

LAW REVIEW¹ 25025

July 2025

The Supreme Court Overrules the Office of Personnel Management, The Merit Systems Protection Board, and the United States Court of Appeals for the Federal Circuit on Differential Pay for Volunteers.

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

1.4—USERRA enforcement.

1.6—USERRA and statute of limitations.

1.8—Relationship between USERRA and other laws/policies.

2.0—Paid leave for government employees who are Reserve Component members.

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 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 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 samwright50@yahoo.com.

Feliciano v. Department of Transportation, 605 U.S. ____ (2025).³

Q: I am a Chief Petty Officer (E-7) in the Navy Reserve (USNR) and a life member of the Reserve Organization of America (ROA).⁴ I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I have found those articles to be most helpful to me in understanding, asserting, and enforcing my USERRA rights with respect to my civilian employer, a federal executive agency. I have informed my USNR colleagues of your excellent articles. I joined your organization and later upgraded to life-member status because I want to support this excellent free service that you are providing to Reserve Component (RC) service members.

Several years ago, when I was a third-class petty officer (E-4), I volunteered to return to active duty for one year. Going on active duty caused me to lose pay, because my active-duty pay as an E-4 was less than my regular civilian pay. I heard about differential pay for federal employees in this situation. I inquired at the personnel office of the federal agency where I worked about differential pay. An employee in the personnel office told me: “You are not eligible for differential pay because you volunteered for active duty.” I believed her statement, and I did not make a formal application for differential pay.

³ This is a decision of the United States Supreme Court. The decision was announced on 4/30/2025. Decisions of the Supreme Court are officially published in *United States Reports*, a series of volumes that contain only Supreme Court decisions. There is a lag time between the announcement of a Supreme Court decision and its official publication. This decision will be published in Volume 605 of *United States Reports*. We do not yet know the page number where the decision will start. We will know that when Volume 605 is published, early next year (2026).

⁴ The factual set-up for this article is hypothetical but realistic.

Just recently, I heard that the Supreme Court decided a case on this issue and expanded the right to differential pay to include volunteers like me. Is that true? Is it too late for me to make a claim for differential pay?

Answer, bottom line up front.

You are referring to *Feliciano v. Department of Transportation*, the Supreme Court decision that I discuss in detail in this article. As a result of that decision, you, and individuals like you, are eligible for differential pay. It is not too late for you to make your claim, but you should do so as soon as possible.

Q: What are the facts of the *Feliciano* case?

A: Nick Feliciano is a petty officer in the Coast Guard Reserve (USCGR) and a life member of ROA. On the civilian side, he has been an air traffic controller (ATC) for the Federal Aviation Administration (FAA) since 2005. The FAA is part of the Department of Transportation.

Feliciano was involuntarily ordered to return to active duty in July 2012, and his orders referred to section 12302 of title 10 of the United States Code.⁵ When those orders expired, Feliciano volunteered to continue his mission with the USCGR under Title 10 section 12301(d). In all, Feliciano was on active duty and away from his ATC job for most of the time between July 2012 and February 2017. His pay on active duty was substantially less than his regular federal salary. He applied for and received differential pay during his 12302 time, and the FAA declined to award him that pay for his 12301(d) time, based on guidance from the

⁵ 10 U.S.C. § 12302.

United States Office of Personnel Management (OPM). At all times, he was performing the same tasks, for the same command, in support of counter-drug and anti-human trafficking operations.

Feliciano appealed to the United States Merit Systems Protection Board (MSPB) and lost. He appealed to the United States Court of Appeals for the Federal Circuit and lost again. Finally, he applied to the Supreme Court for a writ of certiorari, and the Court granted certiorari (agreed to hear the case). There were new briefs and a new oral argument in the Supreme Court. On 4/30/2025, the Supreme Court ruled for Feliciano. This is an important favorable precedent that helps thousands of federal employees who are similarly situated, and that includes you.

Q: What federal statutes apply to this case?

