

LAW REVIEW¹ 19004

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Relationship between 5 U.S.C. 8332(c)(2) and 38 U.S.C. 4318

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[Update on Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.3.2.3—Pension credit for service time

1.8—Relationship between USERRA and other laws/policies

Q: I recently retired from the Army as a Lieutenant Colonel with 20 years of full-time active duty, but not all of it continuous. I attended college from 1991 to 1995 and participated in the Army Reserve Officers Training Corps (ROTC) program. In May 1995, I graduated college and was commissioned a Second Lieutenant in the Army. I remained on full-time active duty for 13 years, until May 2008, when I left active duty and affiliated with the Army National Guard. I was hired by the Department of the Army (DA) as a civilian employee shortly after I left active duty.

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1700 "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 1500 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. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 36 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.

After I left active duty in May 2008, I was involuntarily called to active duty twice, for one year each time, and I also performed annual training tours and other short periods of military training, adding up to another year of active service. In 2014, I realized that I was only four years short of qualifying for a regular military retirement, not the reserve component retirement that one normally does not receive until age 60. Accordingly, I returned to active duty on 10/1/2014 and remained on active duty for exactly four years, until 9/30/2018, when I retired from the Army as a Lieutenant Colonel with exactly 20 years of active federal service.

I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), including Law Review 15116 (December 2015), a primer on USERRA. When I left my federal civilian job to return to active duty in 2014, I made sure to meet the five USERRA conditions and to document that I met them. I left my job to return to active duty, and I gave the civilian employer prior oral and written notice. I carefully remained within the five-year cumulative limit on the duration of the periods of uniformed service that I performed, with respect to my employer relationship with the Federal Government.³ I served honorably and did not receive a disqualifying bad discharge from the Army. After I left active duty by retirement on 9/30/2018, I applied for reemployment almost immediately, and well within the 90-day deadline.

I returned to my civilian DA job without much difficulty, but the DA civilian personnel office has refused to credit my four years of active duty (October 2014 to September 2018) for federal civilian pension purposes. The DA civilian personnel office told me that I cannot be credited for my active duty time because I used that active duty time to qualify for a regular (rather than a reserve) retirement, citing section 8332(c)(2) of title 5 of the United States Code. What is section 8332(c)(2)? Does that section trump section 4318 of USERRA? Or does section 4318 of USERRA trump section 8332(c)(2)?

A: Section 8332(c)(2) of title 5 reads as follows:

If an employee [of the Federal Government] or a Member [of Congress] is awarded retired pay based on any period of military service, the service of the employee or Member may not include credit for such period of military service unless the retired pay is awarded—

- (A) Based on a service-connected disability—
 - (i) Incurred in combat with an enemy of the United States; or
 - (ii) Caused by an instrumentality of war and incurred in line of duty during a period of war as defined by section 301 of title 38; or

³ As I have explained in detail in Law Review 16043 (May 2016), your two involuntary recalls to active duty and your Army National Guard training periods do not count toward exhausting your five-year limit.

(B) Under chapter 1223 of title 10 (or under chapter 67 of that title as in effect before the effective date of the Reserve Officer Personnel Management Act).⁴

Chapter 1223 of title 10 is the chapter that provides for Reserve Component retirement at age 60.⁵ One section of chapter 1223 provides that it is possible for a person to use the same period of active military duty for chapter 1223 retirement (but not regular military retirement) and for retirement as a federal, state, or local government employee. That section is as follows:

No period of service included wholly or partly in determining a person's right to, or the amount of, retired pay *under this chapter* may be excluded in determining his eligibility for any annuity, pension, or old-age benefit, under any other law, *on account of civilian employment by the United States* or otherwise, or in determining the amount payable under that law, if that service is otherwise properly credited under it.⁶

Section 8332(c)(2)(B) of title 5 is entirely consistent with section 12736 of title 10. You can use the same period of active military duty to help you qualify for and to determine the amount of your *reserve* military retirement under chapter 1223 and your federal civilian retirement. You cannot use the same period of active military duty for *regular* military retirement (as in your case) and for federal civilian retirement.

