

Applying Section 4318 of USERRA to the Situation of a Returning National Guard Member

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Q: I am a Sergeant Major (E-9) in the Army National Guard (ARNG) and a member of the Reserve Officers Association (ROA). I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I have used those articles to help me understand and protect my rights with respect to my civilian employer, concerning my National Guard service, and I have referred many junior enlisted National Guard members to your articles. More than 20 times over the last decade, I have spoken to you by telephone about USERRA, and you charged me nothing for your time. Some of those conversations lasted longer than an hour each.

¹ I invite the reader’s attention to 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.

² 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 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.

As an ARNG member, I have a dual federal-state status. I perform periodic military training, under title 32 of the United States Code. I have performed both voluntary and involuntary tours of active duty, under title 10 of the United States Code.

In my state status, I am subject to call by the Governor for state active duty. More than a dozen times in my long ARNG career, I have been called to state active duty for fires, floods, tornadoes, riots, and other state emergencies. I have used the two articles for my state in your "state laws" section at www.roa.org/lawcenter to help me understand the state law that protects my job while I am on state active duty and the state law that gives me the right to 15 days of *paid* military leave per year with respect to my civilian employer, a city government.

I am a career firefighter for a southern city of 55,000 people. I began my career more than 20 years ago, in May 1997, and I always planned to retire from firefighting as soon as I reached the 20-year point. This past spring, as I was approaching my 20th anniversary as a firefighter, I applied for retirement effective May 31, 2017. The city denied my request, saying that I was short of the 20-year point because my recent military service time did not count for city pension credit.

I have been away from my civilian job for active duty for almost four years. I was involuntarily recalled to active duty on October 1, 2013. At the end of that year, I extended voluntarily for a second year, then a third year, and then a fourth year. The Army has told me that I will not be extended again. I will be leaving active duty on September 30, 2017, at the end of my current orders.

I gave the city a month of notice before I left my job to go on active duty at the end of September 2013. I also gave the city notice of each extension. In July of this year, I told the city that I would be leaving active duty at the end of September and returning to work in early October. I inquired about the possibility of returning to work briefly and then retiring. The city's personnel department chief insisted that I will not be eligible to retire with a 20-year pension until sometime in late 2021, because my last four years of active military service do not count as "creditable service" for city pension eligibility.

I have read in more than one of your articles that the returning veteran is entitled to be treated, for seniority and pension purposes, as if he or she had been continuously employed in the civilian job during the time that he or she was away from work for service. Does my military time count for civilian pension eligibility?

Answer, bottom line up front:

Upon reemployment under USERRA, you are entitled to city pension credit for the last four years of active duty. That means that you must meet all five USERRA eligibility criteria and return to work. At that point, and only at that point, will you have more than 20 years of city pension credit. Thus, you were not entitled to pension credit for your current active duty period in May 2017 and you are not entitled to the pension credit today (September 2, 2017). You will almost certainly be entitled to the pension credit early next month, when you meet the five USERRA conditions and return to work.

Explanation:

Section 4318 of USERRA governs pension eligibility and entitlements. Here is the text of that section:

- (a)(1)(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter [USERRA] shall be determined under this section.
 - (B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.
 - (2)(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.
 - (B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitality of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.
- (b)(1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in

the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated--

- (A) by the plan in such manner as the sponsor maintaining the plan shall provide; or
- (B) if the sponsor does not provide--
 - (i) to the last employer employing the person before the period served by the person in the uniformed services, or
 - (ii) if such last employer is no longer functional, to the plan.
 - (2) *A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.*
 - (3) *For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed--*
 - (A) *at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or*
 - (B) *in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).*
- (c) Any employer who *reemploys a person under this chapter* and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days

after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.³

Under section 4318, you are entitled to city pension credit for each period of uniformed service for which you have been “reemployed under this chapter” (USERRA) during your city government career. You are reemployed under USERRA when you meet the five USERRA conditions and return to work for the pre-service employer. As I have explained in Law Review 15116 (December 2015) and many other articles, you are entitled to reemployment under USERRA when you meet five conditions:

- a. Must have left a civilian job (federal, state, local, or private sector) to perform uniformed service.
- b. Gave the employer prior oral or written notice.
- c. Have not exceeded the cumulative five-year notice on the duration of the period or periods of uniformed service, with respect to the employer relationship for which you seek reemployment. As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting your limit.
- d. Were released from the period of service without having received a disqualifying bad discharge from the military.
- e. Made a timely application for reemployment after release from the period of service.

