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A Federal Employee who Leaves his or her Job for Military Service Is Entitled to Differential Pay, but only if the Service Qualifies as "Contingency Service."
By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.1.1.8—USERRA applies to the Federal Government
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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 SWright@roa.org.

***Adams v. Department of Homeland Security,* 3 F.4th 1375 (Fed. Cir. 2021), *cert. denied,* 142 S. Ct. 2835 (June 24, 2022).[3]**

The law that applies to this case

Section 5538 of title 5 of the United States Code (U.S.C.) provides as follows:

> **(a)** 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 [10 USCS § 12304b] or a provision of law referred to in section 101(a)(13)(B) of title 10 [10 USCS § 101(a)(13)(B)]* shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which—
> **(1)** the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)
> **(2)** the amount of pay and allowances which (as determined under subsection (d))—
> **(A)** is payable to such employee for that service; and
> **(B)** is allocable to such pay period.
> **(b)** Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee's civilian employment had not been interrupted)—
> **(1)** during which such employee is entitled to re-employment rights under chapter 43 of title 38 [38 USCS §§ 4301 et seq.] with

[3] This is a recent decision of the United States Court of Appeals for the Federal Circuit, the specialized Federal appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from decisions of the Merit Systems Protection Board. The citation means that you can find this decision in Volume 3 of *Federal Reporter 4th Series,* and the decision starts on page 1375 of that volume.

respect to the position from which such employee is absent (as referred to in subsection (a)); and
(2) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee is entitled by virtue of such employee's civilian employment with the Government.
(c) Any amount payable under this section to an employee shall be paid—
(1) by such employee's employing agency;
(2) from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and
(3) to the extent practicable, at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted.
(d) The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section.
(e)
(1) The head of each agency referred to in section 2302(a)(2)(C)(ii) [5 USCS § 2302(a)(2)(C)(ii)] shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.
(2) The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.
(f) For purposes of this section—
(1) the terms "employee", "Federal Government", and "uniformed services" have the same respective meanings as given those terms in section 4303 of title 38;
(2) the term "employing agency", as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency

referred to in section 2302(a)(2)(C)(ii) [5 USCS § 2302(a)(2)(C)(ii)]) with respect to which such employee has reemployment rights under chapter 43 of title 38 [38 USCS §§ 4301 et seq.]; and
(3) the term "basic pay" includes any amount payable under section 5304 [5 USCS § 5304].[4]

Relationship between section 5538 and the Uniformed Services Employment and Reemployment Rights Act

As I have explained in detail in Law Review 15067 (August 2015) and many other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA)[5] on 10/13/1994 as a long-overdue update of and improvement upon the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA's first section states: "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."[6]

To fulfill the aspiration to make the Federal Government the "model employer", Congress has enacted several "over and above USERRA" benefits for Reserve Component (RC) members[7] who are federal employees. Section 5538 is one of the more important of those benefits. Some RC service members, especially enlisted service

[4] 5 U.S.C. § 5538 (emphasis supplied). Congress enacted this provision on 3/11/2009. Omnibus Appropriations Act, Public Law 111-8, Division D, Title VII, § 751, 123 Stat. 524 (2009). Congress amended this section into its present form on 8/13/2018: Public Law 115-232, Division A, Title VII, Subtitle A, § 605, 132 Stat. 1795 (2018).
[5] Public Law 103-353, 108 Stat. 3149 (1994). Congress has amended and improved USERRA many times since 1994. The law is currently codified in title 38 of the United States Code, sections 4301 through 4335 (38 U.S.C. §§ 4301-35).
[6] 38 U.S.C. § 4301(b).
[7] There are seven Reserve Components of the United States armed forces. In descending order of size, they are the Army National Guard, the Army Reserve, the Air National Guard, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve. Congress has established the Space Force as the newest armed force, but the Space Force does not have a Reserve Component. Instead, the Space Force has a single component that includes both full-timers and part-timers. *See* Law Review 23028 (May 2023).

members, are paid while on active duty at a substantially lower rate than they normally receive in their civilian jobs, including federal civilian jobs. Under section 5538, a federal civilian employee who leaves his or her job for military service and receives a smaller compensation while away is entitled to differential pay to make up the difference.

