

LAW REVIEW 1010

Differential Pay for Federal Employees—Continued

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

2.0—Paid Leave for Government Employees Who Are Reserve Component Members

In January 2013, Congress corrected the exclusion of title 14 duty (performed by Coast Guard Reservists) from eligibility for differential pay under 5 U.S.C. 5538. Please see Law Review 13008 (January 2013).

Q: I read with great interest your Law Review 1003 (January 2010) concerning the new (March 2009) law that provides for a federal employee who has been called to active duty, as a Reserve Component member, for a contingency operation, to receive differential pay, if his or her military salary while on active duty is less than his or her federal civilian salary. I am a Lieutenant (junior grade) in the Coast Guard Reserve and a member of ROA, and I work for the U.S. Department of Interior. I have been called to active duty under title 14 of the United States Code (which applies to the Coast Guard), and I am currently serving in Haiti, as part of our nation's response to the earthquake. My federal civilian salary is substantially greater than my active duty O-2 pay. Am I entitled to differential pay under this new law?

A: No. The new law is section 5538 of title 5, United States Code (5 U.S.C. 5538). This new law provides for a federal employee to receive this differential pay if he or she has been called to active duty under sections 688, 12301(a), 12302, 12304, 12305, or 12406 of title 10, or under chapter 15, which includes sections 331, 332, and 333. A federal employee called to active duty under title 14 is not entitled to differential pay, under section 5538 as currently written.

I have heard that some Coast Guard Reservists are being called for the Haiti operation under 10 U.S.C. 12304, a section that is mentioned in 5 U.S.C. 5538. If you can get the Coast Guard to rewrite your orders and cite 10 U.S.C. 12304 you will be entitled to receive differential pay from the Department of Interior.

In Law Review 1003, I stated that a federal employee called to active duty and receiving this differential pay could continue to receive this differential pay during the period (up to 90 days) after the person has left active duty and before he or she applies for reemployment. On Dec. 16, 2009, President Obama signed the Consolidated Appropriations Act of 2010, Public Law 111-117. Section 745 of that Act amends 5 U.S.C. 5538. The amendment clarifies that the federal employee receiving differential pay is not entitled to continue receiving the differential pay after leaving active duty.

In Law Review 1003, I stated that military allowances (like the basic allowance for quarters) and military special pays (like hazardous duty pay) are not to be included in computing the differential pay that the federal employee is to receive. The Office of Personnel Management (OPM) has pointed out that my statement is not correct and that these allowances and special pays are to be included in computing differential pay. I regret the error.

OPM has not yet promulgated regulations under 5 U.S.C. 5538, but it did publish guidance on this new law on Dec. 8, 2009 and revised guidance on Jan. 8, 2010. Those documents and much other useful information are available at www.opm.gov/reservist.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.