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When You Returned to Federal Civilian Employment, after Active Duty, in October 2012, You Should Have Received Step Increases Based on Credit for your Military Service. Perhaps it Is Not Too Late To Fix This.

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

1.1.1.8—USERRA applies to the Federal Government
1.3.2.2—Continuous accumulation of seniority—escalator principle
1.3.2.5—Rate of pay upon reemployment

Q: I am a retired Army Reserve Colonel and a life member of the Reserve Organization of America (ROA).[3] I only very recently became aware of your "Law Review" articles, when I

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2300 "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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

[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 45 years, I have collaborated 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 38 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 mailto:swright@roa.org.

[3] At its 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new "doing business as" name—the Reserve Organization of America. The point of the name change is to emphasize that the

read Law Review 22014 (February 2022). I wish that I had known about your articles during the years that I was a drilling Army Reserve officer.

I was born in 1960, and I graduated from high school in 1978. In college, I participated in the Army's Reserve Officers Training Corps (ROTC), and I was commissioned a Second Lieutenant when I graduated in May 1982. I then served on active duty for the next six years, until May 1988, when I was released from active duty and affiliated with the Army Reserve (USAR). I participated until 9/30/2012. I became a "gray area" retiree[4] on that date.

I became a Federal civilian employee in June 1988, shortly after I left active duty. I am still a Federal civilian, but I will be retiring soon.

I was away from my civilian job for drill weekends and annual training and for involuntary call-ups in 1990-91, 2001-02, and 2005-06. I returned to voluntary Active Guard & Reserve (AGR) duty on 10/1/2008 and left active duty, to become a gray area retiree, exactly four years later, on 9/30/2012.[5] I reached my Mandatory Removal Date (MRD), based on 30 years of commissioned service, in May 2012, 30 years after I was commissioned a Second Lieutenant, but the Army allowed me to remain on active duty through the end of Fiscal Year 2012 to give me the opportunity to train my replacement.

In my civilian job, I was promoted from GS-12 to GS-14 in August 2008, shortly before I began my final active-duty period. When I left my civilian job to enter active duty in October 2008, I was a GS-14, Step 1. When I returned to my civilian job in October 2012, I was reinstated as a GS-14, Step 1.

Based on having read your Law Review 22014 (February 2022), I think that I was entitled to be reinstated as a GS-14, Step 4, because it is reasonably certain that I would have advanced to that rank if I had remained continuously employed in the civilian job instead of leaving for active military service. What do you think?

Answer, bottom line up front:

If you met the five USERRA conditions for reemployment,[6] you were entitled, under USERRA's "escalator principle", to the seniority and rights and benefits determined by seniority that you

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organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

[4] A gray area retire is a person who has met all the requirements for a Reserve retirement except the age requirement (age 60). Under legislation enacted in 2008, a Reserve Component member who has contingency service after 1/28/2008 can start drawing Reserve retirement before his or her 60th birthday under some circumstances. *See* Law Review 16090 (September 2016).

[5] I will discuss this person's active duty periods, in connection with USERRA's five-year limit, in Law Review 22017.

[6] I will discuss the five USERRA conditions in Law Review 22017, the next article in this "Law Review" series.

had when you left your job for uniformed service plus the additional seniority and rights and benefits determined by seniority that you would have attained if you had remained continuously employed in the civilian job.[7]

Federal employees receive a step increase from Step 1 to Step 2 after 52 weeks (one year) of creditable service, and from Step 2 to Step 3 after another 52 weeks, and from Step 3 to Step 4 after another 52 weeks. Beginning with Step 4 to Step 5, the advancement occurs after 104 weeks of creditable service.[8] If you had remained in your civilian job, you would have been advanced to Step 2 in August 2009, to Step 3 in August 2010, and to Step 4 in August 2011. When you returned to work in October 2012, you would have been more than halfway to Step 5. You are clearly entitled to these step increases upon your reemployment.

Explanation

Since Congress enacted the reemployment statute in 1940, there have been 17 decisions of the United States Supreme Court under this statute. In Category 10.1 of our Law Review Subject Index, you will find a "Law Review" article about each of these 17 cases. The 12th case came in 1975, and I discuss that case in detail in Law Review 09007 (February 2009). That case is *Foster v. Dravo Corp.*[9]

In its first case construing the 1940 reemployment statute,[10] the Supreme Court enunciated the "escalator principle" when it held: "[The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."[11]

In subsequent cases, the Supreme Court refined the escalator principle. It does not apply to all that might have happened to the veteran if he or she had remained continuously employed in the civilian job, instead of being away from the job for military service. The escalator principle applies to "perquisites of seniority." A two-pronged test determines whether a benefit qualifies as a perquisite of seniority. First, the benefit must be something that was intended to be a reward for length of service, rather than a form of short-term compensation for services rendered, or in this case not rendered because the veteran was away from work for military service at the time. Second, it must be reasonably certain (not necessarily absolutely certain) that the veteran would have received the benefit if he or she had remained continuously employed.

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[7] *See* 38 U.S.C. § 4316(a).
[8] *See* https://www.opm.gov/policy-data-oversight/pau-leave/pay-administration/fact-sheets/within-grade-increases/.
[9] 420 U.S. 92 (1975).
[10] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946).
[11] *Fishgold,* 328 U.S. at 284-85.

A step increase in Federal civilian employment clearly qualifies as a "perquisite of seniority" under this two-pronged test. It clearly is a reward for length of service, rather than a form of short-term compensation for services, and it is reasonably certain that you would have received these step increases if you had remained continuously employed. Depriving you of these step increases upon your reemployment in October 2012 clearly violated USERRA.

Please join or support ROA

This article is one of 2,300-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 on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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.

If you are now serving or have ever served in any one of our nation's eight[12] uniformed services, you are eligible for membership in ROA, and a one-year membership only costs $20 or $450 for a life membership. 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:

Reserve Organization of America
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[12] Congress recently established the United States Space Force as the 8th uniformed service.