Under USERRA's second section, USERRA is a floor and not a ceiling on the employment and reemployment rights of those who are serving or have served our country in uniform. That section provides:

> **(a)** Nothing in this chapter shall supersede, nullify or diminish any *Federal* or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
> **(b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[8]

Section 5538 is an example of another Federal law that provides greater or additional rights to RC members who are Federal civilian employees. Thus, section 5538 is not superseded by USERRA.[9]

Section 4311 of USERRA

Section 4311 of USERRA provides as follows:

[8] 38 U.S.C. § 4302 (emphasis supplied).
[9] 38 U.S.C. § 4302(a).

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, *or any benefit of employment* by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor in the employer's action*, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

> **(2)** under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.
>
> **(d)** The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.[10]

Section 4303 of USERRA defines 17 terms used in this law, including the term "benefit of employment." USERRA broadly defines that term as follows:

> **(2)** The term "benefit", "benefit of employment", or "rights and benefits" means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits,

[10] 38 U.S.C. § 4311 (emphasis supplied).

vacations, and the opportunity to select work hours or location of employment.[11]

If a federal employee is away from his or her job for service in the uniformed services and is entitled to differential pay under section 5538, and if the federal agency employer fails to pay the differential pay, that is a violation of section 4311 of USERRA.

USERRA's enforcement mechanism with respect to federal agencies as employers

One of the major improvements made by the enactment of USERRA in 1994 was the creation of a specific enforcement mechanism for complaints that Federal executive agencies, as employers, have violated USERRA. That enforcement mechanism is set forth in section 4324 of USERRA as follows:

(a)

(1) A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

(2)

(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is

[11] 38 U.S.C. § 4303(2).

entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

(B) Not later than 60 days after the date the Special Counsel receives a referral under paragraph (1), the Special Counsel shall—

(i) make a decision whether to represent a person before the Merit Systems Protection Board under subparagraph (A); and

(ii) notify such person in writing of such decision.

(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person—

(1) has chosen not to apply to the Secretary for assistance under section 4322(a);

(2) has received a notification from the Secretary under section 4322(e);

(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B) declining to initiate an action and represent the person before the Merit Systems Protection Board.

(c)

(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d)

(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection

(c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.[12]

The facts of the *Adams* case

Bryan Adams is an enlisted service member in the Arizona Air National Guard and a member of the Reserve Organization of America (ROA).[13] On the civilian side, he is a human relations specialist for Customs & Border Protection (CBP), a component of the United States Department of Homeland Security (DHS). During 2018, Adams was away from his civilian job for three periods of military service. Adams' military compensation during these three service periods was less than his regular civilian compensation. Accordingly, Adams applied for differential pay under section 5538, and CBP denied his request. This lawsuit resulted.

[12] 38 U.S.C. § 4324.

[13] 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.

Bryan Adams brought an action against DHS in the Merit Systems Protection Board.

Bryan Adams was represented by attorney Brian Lawler.[14] Through Brian Lawler, Bryan Adams initiated an action against DHS in the Merit Systems Protection Board (MSPB).[15] The MSPB ruled against him, holding that he had not provided evidence showing that the denial of the differential pay was motivated by his Army Reserve service.[16]

Bryan Adams appealed to the Federal Circuit.

