

**LAW REVIEW 17090<sup>1</sup>**  
**September 2017**

**Pension Credit for Military Service Time Is Not Limited to Five Years**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

- 1.1.1.7—USERRA applies to state and local governments
- 1.3.1.2—Character and duration of service
- 1.3.2.3—Pension credit for service time
- 1.8—Relationship between USERRA and other laws/policies

**Q: I am a retired Chief Master Sergeant (E-9) of the Air Force Reserve and a member of the Reserve Officers Association (ROA). I am a long-time employee of a city government. I began my career with the city in January 1988, and I am looking to retire in January 2018, with 30 years of city service. I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I believe that Law Review 13138 (October 2013) is particularly relevant to my situation.**

**My career with the city government has been interrupted many times by periods of military service. Some of the periods were voluntary, and some were involuntary—when I was called to active duty with my unit. The periods that I have been away from my city job since January**

---

<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1500 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

<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. I have 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 35 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 [SWright@roa.org](mailto:SWright@roa.org) or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

**1988 total seven years, ten months, and 28 days, according to the computation by the city's personnel department and the pension administrator.**

**I have read and reread your Law Review 16043 (May 2016), about USERRA's five-year limit. As you have advised in your articles more than once, I have gathered all my military orders for all periods of military duty since I began my job with the city almost 30 years ago. Applying the rules as you explained them in Law Review 16043, I have determined that periods of service totaling exactly four years count toward my five-year cumulative limit with the city. The other three years, ten months, and 28 days are exempt from the computation of the five-year limit, under three different subsections of section 4312(c) of USERRA.<sup>3</sup>**

**The city's pension plan administrator insists that under USERRA there is an absolute five-year limit on the cumulative period or periods of military service for which I can claim city pension credit. I believe, based on your Law Review 13138, that there is no such limit and that I am entitled to city pension credit for all my military service periods, even though the total is greater than five years. I have provided the pension plan administrator a copy of your Law Review 13138, but she refused to read it, calling it "propaganda."**

**The city has a defined benefit pension plan—a traditional pension. The top benefits go to employees who have 30 years of city service. I believe that I meet the 30-year threshold in January 2018, and I want to retire at the start of the new year. The pension plan administrator insists that I must wait until December 2020 to retire with 30 years of city service, because two years, ten months, and 28 days of my military service time must be excluded from my pension credit, because it is beyond the absolute five-year limit. Who is correct?**

**A:** You are correct. I reiterate what I wrote in Law Review 13138 (October 2013). You are entitled to credit for all your military service time since January 1988, although the cumulative total is greater than five years.

Section 4318 of USERRA governs pension credit for military service time. Here is the entire text of that section:

- (a)(1)(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) *or a right provided under any Federal or State law governing pension benefits for governmental employees*, the right to pension benefits of *a person reemployed under this chapter* [USERRA] shall be determined under this section.

---

<sup>3</sup> 38 U.S.C. 4312(c).

- (B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.
    - (2)(A) *A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.*
  - (B) *Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.*
- (b)(1) *An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated--*
  - (A) *by the plan in such manner as the sponsor maintaining the plan shall provide; or*
  - (B) *if the sponsor does not provide--*
    - (i) *to the last employer employing the person before the period served by the person in the uniformed services, or*
    - (ii) *if such last employer is no longer functional, to the plan.*
      - (2) *A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer*

throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

- (3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed--
  - (A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or
  - (B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).
- (c) Any employer who *reemploys a person under this chapter* and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.<sup>4</sup>

Under section 4318, you are entitled to city pension credit for each period of uniformed service for which you have been “reemployed under this chapter” (USERRA) during your city government career. You are reemployed under USERRA when you meet the five USERRA conditions and return to work for the pre-service employer. As I have explained in Law Review 15116 (December 2015) and many other articles, you are entitled to reemployment under USERRA when you meet five conditions:

- a. Must have left a civilian job (federal, state, local, or private sector) to perform uniformed service.
- b. Gave the employer prior oral or written notice.
- c. Have not exceeded the cumulative five-year notice on the duration of the period or periods of uniformed service, with respect to the employer relationship for which you seek reemployment. As I have explained in detail in Law Review 16043 (May 2016), there are nine exemptions to the five-year limit—kinds of service that do not count toward exhausting your limit.

---

<sup>4</sup> 38 U.S.C. 4318 (emphasis supplied).

- d. Were released from the period of service without having received a disqualifying bad discharge from the military.
- e. Made a timely application for reemployment after release from the period of service.

Based on the facts as you have explained them to me, it seems clear that you met the five conditions for each period of service during your city government career.

Contrary to what the pension administrator has told you, there is no cumulative five-year limit on the duration of the periods of service for which you can claim city pension credit. There is a five-year limit on the cumulative duration of the periods of uniformed service as a condition upon reemployment, but there are nine exemptions. You must demonstrate that the period beyond five years is exempt from the five-year limit, and I think that you have adequately demonstrated that. You still have one year of “head room” on your five-year limit.

**Q: The city pension administrator and the city attorney have repeatedly asserted that state law and city ordinances preclude me from claiming more than five years of city pension credit for military service periods. What do you say about that?**

**A:** State law and city ordinances are irrelevant on this question, because you have the right to pension credit under USERRA. As a federal statute, USERRA trumps conflicting state statutes and even state constitutions, and it certainly trumps city ordinances.

USERRA is a floor and not a ceiling on the rights of those who are away from their civilian jobs for uniformed service. State laws, city ordinances, and other matters can give the service member or veteran greater or additional rights but cannot take away USERRA rights. Section 4302 of USERRA 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.*<sup>5</sup>

The “Supremacy Clause” of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

---

<sup>5</sup> 38 U.S.C. 4302 (emphasis supplied).

United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>6</sup>

State and local government officials in your part of the country sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

---

<sup>6</sup> United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18<sup>th</sup> Century.