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Returning to a Federal Civilian Job while on Terminal Leave

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Q: I am a Major in the Army Reserve and a member of the Reserve Organization of America.³ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1700 “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 Spouse 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 very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1500 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. For 42 years, I have worked 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 (VRRRA—the 1940 version of the federal reemployment statute) for 36 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.

³ At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new “doing business as” (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most

I started a federal civilian job in January 2015—the first time I ever worked for the Federal Government as a civilian. I left the job to go on active duty on 4/1/2017, after giving both oral and written notice to my direct supervisor and the personnel office of the agency. My orders are for two years, through 3/31/2019. The orders will not be extended, and I will be leaving active duty shortly. I want to return to my civilian job as soon as possible.

During my recent two years of active duty, I have earned 60 days of leave from the Army, and I have only used a handful of those days. I plan to go on terminal leave on or about 2/28/2019. During the entire month of March, I will be on leave from the Army but still on active duty. When my leave expires on 3/31/2019, I will leave active duty instead of returning to my duty assignment.

I contacted my civilian supervisor and told her that I want to return to work on 3/1/2019, and I asked her if that works for her and for the organization. She said that would be great because my job has remained unfilled and there is a backlog of work that needs to be done. She forwarded my return-to-work request to the agency's personnel office, but the director of that office said that I cannot return to the federal civilian payroll until 4/1/2019 because federal law makes it unlawful for me to receive a military paycheck and a civilian paycheck for the same period. What do you think?

A: The personnel director is wrong. Congress has enacted a specific authorization for a service member on terminal leave, at the end of a period of active duty, to return to a federal civilian job or start a new federal civilian job and to receive both a military salary and a civilian salary while on terminal leave. Here is the pertinent section:

A member of a uniformed service who has performed active service and who is on terminal leave pending separation from, or release from active duty in, that service under honorable conditions may accept a civilian office or position in the Government of the United States, its territories or possessions, or the government of the District of Columbia, and he is entitled to receive the pay of that office or position in addition to pay and allowances from the uniformed service for the unexpired portion of the terminal

senior officers. Our nation has seven Reserve Components. In ascending order of size, they are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

leave. Such a member also is entitled to accrue annual leave with pay in the manner specified in section 6303(a) of this title for a retired member of a uniformed service.⁴

Q: Do I have the right to insist on returning to work while on terminal leave?

A: No. When you are on terminal leave you do not yet meet the fourth and fifth of the five USERRA conditions for reemployment. As I have explained in Law Review 15116 (December 2015) and many other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services, as defined by USERRA. USERRA's definition of uniformed service includes active duty, active duty for training, initial active duty training, inactive duty training, funeral honors duty, etc.⁵
- b. You must have given the employer prior oral or written *notice*.⁶ You do not need the employer's permission, and the employer does not get a veto on your right to absent yourself from your job for uniformed service.⁷
- c. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service that you have performed with respect to the employer relationship for which you seek reemployment.⁸
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.⁹
- e. After release from the period of service, you must be timely in reporting back to work or applying for reemployment.¹⁰

⁴ 5 U.S.C. 5534a. This provision was enacted more than half a century ago. It was added to title 5 of the United States Code by Public Law 90-83, 81 Stat. 199 (Sept. 11, 1967). The final sentence of this section was added by Public Law 109-364, 120 Stat. 2407 (Oct. 17, 2006).

⁵ 38 U.S.C. 4303(13).

⁶ 38 U.S.C. 4312(a).

⁷ 20 C.F.R. 1002.87. See also Law Review 15030 (March 2015).

⁸ 38 U.S.C. 4312(c). Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your five-year limit.

⁹ 38 U.S.C. 4304. Disqualifying bad discharges include punitive discharges (awarded by court martial for serious criminal misconduct) and other-than-honorable administrative discharges. Ordinarily, you will not be discharged at the end of a period of military duty or training. You will simply leave active duty and revert to the status of a traditional reservist.

¹⁰ After a period of training or service lasting fewer than 31 continuous days, you must report back to work at the start of the first regularly scheduled work period on the first calendar day after release from the period of service, the time reasonably required for safe transportation from the place of service to your residence, and the expiration of eight hours (for rest) after you arrive at your residence. 38 U.S.C. 4312(e)(1)(A). After a period of service lasting 31 to 180 days, you have 14 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(C). After a period of service lasting 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D).

When you are on terminal leave, you do not yet meet condition d and condition e. You have not yet been *released* from the period of service without a disqualifying bad discharge, and you have not yet applied for reemployment after release from the period of service.¹¹

While it is not correct to say that you have the right to insist on returning to work on terminal leave, it is correct to say that there is *no legal impediment* to your returning to work on terminal leave and drawing the dual salaries for the terminal leave period. If your supervisor is correct that your job has been left unfilled and that there is a backlog of work to be accomplished, it is likely that the federal agency will want you to return to work as soon as possible.

Q: If I return to work while on terminal leave, do I receive federal civilian pension credit and military retirement credit for that period when I am on active duty (on terminal leave) and back at work at my civilian job?

A: Yes.¹²

¹¹ When a person applies for reemployment while still on active duty, the application is deemed to go into effect on the day after he or she is released from active duty. *See Martin v. Roosevelt Hospital*, 426 F.2d 155, 159 (2nd Cir. 1970).

¹² *See Miller v. Office of Personnel Management*, 903 F.3d 1274, 1277-78 (Fed. Cir. 2018).