After the MSPB ruled against Adams' claim, Bryan Adams (through Brian Lawler) appealed to the Federal Circuit. In the appellate court, Adams won the battle but lost the war. The Federal Circuit panel held that a federal employee claiming deprivation of differential pay under section 5538 or paid military leave under section 6323 of title 5 is not required to prove that the denial of the benefit was motivated by the employee's service in a Reserve Component (RC) of the armed forces. Only RC service members who are federal employees are entitled to differential pay under section 5538 or paid military leave under section 6323, so applying the "motivating factor" test is nonsensical. Thus, Adams won the battle, but he lost the war when the Federal Circuit

[14] Brian Lawler is a recently retired Marine Corps Reserve officer and a life member of ROA. His office is in San Diego, and he has a nationwide practice representing service members and veterans with claims under USERRA and other laws, including section 5538. He is the author of several of our "Law Review" articles, and he is one of two lawyers (along with Thomas Jarrard, Esq.) to whom I frequently refer clients.

[15] The MSPB is a quasi-judicial Federal executive agency that adjudicates disputes involving Federal executive agencies, as employers, and Federal employees, former Federal employees, and unsuccessful applicants for Federal employment under several laws, including USERRA. The MSPB has three members, including a Chair and Vice Chair, who are to be of the same major political party as the President, and a Member, who is to be of the other major political party. These members must be nominated by the President and confirmed by the Senate. The MSPB was without a quorum for more than four years but has been back up to full strength since May 2021. An MSPB case starts before an Administrative Judge (AJ) of the MSPB. The AJ conducts a hearing and makes findings of fact and conclusions of law, and either party can appeal to the MSPB itself.

[16] *Adams v. Department of Homeland Security,* 2020 MSPB LEXIS 411 (M.S.P.B. Feb. 4, 2020).

panel applied the rules of statutory interpretation to the language of section 5538 and concluded that Adams was not entitled to differential pay, based of the nature of his three periods of service.

As is always the case in the federal intermediate appellate courts, the case was assigned to a panel of three appellate judges. In this case, the three judges were Judge Todd M. Hughes, Judge Kimberly Ann Moore, and Judge Jimmie V. Reyna, all active (not senior status) judges of the Federal Circuit. Judge Hughes wrote the opinion, and the other two judges joined in a unanimous panel decision affirming the MSPB decision, but on grounds other than those relied upon by the MSPB. In his opinion, Judge Hughes wrote:

> Generally, an employee making a USERRA claim under 38 U.S.C. § 4311 must show that (1) they were denied a benefit of employment, and (2) the employee's military service was "a substantial or motivating factor" in the denial of such a benefit. *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001) (citation omitted). However, when the benefit in question is only available to members of the military, claimants do not need to show that their military service was a substantial or motivating factor. *See Butterbaugh v. Dep't of Just.*, 336 F.3d 1332, 1336 (Fed. Cir. 2003) ("[W]e agree with the Board that, in contrast to cases such as *Sheehan*. . . the question in this case is not whether Petitioners' military status was a substantial or motivating factor in the agency's action, for agencies only grant military leave to employees who are also military reservists."); *see also Maiers v. Dep't of Health & Hum. Servs.*, 524 F. App'x 618, 623 (Fed. Cir. 2013) ("In *Butterbaugh*, we determined that claimants need not show that their military service was a substantial motivating factor when the benefits at issue were only available to those in military service.").

> Because differential pay is only available to members of the military, we agree with Mr. Adams that the Board erred in its legal analysis by requiring that he show that his military service was a motivating factor in the agency's decision to deny differential pay. In order to establish a USERRA violation, Mr. Adams was only required to show that he was denied a benefit of employment. We therefore consider whether Mr. Adams was entitled to differential pay as a benefit of employment under the statutory provisions.[17]

In his opinion for the three-judge panel, Judge Hughes held that Adams was not entitled to differential pay for the three 2018 military periods under Judge Hughes' interpretation of section 5538. He explained his rationale as follows:

> 5 U.S.C. § 5538(a) states:
>
> 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 . . . a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled [to differential pay].
>
> The provisions of law listed in 10 U.S.C. § 101(a)(13)(B) define what qualifies as a "contingency operation." Thus, for Mr. Adams to be entitled to differential pay, he must have served pursuant to a call to active duty that meets the statutory definition of contingency operation. We conclude that none of Mr. Adams's service qualifies as an active duty contingency operation.

