

Sometimes You Get Federal Employee Retirement Credit for Military Service, and Sometimes such Credit Is Precluded

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

1.3.2.3—Pension credit for military service

I continue to receive questions about the eligibility of federal civilian employees to purchase federal civilian retirement credit for active military service that *predates* the start of their federal civilian careers.³ In some circumstances, the federal employee can claim credit for the period of military service, and in other circumstances such credit is precluded. To understand the difference, we will first quote the relevant subsection of title 5 of the United States Code and then we will discuss five hypothetical but realistic scenarios. Here is the pertinent subsection:

If an employee or Member is awarded retired pay based on any period of military service, the service of the employee or Member *may not include credit for such period of military service unless* the retired pay is awarded—
(A) based on a service-connected disability—

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,400 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

² Captain Wright is the author or co-author of more than 1,200 of the more than 1,400 "Law Review" articles available at www.servicemembers-lawcenter.org. He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA's Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an "of counsel" relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm's Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

³ A period of military service that *interrupts* one's federal civilian career is governed by the Uniformed Services Employment and Reemployment Rights Act (USERRA) and is outside the scope of this article.

- (i) incurred in combat with an enemy of the United States; *or*
 - (ii) caused by an *instrumentality of war* and incurred in the line of duty *during* a period of war as defined in section 301 of title 38; *or*
- (B) under chapter 1223 of title 10.⁴

To understand this subsection, let us discuss five retired Army officers, each of whom graduated from the United States Military Academy and were commissioned second lieutenants in May 1990.

Joe Smith—regular active duty for 20 years, not disabled

Joe Smith served on active duty continuously for 20 years and retired as a Major in May 2010. After he retired from the Army, he took a civilian job for the Department of the Navy (or any other federal agency). Smith does not claim a service-connected disability. He qualified for regular military retirement based on 20 years of active military service.

Section 8332(c)(2) precludes Smith from getting federal civilian retirement credit for his 20 years of active duty. He is retired, and not for a disability, and not under chapter 1223 of title 10 (Reserve Component retirement).

Mary Jones—retired for disability based on wound in combat

Mary Jones remained on active duty and in April 2003 she was participating in the invasion of Iraq when she was seriously wounded in action. As a result of her wounds, she was processed for a disability retirement, which went into effect in 2006. She began a federal civilian career in 2007. Mary is not precluded from obtaining federal civilian retirement credit for her years of active military service because she qualified for a service-connected disability retirement based on wounds “incurred in combat with an enemy of the United States.”⁵

Bob Williams—injured in the line of duty, during time of war, by an instrumentality of war.

In 2003, while Jones was in combat in Iraq, Bob Williams was undergoing training at the National Training Center in California. In a tragic accident, a soldier that Williams commanded ran over Williams while operating a tank in a training exercise. Williams suffered serious and permanently disabling injuries in the line of duty and was processed for a disability retirement from the Army. While the injuries were not suffered in combat, they were caused by an

⁴ 5 U.S.C. 8332(c)(2) (emphasis supplied).

⁵ 5 U.S.C. 8332(c)(2)(A)(i).

instrumentality of war (a tank) and were incurred during time of war. Williams is not precluded from receiving federal civilian retirement credit for his years of active duty.⁶

Alice Adams—injured in an automobile accident while on active duty

Also in 2003, Alice Adams was seriously injured in an automobile accident, while on active duty at Fort Bragg, North Carolina. The accident and the injuries were deemed to be in the line of duty because Adams was not in an unauthorized absence status at the time of the accident and the accident was not caused by any misconduct by Adams. Adams was processed for a disability retirement from the Army in 2006, and she began a federal civilian career in 2007. Although Adams has qualified for a military disability retirement, she is precluded from obtaining federal civilian retirement credit for her years of active duty. Her injuries were not caused by an instrumentality of war.

David Davis—qualified for Reserve retirement based on five years of active duty plus 20 years of Army Reserve service

David Davis served on active duty for five years, until he was released from active duty in May 1995. After he left active duty, he affiliated with the Army Reserve and he began a federal civilian career at the Department of the Interior. For the next 20 years, Davis participated in the Army Reserve. In May 2015, Davis retired from the Army Reserve as a Lieutenant Colonel.⁷ Davis is not disqualified from receiving federal civilian retirement credit for his five years of active duty “under chapter 1223 of title 10” (Reserve retirement).

⁶ 5 U.S.C. 8332(c)(2)(A)(ii).

⁷ Davis is a “gray area retiree.” He will start drawing his Reserve retired pay when he turns 60, in 2028.