When you applied for firefighter retirement in May 2017, you only met the first two of the five conditions. Today (September 2, 2017) you still only meet the first two conditions. To meet the other three conditions, you must leave active duty without a disqualifying bad discharge from the Army, and then you must make a timely application for reemployment with the city.

Today, it is very likely but not 100% certain that you will meet the five conditions in early October. You could extend on active duty yet again and go over the five-year limit. You could do something incredibly stupid and get a disqualifying bad discharge. You could win the Publisher’s Clearinghouse Sweepstakes and decide to forego returning to the fire department, even briefly for retirement eligibility. God forbid, you could die. Until you meet all five USERRA conditions, you are not entitled to city pension credit for your military service time. You need to demonstrate that you meet the five conditions for each period of military service that has interrupted your firefighter career, going back to May 1997.

USERRA’s five-year limit

I will discuss in detail the five-year limit, because that may be the “long pole in the tent” in determining your eligibility for reemployment next month. You were involuntarily called to active duty for one year, from October 1, 2013 until September 30, 2014. That year clearly does

³ 38 U.S.C. 4318 (emphasis supplied).

not count toward exhausting your five-year limit with respect to your employer relationship with the city.⁴

Your three years of voluntary active duty, from October 2014 through September 2017, count toward your five-year limit with the city, unless your military orders contain “magic words” excluding those periods from the limit. Even if those three years count, you are still within the five-year limit, unless you have more than two years of non-exempt service between May 1997 and September 2013.

Your National Guard training periods (drill weekends, annual training, etc.) do not count toward exhausting your five-year limit, and your state active duty periods also do not count. Your involuntary call-up for duty in Iraq in 2003 and your involuntary call-up for service in Afghanistan in 2009 do not count toward the five-year limit.

I suggest that you reread my Law Review 16043 (May 2016) and then gather together all your military orders, going back to May 1997, in three stacks. Stack one is for the periods that clearly count toward your five-year limit, and stack two is for the periods that clearly do not count. Stack three is for the periods as to which you may be uncertain, and we can discuss those periods. When you apply for reemployment next month, you need to be prepared to document that you have not exceeded the cumulative five-year limit with respect to your firefighter career.⁵

Going back to May 1997, you are entitled to city pension credit for each period of military service for which you met the five conditions, *even if the cumulative total of those periods exceeds five years.*⁶

Q: The city has a contributory defined contribution pension plan. There is an individual account for each firefighter. The individual contributes up to 10% of his or her city earnings to his or her account, and the city matches those contributions dollar-for-dollar.

For example, in calendar year 2012 (the last full year before I reentered active duty on October 1, 2013), I earned \$50,000 from the city and contributed \$5,000 to my pension account, which the city matched. I made my contribution by payroll deduction on a pre-tax basis. That means I paid federal and state income tax on \$45,000, not \$50,000. This favorable tax treatment saved me hundreds of dollars in federal and state income tax.

⁴ 38 U.S.C. 4312(c)(4)(A).

⁵ 38 U.S.C. 4312(f)(1)(B).

⁶ Please see Law Review 17090 (September 2017).

In 2013, I had earnings from the city for the first nine months, before I went on active duty on October 1, 2013. I made my pension contributions by payroll deduction for January through September of 2013 and received the employer matches of those contributions. I had no city earnings and have made no employee contributions to my pension account for the last three months of 2013, or for 2014, 2015, 2016, or the first nine months of 2017.

Three times over the last four years, while I have been on active duty, I have tried to make employee contributions to my city pension account, based on 10% of my Army earnings, but the city refused to accept my contributions and refused to make employer matching contributions to my account. Was the city required to accept my contributions and make matches during my service?