[17] *Adams,* 3 F.4th at 1377-78.

We first consider Mr. Adams's title 32 orders to perform annual training and conclude that Mr. Adams is not entitled to differential pay for this period of service because training does not qualify as "active duty" as required by 5 U.S.C. § 5538(a). Active duty is defined as "full-time duty in the active military service of the United States . . . [but] [s]uch term does not include full-time National Guard duty." 10 U.S.C. § 101(d)(1). As relevant here, full-time National Guard duty is defined as:

[T]raining or other duty, other than inactive duty, performed by a member of the . . . Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory . . . under section . . . 502. . . of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States. *Id.* § 101(d)(5).

Mr. Adams was ordered to annual training under 32 U.S.C. § 502(a). Since training under § 502 of title 32 is explicitly included in the definition of full-time National Guard duty, and since full-time National Guard duty is explicitly excluded from the definition of active duty, Mr. Adams was not called to active duty during the period of service that he spent in training. Because only members of the military who are called to active duty are entitled to differential pay under 5 U.S.C. § 5538(a), Mr. Adams is not entitled to differential pay for his time spent in annual training.

We next consider Mr. Adams's title 10 activation orders to support MPA tours and conclude that Mr. Adams is not entitled to differential pay for these periods of service because his service did not qualify as a "contingency operation" as required by 5 U.S.C. § 5538(a). As relevant to this case, 10 U.S.C. § 101(a)(13)(B) defines the term "contingency operation" as:

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

Mr. Adams was not called to duty under any enumerated section in the definition of contingency operation, and his orders expressly stated that they were "non-contingency" activation orders. Nevertheless, Mr. Adams argues that he was serving in a contingency operation because the statutory definition includes members of the military called to service under "any other provision of law" during a declared national emergency. Mr. Adams argues that he was called to duty under a provision of law, 10 U.S.C. § 12301(d), and that the United States has been in a continuous state of national emergency since September 11, 2001. *See* 84 Fed. Reg. 48,545 (declaration of the President continuing the national emergency for the year 2019-2020). Thus, Mr. Adams argues that every military reservist ordered to duty is performing a contingency operation so long as the national emergency continues.

> We have previously rejected such an expansive reading of the definition of contingency operation. *See O'Farrell*, 882 F.3d at 1086 n.5 (explaining that not all reservists called to active duty during a national emergency are acting in support of a contingency operation). In *O'Farrell*, we considered 5 U.S.C. § 6323(b), which entitled military reservists to military leave benefits if they were called to active duty "in support of a contingency operation." There, we found that the Petitioner's activation orders under 10 U.S.C. § 12301(d) qualified for benefits because the

> Petitioner was called to active duty to replace a member of the Navy who had been deployed to Afghanistan, and we therefore reasoned that Petitioner was indirectly supporting the contingency operation in Afghanistan. *Id.* at 1087-88. We find no inconsistency between *O'Farrell* and the agency's decision to deny differential pay to Mr. Adams. The requirements to qualify for differential pay under § 5538(a) are stricter than those for entitlement to benefits under § 6323(b), because § 5538(a) does not entitle a claimant to benefits when they are activated "in support" of a contingency operation, only when they are directly called to serve in a contingency operation. Moreover, unlike the Petitioner in *O'Farrell*, Mr. Adams has not alleged any similar connection between his service and the declared national emergency.

