Military Reservists Denied Differential Pay

Summary

Many military reservists who are called to duty during wartime leave the comfort and security of family and friends back home but don't get to leave the burdens of ongoing household, family, and living expenses at the same time. To avoid bankruptcy and building a mountain of debt, they need to maintain their same level of income since their military pay is often much less than their civilian. Therefore, their full-time employers often provide payments to bridge that gap, differential pay. Congress passed a law, signed by POTUS in 2008, to address this very issue concerning reservists who are federal civilian employees. Somehow, the Office of Personnel Management (OPM) erroneously determined that that law's differential pay provision should be denied federal employees if they volunteered for wartime active duty.

The Trump Administration should pay reservists, and their estates if they did not come home, past differential payments wrongly denied by OPM simply because they volunteered to go and fight our in our Nation's Wars. The Administration needs to immediately correct this error in implementing the Reservist Differential Pay law.

A class action lawsuit has been filed but this litigation should not be necessary since the Administration can and should take action now to settle the case and direct OPM to end this unjust policy.

Background

After September 11, 2001, as in prior wars, when many reservists were activated a very large segment of private sector employers (including many foreign employers of U.S. military reservists) stepped up to provide benefits to their employees to ensure that they would maintain the same level of pay during their deployment as before they were called to duty. It is known as a differential pay benefit.

In 2009, Congress belatedly passed a similar differential pay benefit for federal civilian employees with the intent to provide, at least, a comparable benefit to reservist who leave civilian jobs, their families, and the safety and comfort of their communities to go off to fight our nation's wars.[1] Such federal employees are not paid exorbitant salaries during their regular jobs and usually need their full salary level to pay family living expenses, particularly in the larger urban areas.

When the law was implemented and guidance promulgated by the U.S. Office of Personnel Management (OPM), they arbitrarily ruled that any federal civilian employees who volunteered for wartime mobilization would be altogether excluded from consideration for this employment

[1] This authority is codified in 5 U.S.C. 5538, which was added by section 751 of the Omnibus Appropriations Act, 2009 (Public Law 111-8, March 11, 2009) and was amended by section 745 of the Consolidated Appropriations Act, 2010 (Public Law 111-117, December 16, 2009).

benefit. One could speculate there might have been bureaucratic grousing about not wanting to incentivize reservists to volunteer and, thus, be absent from their bureaucracy's employment pool. The only problem is this kind of thinking is not only contrary to the Differential Pay law but a blatant violation of the Uniform Services Employment and Reemployment Rights Act's (USERRA) anti-discrimination provisions.

Regardless of the real motivation, the decision by OPM is markedly contrary to the congressional intent in passing the law, as well as, the unmistakable plain meaning and language of the differential pay statute itself.

Our service members, especially those who volunteer to go to war and whom otherwise could have avoided wartime duty had they not volunteered, are due this pay differential and strong arguments exist to pay it from both a practical policy standpoint, as well as, a strict legal standpoint.

"Voluntary" deployments

There were many cases of patriotic Americans volunteering to join the armed forces following September 11th to serve our country after it was attacked. One of the most well known is that of a professional football player, Pat Tillman.

During that time many reservists were called to active duty. In each case they receive orders to report. Some orders were involuntary (compulsory) and involved the activation of large units of which they are a members; while others were voluntary in which case the military personnel sign waivers agreeing to be individually mobilized in order to fill tens of thousands of critical wartime shortfalls. In fact, the armed forces could not have effectively executed its modern contingency missions without the tens of thousands of reservists who waived all protections against individually-targeted mobilization to volunteer under 10 U.S.C. 12301(d) to fill critical combat/wartime shortfalls among deploying forces.

To be clear, there are, today, over five thousand such individual "volunteers" of a total 37,123 reservists currently on active duty for contingency operations (wars). These numbers are separate and apart from the other thousands of reservists that may be on active duty in various theaters around the world but are not specifically engaged in the various warfighting operations.

OPM somehow determined that pay differentials are not owed to service members who volunteered to fill critical troop shortfalls in units deploying for contingency (wartime) missions. OPM seems to have taken the view that those who deployed "voluntarily" chose to accept the position when they could have easily decided to just stay at home in their current federal civilian job. That simplistic view is very off-base in its thinking.