A: Section 5538 of title 5 of the United States Code provides:

An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under section 12304b of title 10 *or a provision of law referred to in section 101(a)(13)(B) of title 10* shall be entitled, while serving on active duty, to [differential pay].⁶

Section 101(a)(13)(B) of title 10 provides:

The term “contingency operation” means a military operation that ... results in the call or order to, or retention on, active duty of members of the uniformed services under section 688,

⁶ 5 U.S.C. § 5538(a) (emphasis supplied).

12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title [title 10], chapter 13 of this title, section 3713 of title 14 [which pertains to the Coast Guard], *or any other provision of law during a war or during a national emergency declared by the President or Congress.*⁷

The Supreme Court opinion includes the following paragraphs:

Though Mr. Feliciano acknowledged that he was not called up under any of the specific statutes listed in §101(a)(13)(B), he argued that the statute’s closing words, italicized above, entitled him to differential pay. After all, the Coast Guard called him to active duty under another “provision of law” (§12301(d)), and his orders came “during a national emergency.” ECF Doc. 21, at 21–23. As a result, he contended, he served pursuant to a call to active duty under “a provision of law referred to in 10 U. S. C. §101(a)(13)(B),” and was thus entitled to differential pay under §5538(a). *Id.*, at 19, 23.

The Federal Circuit disagreed. Citing its earlier decision in *Adams v. Department of Homeland Security*, 3 F. 4th 1375 (2021), the court reasoned that, when a reservist seeks differential pay for service “during a national emergency,” he must show not only that he served on active duty while a national emergency was ongoing. He must also show a substantive connection between his service and a particular national emergency. App. to Pet. for Cert. 4a. Because Mr. Feliciano had not made that second showing, the court held, he was not entitled to differential pay. *Id.*, at 3a–4a. Mr. Feliciano sought review of the Federal Circuit’s decision, and we agreed to take his case. 602 U. S. ____ (2024).⁸

⁷ 10 U.S.C. § 101(a)(13)(B) (emphasis supplied). Almost continuously since 9/12/2001, the day after the “date which will live in infamy” for our time, one or more “national emergency” declarations have been in effect.

⁸ *Feliciano*, 605 U.S. at ____.

Q: How did the Supreme Court resolve this issue?

A: The Opinion of the Court includes the following:

At its core, the dispute before us turns on the meaning of the phrase “during a national emergency.” Does that language promise differential pay to certain federal civilian employees called to active-duty service while a national emergency is ongoing, as Mr. Feliciano argues? Or does it require a reservist to prove some additional, substantive connection between his service and a particular national emergency, as the Federal Circuit held and the government contends? Several considerations persuade us that Mr. Feliciano’s interpretation is the sounder one.

Start with the word “during.” Normally, we have said, that word “denotes a temporal link” and means “contemporaneous with.” *United States v. Ressam*, 553 U. S. 272, 274–275 (2008). Any number of dictionaries from around the time of §101(a)(13)(B)’s adoption in 1991 offer up similar formulations. See, e.g., *Black’s Law Dictionary* 504 (6th ed. 1990) (defining “during” as “throughout the course of; throughout the continuance of; in the time of; after the commencement and before the expiration of.”) *Accord*, *Random House Dictionary of the English Language* 608.

Conversely, the word “during” does not generally imply a substantive connection. The government itself has previously acknowledged as much. As its briefing in *Ressam* explained, “[t]he plain everyday meaning of ‘during’ is ‘at the same time’ or ‘at a point in the course of.’ It does not normally mean ‘at the same time and in connection with.’” Brief for United States in *United*

States v. Ressam, O. T. 2007, No. 455, pp. 13–14 (emphasis added). Reading “during” to require a substantive connection, the government warned, risks “read[ing] in a relational element” that the word does not necessarily convey. Tr. of Oral Arg. in *United States v. Ressam*, O. T. 2007, No. 455, p. 31.

