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Under USERRA, You Are Entitled to Imputed Earnings during The Time You Were Away from Work for Service

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.1.7—USERRA applies to state and local governments
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1.8—Relationship between USERRA and other laws/policies

Q: I am the Coast Guard Reserve Lieutenant—the same guy who asked the questions in Law Review 19090 and Law Review 19091. I am concerned that my county government employer and the Virginia Retirement System (VRS) are shortchanging me in the computation of my retirement benefit.

I began my career as a county police officer in April 2000. As of April 2020, just six months from now, I will have 20 years of police officer service and will be eligible to retire from the police department. I plan to retire as soon as I am eligible.

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1900 "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 1700 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 43 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.

The VRS is a state agency with its office in Richmond. It administers the retirement system for state employees and for the employees of many counties and cities in Virginia, including the county where I work.

The monthly retirement benefit of a police officer is determined by a formula that includes the retired officer's "high three" years of police officer compensation. That is, the formula looks to the officer's compensation during his or her highest three *consecutive* calendar years of police officer compensation. Except in unusual circumstances, like when an officer is demoted near the end of his or her career, the high three will be the last three years of employment for retirement. Since I will be retiring in April 2020, I think that my "high three" calendar years should be 2019, 2018, and 2017.

As I explained in Law Review 19090, I was on active duty for exactly three years, from 10/1/2015 until 9/30/2018. I was on active duty and away from my civilian job for the last quarter of 2015, all of 2016, all of 2017, and the first three quarters of 2018. Thus, the county and VRS say that my "high three" consecutive years of police department compensation are 2014, 2013, and 2012. Computing my "high three" that way will result in a *substantial* cut in my monthly pension check.

Based on having read your Law Review 16030 (April 2016) and other articles, I believe that I am entitled to be treated *as if I had been continuously employed* as a county police officer during the three years that I was away from work for military service. Treating me as if I had been continuously employed means that in computing my "high three" compensation I am entitled to use the figure that I *would have earned* if I had worked the entire year in 2018 and 2017, rather than being away from work for service. Do you agree?

A: Yes. Your earnings for 2017 and 2018, for purposes of the "high three" computation, should be *the amount that you would have earned from the police department if you had worked the entire year.* I am informed that only base pay counts in the "high three" computation, not bonuses or special pay like overtime or night differential pay. Thus, it will be easy for the county to compute what you would have earned in 2018 and 2017 if you had been present for work the entire year.

Section 4318 of USERRA governs civilian pension credit for military service time. Here is the entire 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 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 nonforfeitability 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]

The text of section 4318(b)(3)(A), italicized above, clearly applies to your situation and requires that your compensation for 2018 and 2017, for purposes of the "high three" computation, must be what you *would have earned if you had remained continuously employed in the civilian job for all of those two years.* Section 4331 of USERRA[4] gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers, and the Secretary has promulgated such regulations. The pertinent section is as follows:

[3] 38 U.S.C. 4318 (emphasis supplied).
[4] 38 U.S.C. 4331.

How is compensation during the period of service calculated in order to determine the employee's pension benefits, if benefits are based on compensation?

In many pension benefit plans, the employee's compensation determines the amount of his or her contribution or the retirement benefit to which he or she is entitled.
(a) *Where the employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using the rate of pay that the employee would have received but for the period of uniformed service.*
(b)
(1) Where the rate of pay the employee would have received is not reasonably certain, such as where compensation is based on commissions earned, the average rate of compensation during the 12-month period prior to the period of uniformed service must be used.
(2) Where the rate of pay the employee would have received is not reasonably certain and he or she was employed for less than 12 months prior to the period of uniformed service, the average rate of compensation must be derived from this shorter period of employment that preceded service.[5]

Q: If the county and VRS refuse to adjust the computation of my "high three" compensation as you suggest, can I sue the county and VRS in federal court? What about in state court?

A: As I explained in Law Review 19091, the county is a political subdivision of the Commonwealth of Virginia, and political subdivisions do not have sovereign immunity under the 11th Amendment of the United States Constitution. You can sue the county in federal court with your own lawyer and in your own name, just like suing a private employer. If DOJ represents you in the suit, you (not the United States) will be the named plaintiff.

On the other hand, VRS is an arm of the Commonwealth of Virginia, and you cannot sue the Commonwealth in federal court.[6] You cannot sue the Commonwealth of Virginia in state court because of the recent Virginia Supreme Court precedent.[7] The only way that you can get relief against VRS—that you can force VRS to comply with federal law—is to get DOJ to sue VRS in federal court in the name of the United States as plaintiff.[8]

You need to reopen your DOL-VETS case and complain about the violation of your pension rights under section 4318—this is far more important than the question of whether you will be a detective or a patrol officer in your last few months of police service. You need to get DOL-VETS to find this pension claim to have merit and to refer your claim to DOJ, so that all your USERRA claims can be consolidated in a single lawsuit.

Q: The County Attorney insists that what I am asking violates state law in Virginia. What do you say about that?

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[5] 20 C.F.R. 1002.267 (bold question in original, emphasis by italics supplied).
[6] 38 U.S.C. 4323(b)(2).
[7] *Clark v. Virginia Department of State Police,* 292 Va. 725, 793 S.E.2d 1 (2016), *cert. denied,* 138 S. Ct. 500 (2017).
[8] 38 U.S.C. 4323(a)(1) (final sentence). *See also* 38 U.S.C 4323(b)(1).

A: The state law is irrelevant because USERRA explicitly supersedes and overrides state laws that purport to limit USERRA rights.[9] I also invite your attention to the Supremacy Clause of the United States Constitution, which reads as follows:

> 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.[10]

The County Attorney needs to be reminded that a century and a half ago our country had a bloody argument about the supremacy of federal authority over state authority, and the federal side won. General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

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This article is one of 1900-plus "Law Review" articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

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[9] 38 U.S.C. 4302(b).

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

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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