The members of our military have a solemn view of their obligations to our country. Beyond their duty to their country, which they take very seriously, they think about their duty to their fellow servicemembers. They understand that even if they may not receive involuntary orders as part of their assigned units to serve in the fight, their services are truly needed and their failure to fill those tens of thousands of advertised critical deployment shortfalls means those units won't be fighting with their full staffing complement for wartime missions in their particular military

skillset. They also understand the real-world implications of declining to "volunteer" when their skills are desperately needed. While the word "voluntary" may have a casual meaning to a bureaucrat in OPM, it is nothing like casual to our service members who put themselves in danger to defend our freedoms -- some of whom paid the ultimate sacrifice and didn't return home to their families.

Language of the law

The law couldn't be more clear. The operative language states that all military reservists who are federal civilian employees are entitled to a reservist differential if their civilian pay is greater than their military pay and they are serving on military orders when involuntarily mobilized **or** when voluntarily mobilized "***during a war or during a national emergency declared by the President or Congress***."[2]

On September 14, 2001, President Bush made the first emergency declaration based on the 9/11 terrorist attacks that has remained in force and seen annual reissuance in unbroken succession by Presidents of both parties up to today. In fact, the particular name of each contingency operation (Wars such as Operation Iraqi Freedom, Operation Enduring Freedom, etc.) is expressly designated on written orders issued to all reservists whether volunteering or not. It is relatively easy for DoD and OPM to query a few databases to figure out which "volunteering" reservists have been wrongly denied this reservist differential.

Congressional intent

"*I would like to discuss the financial burden faced by many of the men and women who serve in the military Reserves or National Guard and who are forced to take unpaid leave from their jobs when called to active duty. It is unfair to ask the men and women who have volunteered to serve their country . . . to also face a financial strain on their families*." 149 Cong. Rec. 5764 (2003) (statement of Sen. Durbin).

United States Court of Appeals Recent Decision Repudiating OPM's Erroneous Interpretation

A recent United States Court of Appeals Case (NOV 2018) completely repudiates the OPM false voluntary vs. involuntary rationale to deny those volunteers their Reservist Differential yet they refuse to rescind their erroneous interpretation.

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[2] OPM skirts any reference to the operative language in question in their guidance excluding the volunteers. "This new section covers certain Federal civilian employees who are (1) absent from employment with the Federal Government because they are ordered to perform active duty in the uniformed services under 10 U.S.C. 101(a)(13)(B)…" [*OPM Memo To Heads of Departments and Agencies,* "Subject: Nonreduction in Pay for Certain Federal Civilian Employees on Active Duty in the Uniformed Services or National Guard," April 3, 2009 (CPM 2009-07).] 10 U.S.C. 101(a)(13)(B) states: "(13) The term "contingency operation" means a military operation that— (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 13 of this title, section 712 [1] of title 14, ***or any other provision of law during a war or during a national emergency declared by the President or Congress***." Emphasis added.

"*Section 101(a)(13), in turn, defines what constitutes a "contingency operation" for purposes of § 6323(b). A contingency operation must be a "military operation,"*[4] *10 U.S.C. § 101(a)(13), and the military operations that qualify as contingency operations include, as relevant here, those that "result[] in the call or order to, or retention on, active duty of members of the uniformed services under [certain listed statutory provisions], or any other provision of law ... during a national emergency declared by the President," id. § 101(a)(13)(B) (emphases added). Section 101(a)(13)(B) thus requires that service members be called to, or retained on, active duty pursuant to a "provision of law... during a national emergency."* ***While § 101(a)(13)(B) lists specific statutory provisions under which a service member may be ordered to active duty, the subsection's use of the word "any" indicates that this list of statutory provisions is non-exhaustive and that "other provision[s] of law" should be interpreted broadly. See Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) ("Read naturally, the word `any' has an expansive meaning, that is, `one or some indiscriminately of whatever kind.'" (citation omitted)). Therefore, § 101(a)(13)(B) instructs that a service member may be called to active duty "in support of a contingency operation" pursuant to § 6323(b), even if the service member were ordered to active duty pursuant to a provision of law that is not explicitly listed in § 101(a)(13)(B)."*** *See* O'Farrell v. Department of Defense, 882 F.3d 1080 (2018), United States Court of Appeals, Federal Circuit.