Adopting just that view, this Court in *Ressam* held that a sentencing enhancement addressing those who carry an explosive “during” the commission of a felony applies to individuals who carry explosives “contemporaneous with” their felonies even in the absence of a substantive “relationship between the explosive carried and the underlying felony.” 553 U. S., at 275.⁹

In the end, we are persuaded that the statutory language means what its terms most naturally suggest: A federal civilian employee called to active duty pursuant to “any other provision of law . . . during a national emergency” is entitled to differential pay without having to prove that his service was substantively connected in some particular way to some particular emergency. Because the Federal Circuit held otherwise, its judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.¹⁰

Q: Was this a unanimous decision?

A: No. This was a 5-4 decision. Justice Neil Gorsuch wrote the Opinion of the Court. He was joined by Chief Justice John Roberts, Justice Sonia Sotomayor, Justice Brett Kavanaugh, and Justice Amy Coney Barrett.

⁹ *Feliciano*, 605 U.S. at ____.

¹⁰ *Feliciano*, 605 U.S. at ____.

Justice Clarence Thomas wrote the dissenting opinion. He was joined by Justice Samuel Anthony Alito, Jr., Justice Elena Kagan, and Justice Ketanji Brown Jackson. This is a most unusual combination of “conservative” and “liberal” justices to make a majority.

Q: Because this was a 5-4 decision, does that mean that it is likely to be reconsidered when the composition of the Court changes due to the death or retirement of a Justice and the nomination and confirmation of a new Justice?

A: No. The Supreme Court could grant certiorari (agree to hear) a new case involving the identical issue, but that is most unlikely because of the doctrine of *stare decisis*. That doctrine has been defined as follows:

Stare decisis, meaning in Latin “to stand by things decided,” is a legal principle that directs courts to adhere to previous judgments — or judgments of higher or tribunals — as it has persuasive and binding authority while resolving a case with allegedly comparable facts.

There are horizontal and vertical components to the stare decisis concept. Absent extraordinary circumstances, a court that upholds the principle of “horizontal stare decisis” will follow its own earlier decisions (e.g., the Supreme Court follows a legal precedent unless it has become too difficult for lower courts to apply).¹¹

Q: Could Congress overrule this Supreme Court precedent?

¹¹ <https://legal.thomsonreuters.com/blog/the-doctrine-of-stare-decisis/>.

A: If Congress is displeased with the outcome of *Feliciano*, it could amend section 5538 of title 5 and section 101(a)(13)(B) of title 10 to change the result going forward from the date of the statutory amendment. We (the Reserve Organization of America) are vigilant on this issue and all issues relating to the rights and interests of service members. If a bill is introduced to overturn the favorable *Feliciano* precedent, we will oppose that bill through legislative advocacy (lobbying), and we will bring the matter to the attention of other military associations.

In the absence of a statutory amendment, which is unlikely to happen, the *Feliciano* decision is the last word on the meaning section 5538 and section 101(a)(13)(B). A federal employee who is a Reserve Component service member, and who volunteers to return to active duty under section 12301(d) of title 10 or any other statutory authority (for instance, Title 32 Annual Training) *during* a period of national emergency is entitled to differential pay if his or her compensation while on active duty is less than his or her regular federal civilian compensation. The OPM guidance and the MSPB and Federal Circuit decisions that are inconsistent with *Feliciano* are now obsolete and wrong.

Q: Is *Feliciano* a USERRA case?

A: Yes. The Federal Circuit has held that a benefit like paid military leave under section 6323 of title 5 or differential pay under section 5538 of title 5 is a “benefit of employment” as defined by USERRA.¹² If a federal employee who is also a service member is entitled to such a benefit, and if the federal agency employer fails to accord the benefit

¹² 38 U.S.C. § 4303(2).

to the individual, that is a violation of section 4311 of USERRA.¹³ To determine whether the individual was entitled to the benefit, like paid military leave or differential pay, the MSPB should interpret the words of the underlying statute. The MSPB determination is subject to *de novo* review by the Federal Circuit.¹⁴

In *O'Farrell*, the Federal Circuit reviewed the MSPB's interpretation of section 6323 and disagreed with it and therefore reversed the MSPB's decision against O'Farrell. In *Feliciano*, the Federal Circuit agreed with MSPB's interpretation of section 5538 and therefore affirmed MSPB's decision against Feliciano.

