

When you Turn 60 and Start Drawing your Reserve Component Retirement, you Get a New Opportunity To Elect To Participate in the Reserve Component Survivor Benefit Plan.

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

5.4—Survivor Benefit Plan

Q: I am a retired Navy Reserve Captain and a life member of the Reserve Organization of America (ROA).³ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2,000 “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 Spouses’ 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 46 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 (VRRRA—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 VRRRA 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 VRRRA 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 organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

are especially pertinent to those of us who are serving or have served in the Reserve Components (RC) of the armed forces, and I have shared many of your articles with my Navy Reserve colleagues and subordinates. Recently, I researched your articles for my own situation.⁴

I was born on 9/1/1962 and very recently attained the age of 60 and started drawing my Navy Reserve retired pay. While in college, at a major private university, I participated in the Naval Reserve Officers Training Corps (NROTC), and I was commissioned an Ensign in May 1984. I served on full-time active duty for the next six years, until May 1990, when I was released from active duty and affiliated with the Naval Reserve.⁵ I participated in the USNR faithfully until 2014, when I became a “gray area retiree”⁶ with 30 years of commissioned service (1984 to 2014).

In 2004, 20 years after I was commissioned an Ensign, I received my Notice of Eligibility (NOE) or “20-year letter.”⁷ At that time, I was unmarried and had never been married and had no children, and I thought that I was a “confirmed bachelor” and would never marry. Accordingly, I chose not to participate in the Reserve Component Survivor Benefit Plan (RCSBP). In 2019, at the age of 57, I met the love of my life, and we married last year (2021). My wife is 12 years younger than I am and is in excellent health. She most likely will survive me by many years, and I want to elect to participate in the Reserve Component Survivor Benefit Plan (RCSBP).

When I applied to start drawing my Navy Reserve retired pay upon my 60th birthday, I also applied to participate in the RCSBP. An employee at the personnel center told me that I had my chance to elect the RCSBP in 2004, when I received my NOE, and that it is too late to make the election now.⁸

In your Law Review 10008, published in early 2010, you wrote: “In 2020, when you turn 60 and become eligible to receive retired pay, you will have another opportunity to elect RCSBP coverage for your wife. 10 U.S.C. 1448(a)(2).” I sent a copy of your Law Review 10008, with this portion highlighted, to the personnel center employee. He said: “Captain Wright is wrong. It is too late for you to elect to participate in the RCSBP.” What do you think about this?

⁴ The factual set-up for this article is based on a real situation and a real inquiry, but I have changed many of the facts to disguise the inquirer’s identity and to make the discussion simpler and easier to follow.

⁵ The name of the component changed to “Navy Reserve” in 2005.

⁶ See Law Review 16089 (September 2016) for a definition of the term “gray area retiree.”

⁷ See Law Review 16088 (September 2016) for a detailed discussion of the purpose and effect of the NOE.

⁸ As I explained in footnote 4, I have changed many of the facts of the real situation to disguise the inquirer’s identity. The part about the personnel center employee insisting that you lost the opportunity to participate in the RCSBP when you did not make that election after you received your NOE is hypothetical but realistic.

Answer, bottom line up front

After rereading Law Review 10008 and the statutory citations, I adhere to what I wrote in 2010. I suggest that you bring this matter to the attention of the Staff Judge Advocate (SJA) of the personnel center and the commander. If you are not successful in persuading them, you may need to initiate an action in the Board for the Correction of Naval Records (BCNR) to correct this error and injustice.

You must use DD 2656 to elect to participate in the RCSBP. Now that you have turned 60 and started drawing your Navy Reserve retired pay, you have a new opportunity to elect RCSBP coverage by completing and submitting this form.

Explanation

Here is the pertinent sentence in section 1448(a)(2)(B) of Title 10 of the United States Code: “A person who elects under subparagraph (B) not to participate in the Plan [Reserve Component Survivor Benefit Plan] remains eligible, upon reaching 60 years of age and otherwise becoming entitled to retired pay, to participate in the Plan in accordance with eligibility under paragraph (1)(A).”⁹

The only reasonable interpretation of this sentence is that a Reserve Component service member who validly elected not to participate in the RCSBP when he or she received the Notice of Eligibility (NOE) has another opportunity to elect RCSBP coverage when he or she turns 60 and becomes entitled to the retired pay. The employee who told you that you are not entitled to elect RCSBP coverage now is confused and ill-informed about the law.

Please join or support ROA

This article is one of 2,000-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 more than 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.

⁹ 10 U.S.C. § 1448(a)(2)(B).

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 eight¹⁰ 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
1 Constitution Ave. NE
Washington, DC 20002¹¹

Here is a link to an excellent Military.com monograph about the Reserve Component Survivor Benefit Plan: <https://www.military.com/benefits/survivor-benefits/survivor-benefit-plan-for-reserve-component.html>.

For detailed information about military family law, including the Reserve Component Survivor Benefit Plan and the Uniformed Services Former Spouses’ Protection Act (USFSPA), see *The Military Divorce Handbook* (Am. Bar Assn., 3rd Ed. 2019), by Colonel Mark E. Sullivan, USA (Ret.).

Colonel Sullivan, a life member of ROA, has a nationwide law practice, headquartered in Raleigh, North Carolina. He and the attorneys in his firm work with attorneys all over the country, advising on military-related issues in divorce cases. Here is a link to the law firm website:

¹⁰ Congress recently established the United States Space Force as the 8th uniformed service.

¹¹ You can also donate on-line at www.roa.org.

<https://ncfamilylaw.com/mark-e-sullivan/>. The telephone number is (919) 832-8507.

If you or your spouse are military, and if you are divorcing, you need a divorce lawyer who is familiar with military family law matters, including the USFSPA and military survivor benefit plans. To protect your interests, you need to ensure that your lawyer is familiar with these military wrinkles on family law. It may be impossible for you to find such a lawyer, especially if you are far from any major military installation. In that case, you need to retain another lawyer to advise and assist your attorney on the military aspects of the case. There are several lawyers around the country who offer this service, but you cannot do better than Colonel Sullivan and his firm.

You need competent legal representation because you only get one chance to get this right. See Law Review 13169 (December 2013), by Colonel Sullivan.