APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID BRYON BABCOCK,

Plaintiff-Appellant,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

No. 19-1687

Appeal from the United States District Court for the
Western District of Michigan at Grand Rapids.
No. 1:18-cv-00255–Gordon J. Quist, District Judge.

Argued: March 10, 2020

Decided and Filed: May 11, 2020

Before: COLE, Chief Judge; BOGGS and SUTTON,
Circuit Judges.

OPINION

COLE, Chief Judge. This case asks us to decide whether a federal civil-service pension based on work as a National Guard dual-status technician qualifies as "a payment based wholly on service as a member of a uniformed service" under the Social Security Act. We agree with the district court that it does not.

I.

Plaintiff-Appellant David Babcock joined the Michigan National Guard in 1970 as an enlisted soldier. After serving for three-and-a-half years, Babcock went to flight school, received his pilot license and, in 1975, became employed as a National Guard dual-status technician. He worked in that position for over 33 years.

By statute, a National Guard dual-status technician "is a Federal civilian employee" who "is assigned to a civilian position as a technician" while maintaining membership in the National Guard. 10 U.S.C. § 10216(a)(1); *see also* 32 U.S.C. § 709(e) (providing that National Guard dual-status technicians are employees of both the United States and either the Department of the Army or the Department of the Air Force). These technicians are responsible for "the organizing, administering, instructing, or training of the National Guard" or "the maintenance and repair of supplies issued to the National Guard or the armed forces." 32 U.S.C. § 709(a)(1)—(2); *accord* 10 U.S.C. § 10216(a)(1)(C). Babcock, for his part, served in various roles as a test pilot and pilot instructor for the Michigan National Guard. Additionally, as is required of all dual-status technicians, Babcock held the appropriate military grade for his position, wore a uniform that displayed his rank and unit insignia while working, and

attended weekend drills. *See* 32 U.S.C. § 709(b); *see also id.* § 502(a) (requiring National Guard members to complete certain drills and training). Dual-status technicians may also be required to support operations or missions undertaken by their units. *See* 32 U.S.C. § 709(a)(3)(A). Indeed, for a period between 2004 and 2005, Babcock was deployed to Iraq on active duty.

Babcock received military pay for his active-duty service in Iraq and his inactive-duty training, including weekend drills. *See generally* 37 U.S.C. §§ 204(a), 206 (military pay provisions). But otherwise, he received civil pay and participated in the Civil Service Retirement System ("CSRS"). *See generally* 5 U.S.C. §§ 5301 *et seq.* (describing the federal civil pay system); *id.* § 8332(b)(6) (providing that employment as a dual-status technician is eligible for the CSRS). In accordance with the Social Security Act, Babcock paid Social Security taxes on the wages for his active-duty service in Iraq and for his inactive-duty training from 1988 onwards. *See* 42 U.S.C. § 410(1)(1). He did not pay Social Security taxes on his wages for inactive-duty training before 1988 or on his civil-service wages. *See id.*; *see also id.* § 410(a)(5).

Babcock retired from his position as a dual-status technician on January 31, 2009. At the time, he was classified as a grade 13, step 10, Aircraft Flight Instructor. Upon his retirement, he began receiving monthly CSRS payments from the Office of Personnel Management ("OPM"). He also began receiving separate military retirement pay from the Defense Finance and Accounting Service ("DFAS"). For several years after his retirement from his role

as a dual-status technician, Babcock flew medical-evacuation helicopters for hospitals. His income from this private-sector employment was subject to Social Security taxes. Babcock fully retired in 2014.

On September 30, 2014, Babcock applied for Social Security retirement benefits. On his application, he confirmed that he was receiving monthly CSRS payments. The Social Security Administration ("SSA") granted Babcock's application but reduced his benefits under the Windfall Elimination Provision of the Social Security Act ("WEP") because of his CSRS pension. *See* 42 U.S.C. § 415(a)(7)(A). Babcock asked the SSA to reconsider its decision, citing an exception to the WEP for payments "based wholly on service as a member of a uniformed service." *See id.* § 415(a)(7)(A)(III). Babcock argued that this uniformed-services exception applied to his CSRS pension based on his work as a dual-status technician.