In determining the meaning of the statutory phrase "any other provision of law," we consider the context of the enumerated provisions that qualify as a contingency operation under the statutory definition and find that all of the identified statutes involve a connection to the declared national emergency. *S*ee 10 U.S.C. § 688(c) (authorizing the activation of retired military personnel to perform duties that "the Secretary considers necessary in the interests of national defense"); § 12301(a) (authorizing activation of reservists "[i]n time of war or of national emergency"); § 12302 (authorizing activation in the Ready Reserve "[i]n time of national emergency"); § 12304 (authorizing activation of reservists "when the President determines that it is necessary to augment the active forces"); § 12305 (authorizing the suspension of laws relating to promotion, retirement, or separation for a member of the military that "the President determines is essential to the national security of the United States"); § 12406 (authorizing activation of service members

when the United States "is invaded or is in danger of invasion by a foreign nation"); Chapter 13 (categorizing provisions including authorization to call state militia into federal service during time of insurrection "to suppress the rebellion"); 14 U.S.C. § 3713 (authorizing activation "to aid in prevention of imminent, serious natural or manmade disaster, accident, catastrophe, act of terrorism, or transportation security incident"). By contrast, § 12301(d) authorizes the activation of reservists at any time . . . with the consent of that member." Under the principle of ejusdem generis, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 114, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001) (alteration in original) (quoting 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991)). We find it implausible that Congress intended for the phrase "any other provision of law during a war or national emergency," to necessarily include § 12301(d) voluntary duty that was unconnected to the emergency at hand.

Our reading of § 5538(a) is consistent with the policy guidance from the Office of Personnel Management (OPM) on the matter. OPM guidance instructs that "qualifying active duty does not include voluntary active duty under 10 U.S.C. 12301(d)." *See OPM Policy Guidance Regarding Reservist Differential Under 5 U.S.C. § 5538* at 18 (available at https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/reservist-differential/policyguidance.pdf). The guidance also explains that "[t]he term 'contingency operation' means a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of

> the United States or against an opposing military force." *Id.* at 22. Mr. Adams does not allege that he was ordered to perform such service.
>
> We conclude that Mr. Adams's service supporting MPA tours under § 12301(d) was not a contingency operation. Therefore, Mr. Adams is not entitled to differential pay for these periods of service.
>
> Because none of Mr. Adams's service qualifies as an active duty contingency operation, as required by 5 U.S.C. § 5538(a), the agency properly denied differential pay. We affirm the decision of the Board.[18]
>
> **Bryan Adams appealed again.**

As a next step in the appellate process, Adams (through Brian Lawler) petitioned the Federal Circuit for rehearing en banc.[19] ROA, through pro bono (no compensation) attorneys filed an amicus curiae ("friend of the court") brief in the Federal Circuit, urging that court to grant rehearing en banc in the *Adams* case. Unfortunately, the Federal Circuit denied rehearing en banc.

As a final appellate step, Adams filed a petition for certiorari (discretionary review) in the United States Supreme Court, and ROA filed a new amicus brief urging the Court to grant certiorari. Certiorari is granted if at least four of the nine Justices vote for certiorari at a conference to consider certiorari petitions, and certiorari is denied in

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[18] *Adams,* 3 F.4th at 1378-1381

[19] If this petition had been granted, there would have been new briefs and a new oral argument before all of the active (not senior status) judges of the Federal Circuit.

99% of the cases where it is sought. The Supreme Court denied certiorari on 6/24/2022, so this case is over.

Is it likely that the Supreme Court will grant certiorari in another case, sometime in the future, raising this same issue?

No. The usual way to get certiorari is to show a conflict among the circuits.[20] This issue can only go to the Federal Circuit, because only the Federal Circuit reviews MSPB decisions. Thus, there will never be a conflict among the circuits on this issue.

Please join or support ROA

This article is one of 2300-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. On 10/2/1922, a group of reserve officers who had served in the "Great War" (as World War I was then known) met at Washington's historic Willard Hotel, at the invitation of General of the Armies John J. Pershing, the commander of American forces in that war.

One of those reserve officers 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

[20] There are 11 numbered circuits plus the District of Columbia Circuit and the Federal Circuit. The 11 numbered circuits and the District of Columbia Circuit have geographic jurisdictions. For example, the 7th Circuit is the federal intermediate appellate court that sits in Chicago and hears appeals from district courts in Illinois, Indiana, and Wisconsin. The Federal Circuit has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.

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.

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 seven 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 20002