

## LAW REVIEW<sup>1</sup> 24057

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### A Retired Service Member Must Wait 180 Days after Retiring To Start a new Department of Defense Civilian Job.

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#### 9.0—Miscellaneous

**Q: I am the personnel director for an Army activity. We have a civilian vacancy at our organization, and we need to fill it quickly. We have a well-qualified candidate in mind—let us call her Mary Jones or MJ. MJ was born on 5/1/1967 and turned 57 on 5/1/2024. She graduated from college in 1989 and was commissioned a Second Lieutenant in the Army upon graduation based on her participation in the Army's Reserve Officers Training Corps (ROTC). She served on full-time active**

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<sup>1</sup> I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup> 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>.

duty for ten years and transferred to the Army Reserve in 1999. She actively participated in the Army Reserve (drill weekends, annual training, and several recalls to active duty) until she retired on her 57<sup>th</sup> birthday, on 5/1/2024.

A Reserve Retirement normally kicks in when the individual turns 60, but as you have pointed out in your Law Review 16090 (September 2016), a Reserve Component service member who performed qualifying contingency service as a member of the Selected Reserve after 1/28/2008 is entitled to a reduction in the age of first receipt of Reserve Component retired pay of three months for each 90 days of such qualifying contingency service. MJ was recalled to active duty and deployed to Iraq for 18 months in 2009-10 and later for another 18 months in Afghanistan in 2012-13. Based on her three years of qualifying contingency service in Iraq and Afghanistan, MJ was determined to be entitled to start drawing her Army Reserve retired pay starting on her 57<sup>th</sup> birthday, and so she retired from the Army Reserve on 5/1/2024.<sup>3</sup>

MJ applied for the vacant position at our organization, and we interviewed her and five other candidates. We found that she was the best candidate by far, and we tried to offer her the position, but our higher headquarters personnel office told us that MJ must wait for 180 days after her military retirement before we can offer her the position, unless we apply for and receive a waiver of this “cooling off period.” I have heard of the cooling-off period, but I always thought that this requirement only applies to recently retired *Active Component* service members, not retired Reserve Component members like MJ. How does this requirement work?

A: Here is the entire text of section 3326 of title 5 of the United States Code:

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<sup>3</sup> See 10 U.S.C. § 12731(f)(2)(A).

**(a)** For the purpose of this section, “member” and “Secretary concerned” have the meanings given them by section 101 of title 37.

**(b)** A retired member of the armed forces may be appointed to a position in the civil service in or under the Department of Defense (including a nonappropriated fund instrumentality under the jurisdiction of the armed forces) during the period of 180 days immediately after his retirement only if—

**(1)** the proposed appointment is authorized by the Secretary concerned or his designee for the purpose, and, if the position is in the competitive service, after approval by the Office of Personnel Management; or

**(2)** the minimum rate of basic pay for the position has been increased under section 5305 of this title [5 USCS § 5305].

**(3)** [Deleted]

**(c)** A request by appropriate authority for the authorization, or the authorization and approval, as the case may be, required by subsection (b)(1) of this section shall be accompanied by a statement which shows the actions taken to assure that—

**(1)** full consideration, in accordance with placement and promotion procedures of the department concerned, was given to eligible career employees;

**(2)** when selection is by other than certification from an established civil service register, the vacancy has been publicized to give interested candidates an opportunity to apply;

- (3) qualification requirements for the position have not been written in a manner designed to give advantage to the retired member; and
- (4) the position has not been held open pending the retirement of the retired member.<sup>4</sup>

The definitions section of title 5 of the United States Code defines the term “retired member of the armed forces” as follows: “Retired member of the armed forces” means 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.”<sup>5</sup>

As of 5/1/2024, her 57<sup>th</sup> birthday, MJ is entitled to retired-pay as a member on the Army Reserve retired list. Thus, section 3326 means that she must wait for 180 days before the Army can offer her an Army civilian position, unless a waiver is obtained and approved. Section 3326 does not make a distinction between a retired member of the Active Component and a retired member of the Reserve Component. The Army must wait until 180 days after MJ’s Army Reserve retirement date to offer her this civilian position unless the Secretary of the Army grants a waiver and the United States Office of Personnel Management (OPM) approves the waiver.

If you apply for the waiver, you have a good chance of getting it. You should point out that the proximity in time between MJ’s Army Reserve retirement and her selection for this civilian position is entirely coincidental. It is not like MJ was the most recent commanding officer and she engineered this selection to give herself a civilian job in retirement.

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<sup>4</sup> 5 U.S.C. § 3326.

<sup>5</sup> 5 U.S.C. § 2108(5).

**Q: We have another vacancy and another candidate in mind for that vacancy. Let us call the candidate Joe Smith or JS. JS was born on 5/1/1974 and turned 50 on 5/1/2024. Like MJ, JS participated in the Army ROTC while in college, and he was commissioned a Second Lieutenant upon graduation on 5/29/1996. JS served on full-time active duty for ten years and then transitioned to the Army Reserve in 2006. JS served actively in the USAR until he became a “gray area retiree” when he reached his Mandatory Removal Date on 5/29/2024, based on 28 years of commissioned service as an O-5 (Lieutenant Colonel).**

**Unlike MJ, JS does not have qualifying contingency service as a Selected Reservist, and he does not qualify for early receipt of his Army Reserve retirement pay. JS will start drawing his retired pay on 5/1/2034, when he turns 60.**

**MJ applied for a different civilian position in our organization, and we found him to be the best qualified among the candidates for that position. Do we need to get a waiver from the Secretary of the Army and OPM before we can offer the civilian position to JS?**

**A: No, because JS is not a “retired member of the armed forces” and will not be one until he turns 60 ten years from now. You can offer the position to JS now and you do not need a waiver.**

For further information about section 3326 of title 5 of the United States Code, please see our Law Review 17078 (August 2017) and our Law Review 18035 (April 2018).

**Please join or support ROA.**

This article is one of 2,200-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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 (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).<sup>6</sup>

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 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 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

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<sup>6</sup> See <https://crsreports.congress.gov/product/pdf/IF/IF10540>. These are the authorized figures as of 9/30/2022.

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.

If you are now serving or have ever served in any one of our nation's eight<sup>7</sup> uniformed services, you are eligible for membership in ROA,<sup>8</sup> 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 20002<sup>9</sup>

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<sup>7</sup> Congress recently established the United States Space Force as the eighth uniformed service.

<sup>8</sup> Spouses, widows, and widowers of past or present members of the uniformed services are also eligible to join.

<sup>9</sup> You can also contribute on-line at [www.roa.org](https://www.roa.org).