A: No. Section 4318 of USERRA applies *upon your reemployment*. While you have been on active duty, over the last four years, you have not met the five conditions and have not been reemployed. The city had no legal duty to accept your attempted contributions or to make matches while you have been on active duty.

When you return to work next month, you will then be entitled to resume making contributions to your pension account and to make make-up contributions, to cover what you would have contributed to your pension account during the period that you have been away from work for service. Your make-up contributions will not be computed based on what you earned from the Army during those years. Rather, your make-up contributions will be computed based on what you *would have earned* from the city.⁷

For example, let us assume that you would have earned \$52,000 from the city in calendar year 2014—your make-up contribution will be \$5,200. In 2015, you would have earned \$53,000, so your make-up contribution will be \$5,300. In 2016, you would have earned \$54,000, so your make-up contribution will be \$5,400. You will also need to do make-up contributions for the last three months of 2013 and the first nine months of 2017.

Q: While I was working for the fire department, between 1997 and 2013, I earned a salary and I also earned a lot of overtime pay and night differential pay, when I worked more than 40 hours in a week or when I worked overnight shifts. Am I entitled to make make-up employee contributions and to get employer matches for 10% of what I would have earned in overtime and night differential pay?

⁷ 38 U.S.C. 4318(b)(2).

A: If your fire department colleagues were given the opportunity to make employee contributions and get employer matches based on overtime pay and night differential pay during the 2013-17 period, you are entitled to that same privilege upon your reemployment.⁸

Q: How long do I have to make up the employee contributions that I missed during my four years of active duty?

A: You must make up the contributions during the period that starts on the date you are reemployed and extends for three times the period of service, but not more than five years.⁹ For example, if you return to work on October 15, 2017 you will have until October 14, 2022 to make up the missed contributions.

Q: I want to retire from the fire department in the fall of 2017, shortly after I return to work. Firefighting is a job with great physical demands, and as I get older it is becoming increasingly difficult for me to meet those demands. Is it possible for me to retire in October 2017 and then do the make-up contributions as deductions from my retired pay?

A: No. You must do the make-up contributions while you are employed by the city, not after you retire. The pertinent section of the Department of Labor (DOL) USERRA regulations provides:

If the employee is enrolled in a contributory plan he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions or elective deferrals must be made during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years. Makeup contributions or elective deferrals may only be made during this period *and while the employee is employed with the post-service employer.*¹⁰

If you were ten years younger, I would advise you to return to work for five years and make the make-up contributions by payroll deduction, with pre-tax dollars, to get the favorable tax treatment. In your situation, it may be necessary for you to forego the favorable tax treatment and use post-tax money from your savings or borrowed money to make the make-up contributions during the brief interim between your return to work and your retirement from the fire department.

Q: The city attorney has stated that what I am demanding, by way of pension credit for my military service time, is contrary to state law and city ordinance. What do you have to say about that?

⁸ Please see Law Review 12083 (August 2012), Law Review 12104 (October 2012), and Law Review 13090 (July 2013).

⁹ *Id.*

¹⁰ 20 C.F.R. 1002.262(b) (emphasis supplied).

A: State law and city ordinances are irrelevant on this question, because you have the right to pension credit under USERRA. As a federal statute, USERRA trumps conflicting state statutes and even state constitutions, and it certainly trumps city ordinances.

USERRA is a floor and not a ceiling on the rights of those who are away from their civilian jobs for uniformed service. State laws, city ordinances, and other matters can give the service member or veteran greater or additional rights but cannot take away USERRA rights. Section 4302 of USERRA provides:

- (a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- (b) *This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.*¹¹

The “Supremacy Clause” of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹²

State and local government officials in your part of the country sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

Conclusion

You have a great deal at stake here. The amount of money that you and the city put into your pension account will determine the amount of your monthly retirement income for the rest of your life. Since you will be retiring from the fire department soon, this is your last chance to add to your retirement income. Do not be penny-wise and pound-foolish. You will need to spend some money for legal and financial advice to maximize your retirement benefit and to obtain pension benefits that you are entitled to under USERRA and other laws. You may need to retain a lawyer to sue the city to get it to comply with USERRA.

¹¹ 38 U.S.C. 4302 (emphasis supplied).

¹² United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18th Century.