Under section 4318 of USERRA,⁷ you are entitled (upon reemployment under USERRA) to be treated for civilian pension purposes as if you had been continuously employed in the civilian job during the time that you were away from that job for uniformed service. You met the five USERRA conditions and you were reemployed by the Federal Government (DA) in the fall of 2018. USERRA applies to the Federal Government, as well as state and local governments and private employers. Section 4318 seems to require the DA to give you civilian retirement credit for your 2014-18 active duty while section 8332(c)(2) seems to require the DA to deny you that credit.

There is a conflict between section 4318 and section 8332(c)(2), as applied to your unusual but certainly not unique circumstances. Does section 4318 trump section 8332(c)(2)? Or does section 8332(c)(2) trump section 4318? That is the “\$64,000 question” in your case.

⁴ 5 U.S.C. 8332(c)(2).

⁵ In 2008, Congress amended 10 U.S.C. 12731(f)(2)(A) to permit Reserve and National Guard members to start receiving chapter 1223 retirement benefits before their 60th birthdays if they have “contingency service” after 1/28/2008. Please see Law Review 16090 (September 2016).

⁶ 10 U.S.C. 12736 (emphasis supplied).

⁷ 38 U.S.C. 4318.

Over a period of many centuries, the courts in Great Britain, the United States, Canada, Australia, and other common law countries have developed *rules of statutory construction*. These are considerations that courts apply in determining the meaning and effect of the words enacted by legislative bodies.

The United States Code is long and complex, with titles and sections enacted at different times after consideration by different committees of the Senate and House of Representatives. It is not unusual for a section in one title to conflict with a section in another title, or even the same title, as applied to factual circumstances that may not have been anticipated by Congress.

When there is an apparent conflict between two separate sections of the United States Code, it is necessary for a court to *harmonize* the two sections—to construe them in such a way as to avoid the conflict. One way to do this is to apply the rule that *the specific controls over the general*.

Section 8332(c)(2) deals with a very specific situation—a federal civilian employee starting a new federal civilian job or returning to federal civilian employment after having received a *regular military retirement* (not a reserve retirement under chapter 1223). Section 4318 is more general—a federal, state, local, or private sector employee returning to a civilian job after military service and seeking civilian retirement credit for the period of uniformed service that interrupted the civilian job. When there is a conflict between section 4318 and section 8332(c)(2), as in your case, I think that the rule established by section 8332(c)(2) must trump the rule established by section 4318.

I am not aware of any court case or Merit Systems Protection Board (MSPB) case that has squarely faced this question. We will keep the readers informed of further developments on this important and interesting question.

Q: In Law Review 18105 (November 2018), you wrote that section 4318 of USERRA supersedes and overrides a Texas law that forbids using the same period of military service for a *regular* military retirement and for state civilian retirement as a teacher. How is what you wrote in Law Review 18105 consistent with what you have written in this article?

A: Law Review 18105 dealt with the conflict between section 4318 of USERRA and a *state* law. This article deals with a conflict between section 4318 of USERRA and *another federal law*. The situations differ, and the answer is different.

Section 4302 of USERRA sets forth the relationship between USERRA and other laws and policies, as follows:

- (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.⁸

Under section 4302(b), USERRA supersedes a State law that purports to limit USERRA rights or that imposes an additional prerequisite on the exercise of USERRA rights. USERRA does not necessarily supersede another federal law that limits USERRA rights or imposes an additional prerequisite. If there is a conflict between USERRA and another federal statute, it is necessary to harmonize the two statutes, to avoid the conflict, or to determine whether USERRA trumps the other statute or vice versa. That is your situation, and that situation is different from the situation addressed in Law Review 18105.

⁸ 38 U.S.C. 4302 (emphasis supplied).