

In Computing your Civilian Pension Benefit, the Employer Must Look to what you *Would Have Earned* in the Civilian Job but for your Military Service

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

1.3.2.3—Pension credit for military service time

1.8—Relationship between USERRA and other laws/policies

Q: I am a member of the Reserve Officers Association (ROA), and I recently retired from the Air Force Reserve as a Chief Master Sergeant (E-9). I also retired at the end of last year (2016) from a career as a firefighter for a major southern city. I believe that the city and its pension administrator are shortchanging me with respect to my monthly pension check as a firefighter. That is, I believe that the city has not fully complied with the Uniformed Services Employment and Reemployment Rights Act (USERRA), with respect to crediting me for my military service time for purposes of computing my civilian pension. I have read with great interest many of your “Law Review” articles about USERRA.

For firefighters and police officers, the city has a traditional pension plan—a defined benefit plan. A formula determines the monthly pension check of the retired firefighter or police

¹ I invite the reader’s attention to 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.

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. 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.

officer. The formula includes the number of years of city service that the individual can claim and his or her average salary for his or her high three years of city compensation.

Because firefighters and police officers receive annual cost of living pay adjustments as well as pay raises tied to an additional year of city seniority, the individual's high three years of city compensation will be the last three years before retirement about 99% of the time. Only in the unusual circumstance, like a firefighter or police officer who is demoted near the end of his or her city career, will the compensation in one of the final three years be lower than the compensation that he or she received in an earlier year.

My final three years of city employment were 2014, 2015, and 2016, because I retired from the fire department on December 31, 2016. My city compensation for those three years, if I had worked the entirety of each year, would have been \$80,000 in 2014, \$82,000 in 2015, and \$84,000 in 2016. But I did not work all over 2014 and 2015 for the city. In both of those years, I was away from my fire department job for military duty for a substantial time, for drill weekends, annual training, short periods of Active Duty for Special Work (ADSW), and a seven-month involuntary call to active duty in 2014. In 2014, I earned only \$55,000 from the city, and in 2015 I earned only \$70,000.

I have read, in many of your "Law Review" articles, that the person who leaves a job for voluntary or involuntary military service and who meets the five USERRA conditions and who returns to work for the pre-service employer after release from the period of service is entitled to be treated for seniority *and pension purposes as if he or she had been continuously employed in the civilian job.*

If I had been present for work for the city for all of 2014, I would have earned \$80,000, not \$55,000. If I had been present for work for all of 2015, I would have earned \$82,000, not \$70,000. I have argued that, in computing my "high three" years of city compensation, the city must use the figure of \$80,000 for 2014 and \$82,000 for 2015. Do you agree with this line of reasoning?

A: Yes, I agree with that argument.³ Section 4318 of USERRA⁴ governs your rights regarding your civilian pension for periods of service that have interrupted your civilian career. Section

³ This assumes, of course, that you can show that you met the five USERRA conditions for each period of uniformed service in 2014 and 2015. You must show that each time you left your city job to perform service and that you gave the city prior oral or written notice. You must show that you did not exceed the cumulative five-year limit on the duration of the period or periods of service relating to your employer relationship with the city. Please see Law Review 16043 (May 2016) regarding the computation of the five-year limit. You must show that at the end of each period of service you were released from service without receiving a disqualifying bad discharge from the Air Force and that each time you were timely in reporting back to work or applying for reemployment. Please see Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.

⁴ 38 U.S.C. 4318.

4318 includes the following most important sentence: “For purposes of computing an employer’s liability under paragraph (1) or the employee’s contributions under paragraph (2), the employee’s [civilian] 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).”⁵

Thus, it is clear beyond question that for purposes of determining the amount of your city pension your imputed pay for 2014 should be \$80,000 (not \$55,000) and your imputed pay for 2015 should be \$82,000 (not \$70,000). Making this correction will result in a substantial bump up in your monthly pension check for the rest of your life.

Your rights under USERRA apply to short periods of military training or service, like drill weekends and traditional two-week annual training tours, as well as longer periods of service.⁶

Q: The city pension administrator and the city attorney have repeatedly asserted that state law and city ordinances require that the city look to my actual city earnings in 2014 and 2015, not imputed earnings based on what I would have earned but for my military service, in computing my “high three” years of city compensation for pension computation purposes. 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*

⁵ 38 U.S.C. 4318(b)(3) (emphasis supplied).

⁶ Please see Law Review 17071 (July 2017).

establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.⁷

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 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.⁸

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.

⁷ 38 U.S.C. 4302 (emphasis supplied).

⁸ United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18th Century.