At the time, the only federal court of appeals to have addressed the applicability of the uniformed-services exception to a dual-status technician's CSRS pension was the Eighth Circuit. According to the Eighth Circuit, the text of the exception imposes only the "limited" requirement that "service be as a member of the uniformed service." *Petersen v. Astrue*, 633 F.3d 633, 637 (8th Cir. 2011). The Eighth Circuit held that service as a dual-status technician meets this requirement, and therefore, the uniformed-services exception unambiguously applies to a pension based on service as a dual-status technician. *Id.* at 637-38.

In response to the *Petersen* decision, the SSA issued Acquiescence Ruling ("AR") 12-1(8) to explain how it

would apply the WEP and the uniformed-services exception for claimants residing within the Eighth Circuit. *See* 77 Fed. Reg. 51,842 (Aug. 27, 2012). Under AR 12-1(8), the WEP does not apply when a claimant receives a federal pension based wholly on employment as a dual-status technician for the National Guard; the claimant resides in a state within the Eighth Circuit; and the agency makes a benefits determination after February 3, 2011, the date of the *Petersen* decision. *See id.* at 51,842-43. For claimants residing outside of the Eighth Circuit, however, the WEP would continue to apply if the claimant receives a federal pension based on employment as a dual-status technician. *See id.* Accordingly, because Babcock was not a resident of the Eighth Circuit, the SSA refused to alter its initial determination that the WEP applied to Babcock's Social Security retirement benefits. An administrative law judge ("ALJ") upheld the SSA's determination, and the Appeals Council affirmed the ALJ's decision.

Babcock then sought judicial review by filing suit against the Commissioner of Social Security in the United States District Court for the Western District of Michigan. While his case was pending before the district court, the Eleventh Circuit decided *Martin v. Social Security Administration, Commissioner*, in which it rejected the Eighth Circuit's analysis and held that the uniformed-services exception does not apply to dual-status technicians. 903 F.3d 1154, 1168 (11th Cir. 2018) (per curiam). Focusing on the words "wholly" and "as" in the text of the statute, the Eleventh Circuit concluded that "even if dual status technician employment is *essentially* military, it is

not subject to the uniformed services exception if it is not *wholly* military in nature." *Id.* at 1166 (emphasis in original). Finding it "difficult to conclude that a dual status technician wholly performs that role as a member of the National Guard," the Eleventh Circuit decided that the Commissioner had the more persuasive reading of the statute. *See id.* at 1166, 1168.

Faced with both the *Petersen* and *Martin* decisions, the district court concluded that the Eleventh Circuit's analysis in *Martin* was "more persuasive than the *Petersen* court's analysis" and was "based on the correct application of the language of the exception," and thus, the uniformed-services exception was inapplicable (and the WEP applied) in Babcock's case. *Babcock v. Comm'r of Soc. Sec.*, 2019 WL 2205712, at *2 (W.D. Mich. May 22, 2019). The district court also rejected Babcock's claim that his rights to due process and equal protection were violated because the WEP applied differently to claimants within the Eighth Circuit. *Id.* at *3. The district court accordingly entered judgment in favor of the Commissioner, and this timely appeal followed.

II.

We review the district court's decision de novo. *Valley v. Comm'r of Soc. Sec.*, 427 F.3d 388, 390 (6th Cir. 2005). Because our review involves interpreting a statute that the Commissioner has authority to administer, 42 U.S.C. § 405(a), we start by asking "whether Congress has directly spoken to the precise question at issue." *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If we can ascertain "the unambiguously expressed

intent of Congress," the inquiry ends, and we must give effect to Congress's unambiguous construction of the statute. *Id.* at 842-43; *accord Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018). Only if the statute is silent or ambiguous on the particular issue do we turn to the question of whether to defer to the Commissioner's interpretation of the statute. *See Chevron,* 467 U.S. at 843; *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629-30 (2018).

In deciding whether Congress has spoken directly to the issue at hand, we do not confine ourselves "to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Rather, we must read the words of the statutory provision "in their context and with a view to their place in the overall statutory scheme." *Id.* at 133 (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)); *see also United States v. Parrett*, 530 F.3d 422, 429 (6th Cir. 2008) ("Plain meaning is examined by looking at the language and design of the statute as a whole." (quoting *United States v. Wagner*, 382 F.3d 598, 607 (6th Cir. 2004))). Additionally, we are cognizant that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Brown & Williamson*, 529 U.S. at 133. Employing the available tools of statutory interpretation, we conclude that the uniformed-services exception does not apply to a civil-service pension based on employment as a dual-status technician.