Feliciano applied to the United States Supreme Court for a writ of certiorari, and the Supreme Court granted the writ. The Supreme Court reviewed the Federal Circuit's interpretation of section 5538 *de novo* and disagreed with it; therefore, the Supreme Court reversed the Federal Circuit decision and remanded the case to the Federal Circuit.

Q: What does “*de novo* review” mean?

A: On questions of fact, the reviewing court gives great deference to the trial court or tribunal (like the MSPB) and reverses the factual determination only if it is clearly erroneous or there is no evidence to support it. On questions of law, like the interpretation of the meaning of a statute, the reviewing court reviews the determination *de novo* (as of new) and gives no deference to the legal determination below.

¹³ 38 U.S.C. § 4311.

¹⁴ See *O'Farrell v. Dept. of Defense*, 882 F.3d 880 (Fed. Cir. 2018). See also Law Review 24052 (November 2024) for a detailed discussion of USERRA's enforcement mechanism with respect to federal executive agencies as employers.

Q: What is the Federal Circuit?

A: The United States Court of Appeals for the Federal Circuit is the specialized intermediate federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including review of MSPB decisions.

Q: You have written that Feliciano “applied for certiorari” and that the Supreme Court “granted certiorari.” What does that mean?

A: In the federal court system, the final appellate step is to apply to the United States Supreme Court for certiorari (discretionary review). At least four of the nine Justices must vote for certiorari, or certiorari is denied, and the decision of the Court of Appeals is final. The Supreme Court denies certiorari in about 99% of the cases where a party seeks it.

Q: What role did the Reserve Organization of America (ROA) play in the *Feliciano* case?

A: It is much more likely that the Supreme Court will grant certiorari if an organization like ROA files an amicus curiae (“friend of the court”) brief pointing out the importance of the case and urging the Court to grant certiorari. ROA filed such a brief, and you can file a link to the brief at the end of this article. After the Supreme Court granted certiorari, ROA filed a new brief on the merits.¹⁵

Q: Is there a statute of limitations? How far into the past can I go in claiming differential pay?

¹⁵ Our merits brief is available upon request.

A: USERRA does not have a statute of limitations, and it specifically precludes the application of other statutes of limitations.¹⁶ Since 5 U.S.C. section 5538 was enacted in 2009, you probably have a claim for any differential pay going back to 2009.

Q: Where can I find a lawyer to represent me in my claim for differential pay?

A: Brian Lawler represents Nick Feliciano in *Feliciano v. Department of Transportation*. He is a lawyer in San Diego with a nationwide USERRA practice. He is also a retired USMCR officer and a life member of ROA. You cannot do better than Brian Lawler for a case like this.

In another case, three years ago, Brian Lawler won another great USERRA victory in the United States Supreme Court.¹⁷ Here is a link to Brian Lawler's law firm website: <https://pilotlawcorp.com/brian-j-lawler-founder-shareholder/>.

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. We add new articles each month.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve

¹⁶ See 38 U.S.C. § 4327(b) See also Law Review 22018 (March 2022).

¹⁷ See *Torres v. Texas Department of Public Safety*, 597 U.S. 580 (2022). See also Law Review 24054 (November 2024).

32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members), the Army Reserve (176,171 members), and the Army National Guard (329,705 members).¹⁸

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” 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 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 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 advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and 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.

¹⁸ See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

If you are now serving or have ever served in any one of our nation's eight¹⁹ uniformed services, you are eligible for membership in ROA,²⁰ 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 <https://www.roa.org/page/memberoptions> 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 20002²¹

Here is a link to the ROA amicus brief urging the Supreme Court to agree to hear the *Feliciano* case:

https://cdn.ymaws.com/www.roa.org/resource/resmgr/legislation/20240226133643292_23-861_23-.pdf.

¹⁹ Congress recently established the United States Space Force as the eighth uniformed service.

²⁰ Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

²¹ You can also contribute on-line at www.roa.org.