Administrative adjudications

Merit System Protection Board (MSPB) Adjudication in Favor of Paying Volunteering Reservists and Pointing Out That OPM Held Exact Opposite Position That Same Year When Interpreting the Same Provision of Federal Law Concerning FMLA Benefits:

"OPM's interpretation of § 5538 also cannot be squared with its interpretation of identical language in the Family and Medical Leave Act (FMLA). The same year that it enacted § 5538, Congress added a provision to FMLA allowing federal employees to take leave in certain circumstances related to a relative's "covered active duty" in the military. 5 U.S.C. § 6382(a)(1)(E). The statute defines "covered active duty" for a reservist as a foreign deployment ordered "under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code. Id.§ 6381(7)(B). OPM's regulations implementing this section make it clear that it covers both the laws listed by number in § 101(a)(13)(B) and any other provision of law during a declared war or national emergency. 5 C.F.R. § 630.1202. I do not see how the same statutory language in § 5538 reasonably could be interpreted any other way." Ruling in MSPB, Joshua Marquiz vs. Department of Defense, MSPB, SF-4324-15-0099-I-1, March 12, 2015.

"*Thus, the only issue in dispute is whether the appellant's service is covered under section 101(a)(13)(B). I would find that it is. Although section 12301(d) is not one of the laws enumerated in section 101(a)(13)(B), it clearly falls within the confines of "any other provision of law," and, as noted by the administrative judge, the appellant was called for active duty "during a national emergency declared by the President." Consequently, the administrative judge correctly found that the agency's orders fell within the catchall provision of section 101(a)(13)(B). The appellant, therefore, was ordered under 5 U.S.C. § 5538 to active duty "under a provision of law referred to in section 101(a)(13)(B)." As such, he was entitled to differential pay during his absence from the agency, and is accordingly entitled to corrective action. It is immaterial for purposes of 5 U.S.C. § 5538(a)-(b) that the statute at issue here is not among those enumerated in President George W. Bush's September 14, 2001 emergency declaration. It is true that the National Emergency Act states in part that "[w]hen the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act." 50 U.S.C. § 1631. The question before us, however, is not whether the President exercised or invoked powers under 5 U.S.C. § 5538—it is whether the appellant was absent in order to perform active duty in the uniformed services pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10. Here, it is undisputed that the appellant was ordered to active duty under such a provision of law, and, unlike the National Emergency Act, there is no requirement in 5 U.S.C. § 5538 that the provision of law be invoked or "exercised" by the President. Thus, I would find that the appellant is entitled to corrective action for*

the agency's failure to provide him with differential pay." On Appeal before the full Board, Joshua Marquiz vs. Department of Defense, MSPB, SF-4324-15-0099-I-1, July 12 2016.

Excerpt fully explaining and knocking down each of OPM's excuses for not providing this benefit to volunteering reservists under 10 U.S.C. 12301(d), Decision in MSPB (Joshua Marquiz vs. DoD, MSPB, SF-4324-15-0099-I-1, March 12, 2015):

"*The appellant was ordered to active duty under a statute (§ 12301(d)) that allows reservists to volunteer for military duty and that is not one of laws mentioned by number in § 101(a)(13)(B).In a nutshell, the question here is whether an employee who volunteers for military service during a national emergency is entitled to the same differential pay afforded to those who are called up involuntarily.* *This is a question of first impression for the Board. Two of the Board's sister agencies have reached conflicting answers to this question: the Office of Compliance, which adjudicates USERRA disputes involving legislative-branch employees, concluded that service under § 12301(d) during a national emergency qualifies for differential pay, whereas the Office of Personnel Management (OPM), both in policy guidance and in adjudicating a compensation dispute, concluded that it does not. IAF, Tab 14, exhibit 3, at 18; exhibit 8; Tab 15, at 24-29. Neither the Office of Compliance decision nor OPM's compensation decision binds the Board, but I have considered both for their persuasive value. Although the statutory cross-references may make this case seem complicated, as a matter of textual construction it is straightforward.* ***The appellant was ordered to active duty under § 12301(d) during a declared national emergency. Section 12301(d) is not one of the laws listed by number in § 101(a)(13)(B), but it does constitute "any other provision of law . . . during a national emergency declared by the President." The appellant therefore was ordered to active duty "under a provision of law referred to in" § 101(a)(13)(B). 5 U.S.C. § 5538. So long as he met the other requirements in § 5538 (which were not in dispute here), I find that he was entitled to differential pay during this absence."***

