

More on the “Cooling Off Period” Required of a new Military Retiree Starting a new Civil Service Job for DOD

By Captain Samuel F. Wright, JAGC, USN (Ret.)²
[\(Update on Sam Wright\)](#)

9.0--Miscellaneous

Q: I am a Marine Corps Reserve Colonel nearing retirement. I recently joined the Reserve Officers Association (ROA) because I am most impressed by your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in the Reserve Components of the armed forces. I am particularly interested in Law Review 17078 (August 2017), about the statutory requirement in section 3326(b) of title 5 of the United States Code that a new military retiree must wait at least 180 days after retirement before starting a new Department of Defense (DOD) civil service job. I am wondering how that requirement applies to my situation.

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1600 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 1400 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 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.

I was born on May 9, 1966 so I will celebrate my 52nd birthday next month. I graduated from high school in 1984 and from college in 1988. While in college, I participated in the Naval Reserve Officers Training Corps (NROTC), and I was commissioned a Second Lieutenant in the Marine Corps when I graduated from college in June 1988. I served on full-time active duty for the next seven years and affiliated with the Marine Corps Reserve (USMCR) when I left active duty in June 1995.

I served in the First Gulf War (1990-91) as a junior officer in the regular Marine Corps. As a reservist, I have served multiple active duty tours, some voluntary and some involuntary, in addition to the standard USMCR drill weekends and annual training tours. I have served in Iraq, Afghanistan, and other places as a reservist on active duty.

I am not close to qualifying for a regular military retirement (20 years of full-time active duty), but I have enough points to qualify for a generous reserve retirement. I also have four full years of “contingency service” after 1/28/2008, so I qualify to start drawing my reserve retirement pay on my 56th birthday, on 5/9/2022.³

My most recent lengthy active duty period was for three years, from January 2015 to January 2018, at a major INCONUS military base. I did not have a civilian job when I entered active duty in January 2015, so I did not have reemployment rights in a civilian job when I left active duty earlier this year. I have been unemployed since I left active duty, and I am actively seeking a federal civil service position. The federal jobs that most interest me and for which I am best qualified are in DOD. I am not looking for positions at the military installation where I served my last three years of active duty (2015-18) because that installation is more than 2,000 miles from my home.

Because I was commissioned a Second Lieutenant in June 1988, I will reach my Mandatory Removal Date (30 years of commissioned service as an O-6) in June of this year, and at that point I will become a “gray area retiree” until May 2022, when I turn 56 and start drawing my USMCR retired pay. In Law Review 17078, you wrote that the statutory term for a “gray area retiree” is the Inactive Status List (ISL), but the Marine Corps does not use the ISL terminology. In the USMCR, a person who has stopped actively drilling because of mandatory reserve retirement but who has not yet qualified for reserve pay because he or she has not yet attained the 60th birthday or the earlier point of eligibility for retired pay based on post-2008 contingency service is called “Retired Reserve.”

³ Please see Law Review 16090 (September 2016) for a detailed discussion of the 2008 amendment that permits Reserve and National Guard members to start drawing their reserve retirement pay before their 60th birthdays under some conditions.

There is a specific GS-15 position at a military base near my home. The position is right up my alley, and the civilian personnel office at the base has told me that I am well qualified and that I am being actively considered for the position, but the personnel officer told me that under section 3326(b) I must wait at least 180 days after my June 2018 “retirement” from the USMCR to start this GS-15 civilian job. The problem is that I cannot afford to wait another 180 days for a new job and the military command cannot afford to wait another 180 days to fill a critical position.

What the personnel officer is telling me is directly contrary to what you wrote in Law Review 17078, so I gave the personnel officer a copy of your article. The personnel officer referred the issue, and your article, to the Staff Judge Advocate, Major I.B. Ignorant. Major Ignorant said that Wright’s article is wrong and that I must wait until December 2018 to start the new DOD job. What do you say about this?

Answer bottom line up front

Major Ignorant is wrong, and I adhere to what I wrote in Law Review 17078.

Explanation

Here is the text of section 3326(b):

(b) *A retired member of the armed forces* may be appointed to a position in the civil service in or under the Department of Defense (including a nonappropriated fund instrumentality under the jurisdiction of the armed forces) during the period of 180 days immediately after his retirement only if--

- (1) the proposed appointment is authorized by the Secretary concerned or his designee for the purpose, and, if the position is in the competitive service, after approval by the Office of Personnel Management; or
- (2) the minimum rate of basic pay for the position has been increased under section 5305 of this title.⁴

The term “retired member of the armed forces” is defined in section 2018 of title 5, as follows:

“Retired member of the armed forces” means a member or former member of the armed forces *who is entitled, under statute, to retired, retirement, or retainer pay on account of service as a member.*⁵

⁴ 5 U.S.C. 3326(b) (emphasis supplied).

⁵ 5 U.S.C. 2108(5) (emphasis supplied).

It may be true that the Marine Corps uses different terminology than the other services, but you are not a “retired member of the armed forces” for this purpose until you turn 56 on 5/9/2022. Section 3326(b) simply does not apply to your situation.

As I explained in Law Review 17078, the purpose of section 3326(b) is to put a damper on “job rigging” by senior military officers approaching military retirement or by the very recent colleagues of those senior officers who have retired recently. Months ago, you left the military base where you served your final three-year active duty stint, and you are not seeking a civilian position at that base. Your situation is entirely different from the situation envisioned by Congress when it enacted section 3326(b).