

Military Retirees at O-4 and Above are Not Eligible for the 5-Point Preference in Federal Civilian Employment

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

Subject Index Categories:

8.0—Veterans' preference

Q: I am a retired Army Reserve Lieutenant Colonel and a life member of the Reserve Organization of America.³ I was born in 1961, and I attended our state university from 1979 to 1983. While in college, I participated in the Army's Reserve Officers Training Corps (ROTC), and when I graduated in May I was commissioned a Second Lieutenant. I remained on full-time active duty for a decade, until May 1993, when I was released from active duty and affiliated with the Army Reserve. While on active duty, I served in Saudi Arabia, Kuwait, and Iraq in Operation Desert Shield and Operation Desert Storm.

¹ Please see 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, and we add new articles each month. I am the author of more than 90% of the articles published so far, 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 on active duty and in the Navy Reserve as a judge advocate and retired in 2007. I am a life member of ROA, and I currently serve on the Executive Committee and as Chairman of the Membership Committee. I participated in the drafting of USERRA, to replace the 1940 reemployment statute, while employed as an attorney for the United States Department of Labor (DOL). I have also worked with USERRA and the predecessor reemployment statute as a Navy judge advocate, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), and as an attorney for the United States Office of Special Counsel (OSC). For six years (June 2009 through May 2015), I was a full-time employee of ROA, serving as the first Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC. My paid ROA employment ended 5/31/2015, but I have continued many of the SMLC functions as a volunteer and ROA member. You can reach me by e-mail at SWright@roa.org.

³ In 2018, the members of the Reserve Officers Association amended the organization's constitution and made all past and present uniformed services personnel (E-1 through O-10) eligible for full membership, including voting and running for office. The organization adopted the "doing business as" name "Reserve Organization of America" (ROA) to emphasize that the organization represents and admits to membership enlisted personnel as well as commissioned officers

I served in the Army Reserve and was recalled to active duty in 2003-04 (Iraq) and in 2009-10 (Afghanistan). In May 2011, when I had 28 years of commissioned service, I became a “gray area retiree.”⁴ Based on my service in Afghanistan in 2009-10, I started drawing my Reserve Component retired pay in 2020, three months after my 59th birthday.

After I left active duty in 1993, I was hired as a state police officer, and I received veterans’ preference in getting that position. I served as a state police officer for 25 years and retired in 2018. I am still in good health, and I am not ready to retire, so I applied for a federal civilian position. I thought that I was eligible for the five-point veterans’ preference, based on my service in the First Gulf War (1990-91), but the personnel office of the federal agency where I applied told me that I am not eligible for veterans’ preference because I am retired from the military above the grade of O-3. What gives?

A: Military retirees at or above the grade of O-4 (major or lieutenant commander) are not eligible for the five-point veterans’ preference. The pertinent subsection of the Veterans’ Preference Act (VPA) is as follows:

Except for purposes of chapters 43 and 75 of this title, [not pertinent here] preference eligible’ does not include a retired member of the armed forces unless—(A) the individual is a disabled veteran; or (B) the individual retired below the rank of major or its equivalent.⁵

Because you are not a service-connected disabled veteran, and because you are retired from the Army above the grade of Captain (O-3), you are not eligible for veterans’ preference in federal civilian employment.

When you received veterans’ preference in getting hired as a state police officer in 1993, that was a matter of state law, not the VPA.⁶ The Veterans’ Preference Act of 1944 (VPA)⁷ governs veterans’ preference in federal civilian employment.⁸

⁴ As I have explained in Law Review 16089 (September 2016), the term “gray area retiree” is the colloquial version of the statutory term inactive status list (ISL). A person on the ISL has stopped participating and is waiting until he or she attains the required age (usually age 60) to start drawing Reserve Component retired pay. As I have explained in Law Review 16090 (September 2016), Congress amended section 12731 of title 10 of the United States Code on 1/28/2008. A Reservist or National Guard member who performed contingency service after 1/28/2008 can start drawing his or her Reserve Component retired pay some months prior to his or her 60th birthday—three months reduction from age 60 for each 90 days of contingency service after 1/28/2008. See 10 U.S.C. § 12731(f)(2)(A).

⁵ 5 U.S.C. § 2108(4).

⁶ The VPA only applies to veterans’ preference in federal civilian employment. More than 40 states have similar (not identical) laws at the state level, governing employment in state and local government employment.

⁷ Public Law 78-359, 58 Stat. 387.

⁸ The VPA is codified in scattered sections of title 5 of the United States Code.

Q: My friend Mary Jones is ten years behind me—she was born in 1971. She served in the Navy and Navy Reserve and became a gray area retiree as a Lieutenant Commander (O-4) in 2021, when she was 50. Like me, she served in Afghanistan in 2009-10, and she is entitled to the five-point veterans’ preference in federal civilian employment. Mary has also applied for a federal civilian position. Is she entitled to the five-point veterans’ preference?

A: Yes. Mary’s status as a “gray-area retiree” does not disqualify her from the five-point preference. The VPA defines the term “retired member of the armed forces” as “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.”⁹ When Mary becomes eligible to draw her Reserve Component retired pay, at age 60 or at some earlier point based on contingency service as a member of the Ready Reserve after 1/28/2008, she will then lose her five-point veterans’ preference.

Please join or support the Reserve Organization of America (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, and we add new articles 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 more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s national 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, ESGR volunteers, DOL investigators, 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 their membership status, or lack thereof, in our organization, but please understand that ROA members, through their dues and contributions, pay the cost of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any of our country’s eight uniformed services,¹⁰ you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for

⁹ 5 U.S.C. § 2108(5).

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

a life membership.¹¹ Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to persons who are serving or have served in the Active Component of the armed forces, as well as the National Guard and Reserve.

If you are eligible, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448. If you are not eligible, please contribute to help us continue our vital work. You can send us a contribution at:

Reserve Organization of America
1 Constitution Avenue NE
Washington, DC 20002¹²

¹¹ If you are under the age of 35, you can become an associate member for free for five years or until you turn 35, whichever comes first.

¹² You can also contribute on-line at www.roa.org.