The agency offered several arguments against this interpretation—arguments about the text of § 5538, the text of § 101(a)(13)(B), and the deference owed to OPM's interpretation—but I do not find any of them persuasive...With respect to the text of § 5538, OPM asserted that the phrase "referred to in section 101(a)(13)(B)" means only the laws specifically mentioned by number in that section, not the catch-all provision. IAF, Tab 16, exhibit 8, at 4. Had Congress intended to sweep in the section's catch-all, OPM argued, it would have said "in" rather than "referred to in." Id. at 4-5. ***I fail to see any logic in this argument****. OPM's suggestion for how the statute could have been written—"a provision of law in section 101(a)(13)(B)"—would not cover the catch-all provision any more unambiguously than the current statutory language.* ***And it is perfectly acceptable English usage to say that §101(a)(13)(B) "refers" to the laws covered by the catch-all provision even though it does not specifically list all of those laws by number****. Had Congress intended otherwise, it could have made that clear much more naturally by providing, for example, that differential pay applied only to service under "a provision of law specifically listed by number in" § 101(a)(13)(B) or "a provision of law referred to in section 101(a)(13)(B) other than that subsection's final clause."* ***OPM's interpretation of § 5538 also cannot be squared with its interpretation of identical language in the Family and Medical Leave Act (FMLA). The same year that it enacted § 5538, Congress added a provision to FMLA allowing federal employees to take leave in certain circumstances related to a relative's "covered active duty" in the military. 5 U.S.C. § 6382(a)(1)(E). The statute defines "covered active duty" for a reservist as a foreign deployment ordered "under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code." Id.§ 6381(7)(B). OPM's regulations implementing this section make it clear that it covers both the laws listed by number in § 101(a)(13)(B) and any other provision of law during a declared war or national emergency. 5 C.F.R. § 630.1202. I do not see how the same statutory language in § 5538 reasonably could be interpreted any other way.*** *With respect to the text of § 101(a)(13)(B), OPM argued that the catch-all should not be read to cover voluntary service under § 12301(d) because that would make other parts of the statute superfluous. IAF, Tab 14, exhibit 8, at 5-7. For example, OPM noted that Congress twice added laws to the list in § 101(a)(13)(B), and it argued that these amendments would have been superfluous if those statutes were already covered by the catch-all provision. Id.IAF, Tab 14, exhibit 8, at 5. Similarly, OPM asserted that if Congress wanted service under § 12301(d) to be covered, it would have included that statute in the list of enumerated laws, and so its failure to do so must reflect Congress's intention not to cover that service. Id. at 5-7.* ***These arguments all miss the mark for the same reason: the catch-all applies only during a declared war or national emergency.*** *When Congress added new laws to the list, it was making sure that they would be covered even when the nation was not at war or in an emergency. Similarly, Congress's failure to list § 12301(d) reflects only that it did not want that service*

covered in peacetime, not that it wanted to exclude that service during a war or national emergency. ***Indeed, it is the agency and OPM's interpretation—not the appellant's—that threatens to make part of the statute superfluous by essentially reading the catch-all out of the statute.*** *OPM suggested that the catch-all would apply only if the President specifically mentioned § 12301(d) in his declaration of a national emergency. Id.at 6 n.5. But this interpretation finds no support in the text of the catch-all, which covers any other law during a national emergency, not any other law enumerated in a declaration of national emergency*."

Conclusion

Trump Admin. Should Reverse OPM's Decision to Deny Differential Pay to Reservists Volunteering to Serve on Our Nation's War Missions

A class action lawsuit has been filed and the plaintiff is prepared to continue with the litigation. Such a class action is appropriate since most individuals who would be class members would find the cost of litigating their individual cases expensive, time-consuming and prohibitive. However, this litigation should not be necessary since the Administration can and should take action now to order OPM to end this unjust policy, DoJ to settle this matter for past Differential owed, and start paying all current volunteers the Differential they have earned and are owed.