the title 10 sections specifically enumerated in section 101(a)(13)(B) of title 10. Marquiz filed an appeal with the Merit Systems Protection Board (MSPB), contesting the denial of his claim for differential pay.

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<sup>5</sup> 10 U.S.C. 101(a)(13) (emphasis supplied).

<sup>6</sup> President George W. Bush declared a national emergency shortly after the terrorist attacks of September 11, 2001. Presidential Proclamation No. 7463, 66 Fed. Reg. 48,199 (September 14, 2001). That national emergency declaration remains in effect.

The MSPB is a quasi-judicial federal executive agency, and it was created by the Civil Service Reform Act of 1978 (CSRA).<sup>7</sup> That statute split the former Civil Service Commission (CSC) into three separate federal agencies.

The Office of Personnel Management (OPM) inherited most of the CSC's assets (including the headquarters building at 1911 E Street Northwest in the District of Columbia) and staff and the important functions as the personnel office for the Executive Branch of the Federal Government. The MSPB inherited the adjudicatory functions of the former CSC. The Office of Special Counsel (OSC) inherited the investigative and prosecutorial functions.<sup>8</sup>

The MSPB has three members—a Chairman, a Vice Chairman, and a Member. The Chairman and Vice Chairman must be of the same political party as the President, and the Member must be of the other major political party. Each of the three members is appointed by the President and must be confirmed by the Senate, for a term of years. There are times when one or more of the three seats are vacant, because a confirmed member has departed and has not yet been replaced by a presidential appointment and Senate confirmation. To decide a case, the MSPB needs at least two members, and they must agree on the result.

As I have explained in Law Review 15067 (August 2015) and many other articles, Congress enacted the Veterans' Reemployment Rights Act (VRRA) in 1940, as part of the Selective Training and Service Act (STSA).<sup>9</sup> The VRRA has applied to the Federal Government and to private employers since 1940. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA),<sup>10</sup> Congress expanded the VRRA to make it apply to state and local governments, as employers.

In 1994, Congress enacted USERRA.<sup>11</sup> USERRA was a long-overdue update of and improvement upon the VRRA.

Although the VRRA has applied to the Federal Government since 1940, it lacked an enforcement mechanism for enforcing this law against federal agencies as employers. One of the big improvements brought about by the enactment of USERRA in 1994 was to provide for such an enforcement mechanism. Section 4324 of USERRA provides:

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<sup>7</sup> Public Law 95-454, 92 Stat. 1111 (October 13, 1978). The citation means that the CSRA was the 454<sup>th</sup> new public law enacted during the 95<sup>th</sup> Congress (1977-78), and you can find this law in Volume 92 of *Statutes at Large*, starting on page 1111.

<sup>8</sup> OSC was originally part of the MSPB. In 1984, it was split off and became a separate federal agency.

<sup>9</sup> Public Law 76-783, 54 Stat. 885. The STSA is the law that led to the drafting of more than ten million young men, including my late father, for World War II.

<sup>10</sup> Public Law 93-508, 88 Stat. 1593.

<sup>11</sup> Public Law 103-353, 108 Stat. 3149.

- (a)
  - (1) A person who receives from the Secretary [of Labor] 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.<sup>12</sup>

MSPB cases (including MSPB USERRA cases) start before an Administrative Judge (AJ) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law. Either party (the individual or the federal agency) can appeal the AJ's decision to the MSPB itself. If neither party files a timely appeal, the AJ's decision becomes the decision of the MSPB.

The *Marquiz* case was assigned to Benjamin Gutman, the Chief AJ of the MSPB. This was a “pure question of law” case, meaning that the facts were not in dispute and the dispute was about the meaning of the law as applied to the agreed upon facts. Accordingly, Judge Gutman held an oral argument rather than a hearing. In a scholarly decision, Judge Gutman agreed with Marquiz’ argument that under the “catch-all” clause at the end of section 101(a)(13)(B) a Reserve Component service member on voluntary active duty under section 12301(d) of title 10 was entitled to differential pay under section 5538.

DOD, the employer and the appellee, appealed Judge Gutman’s decision to the MSPB. At the time (summer of 2016), the MSPB was down to just two members, Chairman Susan Tsui

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<sup>12</sup> 38 U.S.C. 4324.

Grundman and Member Mark A. Robbins.<sup>13</sup> Because Chairman Grundman and Member Robbins could not agree on the disposition of DOD's appeal, Judge

Gutman's decision became the decision of the MSPB, and Marquiz received his differential pay.

Under these circumstances, Judge Gutman's decision is not entitled to precedential effect. I believe that his decision will be followed, based on the strength of his legal reasoning and the legal authorities that he cited in his opinion. Nonetheless, it is not fair to say that the MSPB has endorsed the Gutman position that a federal employee on section 12301(d) orders is entitled to differential pay. This is still very much an open question.

**Q: Who represented Marquiz in this proceeding?**

**A:** San Diego lawyer Brian Lawler represented Marquiz.<sup>14</sup> I commend Mr. Lawler for his imaginative, diligent, and effective representation of Mr. Marquiz.

**Q: Where do I go from here in enforcing my right to differential pay?**

**A:** You can bring an action in the MSPB, as Marquiz did. I believe that you will prevail, but the matter is not free from doubt. The MSPB has not decided, in a precedential decision, that a federal employee on section 12301(d) orders is entitled to differential pay.

**Q: My good friend Josephine Smith is on active duty with me at the same military facility. Like me, she is a reservist on voluntary active duty under section 12301(d) of title 10. She is on military leave from a state government agency. Is Josephine entitled to differential pay under section 5538 of title 5?**

**A:** No. Section 5538 is part of title 5, and that title governs the relationship between the Federal Government and federal employees. Section 5538 does not apply to Josephine because she is not a federal employee.

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<sup>13</sup> As I have explained in Law Review 17040 (April 2017), Chairman Grundman left the MSPB in early 2017, shortly after the inauguration of President Trump. The MSPB is now down to one member (Robbins) and cannot act on appeals. The MSPB AJs are continuing their adjudication of cases, but when either party appeals the AJ's decision to the MSPB itself the case goes into limbo until the MSPB has at least two members

<sup>14</sup> Brian Lawler is a Lieutenant Colonel in the Marine Corps Reserve and a life member of ROA. He is the author of several of the "Law Review" articles at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). He has a nationwide practice representing service members and veterans with claims under USERRA and other laws.

USERRA applies to state and local governments, as well as the Federal Government and private employers. When Josephine is released from active duty, she will have the right to reemployment in her state government job, provided she meets the five USERRA conditions.<sup>15</sup>

Josephine may be entitled to a period of *paid* military leave and/or to differential pay, but that is a matter of state law, not federal law. I invite your attention to the "State Laws" section at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find, for each state, an article about the state laws providing for paid military leave and differential pay for employees of the state and its political subdivisions (counties, cities, school districts, etc.) who are away from their civilian jobs for military training or service.

Here is a link to the entire text of the *Marquiz* decision:

<http://pilotlawcorp.com/wp-content/uploads/2015/07/military-differential-pay.pdf>

<http://pilotlawcorp.com/wp-content/uploads/2016/07/Doc8-SplitVoteOrderonPFR.pdf>

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<sup>15</sup> She must have left her civilian job to perform uniformed service and must have given the employer prior oral or written notice. She must not have exceeded the cumulative five-year limit on the duration of her period or periods of uniformed service, relating to the employer relationship for which she seeks reemployment.