A.

The Social Security Act provides individuals with a retirement benefit based on a percentage of their pre-retirement income from "covered" employment—i.e., income that was subject to Social Security taxes. *See generally* 42 U.S.C. § 415 (describing the calculation of benefits). Under the Act's progressive scheme, retirement benefits are not calculated as a flat percentage of pre-retirement income but rather adjusted so that individuals with lower average earnings over their working lives receive a greater percentage of their average earnings than those with higher average earnings. *See id.* § 415(a)(1)(A). In other words, lower-income workers receive a greater return on their Social Security contributions than higher-income workers. *See id.*

Not all employment is covered under the Act. *See id.* § 410(a). For example, the Act does not cover federal civilian employment for those hired before 1984 and participating in the CSRS. *Id.* § 410(a)(5). The Act also does not cover certain types of employment in the military over certain periods. Specifically, while "active duty" service after 1956 is covered, as is "inactive duty training" (e.g., weekend drills) after 1987, inactive duty training between 1957 and 1987 is not covered. *See id.* § 410(1)(1).

Income from "noncovered" employment is exempt from Social Security taxes and not included in calculating the amount of an individual's Social Security benefits. *See id.* § 415(b). Many noncovered positions nonetheless have a separate annuity or pension plan for workers. *See, e.g.*, 5 U.S.C. §§ 8331 *et seq*. (providing for the CSRS). Accordingly, individuals who have been in both covered and

noncovered employment may end up receiving both Social Security retirement benefits and a separate annuity or pension. And because only income from covered employment is used to calculate Social Security benefits, those individuals with both covered and noncovered employment also receive a higher return on their Social Security contributions than those with only covered employment. *See* 42 U.S.C. §§ 415(a)(1)(A), 415(b). In other words, individuals with both covered and noncovered employment tend to have their Social Security benefits calculated as if they were long-term low-wage earners, and thus benefit from the Act's progressive formula.

To address this windfall effect, Congress amended the Social Security Act in 1983 to add a Windfall Elimination Provision, or WEP. Pub. L. No. 98-21, § 113(a), 97 Stat. 65 (1983); *see also* H.R. Rep. No. 98-25, pt. 1, at 21-22 (1983), *reprinted in* 1983 U.S.C.C.A.N. 219, 239-40. The WEP modifies the standard benefits formula for a recipient who is also entitled to "a monthly periodic payment" that "is based in whole or in part upon his or her earnings" for noncovered employment. 42 U.S.C. § 415(a)(7)(A); *see also id.* § 415(a)(7)(B) (detailing the modified formula). In short, the WEP is targeted at those individuals who gain an unintended advantage by receiving a separate pension or annuity based on noncovered work while simultaneously having relatively low earnings from covered work.

B.

That brings us to the uniformed-services exception at issue here, which Congress added in 1994. Pub. L. No. 103-296, § 308(b), 108 Stat. 1464 (1994). Under

this exception, "a payment based wholly on service as a member of a uniformed service" does not trigger application of the WEP. 42 U.S.C. § 415(a)(7)(A)(III). The statute defines a "member of a uniformed service" as "any person appointed, enlisted, or inducted in a component of the Army, Navy, Air Force, Marine Corps, or Coast Guard," including a "reserve component" such as the National Guard. *Id.* § 410(m); *see also* 38 U.S.C. § 101(27). We understand "service" here to refer to work.

Aside from the terms whose meaning arises from the statute, we construe statutory terms in accordance with their plain and ordinary meaning. *See, e.g., Sebelius v. Cloer*, 569 U.S. 369, 376 (2013); *Sunrise Coop., Inc. v. U.S. Dep't of Agric.*, 891 F.3d 652, 657 (6th Cir. 2018). In this context, the word "wholly" plainly means "to the full or entire extent" or "to the exclusion of other things." *Martin*, 903 F.3d at 1163 (quoting *Wholly*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2612 (1961)); *accord Kientz v. Comm'r, SSA,* 954 F.3d 1277, 1282 (10th Cir. 2020) (defining *wholly* to mean "'entirely' or 'exclusively' (quoting *Wholly*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1463 (1981))). Additionally, the word "as" in this context "limit[s] the uniformed services exception only to payments for work performed in one's capacity or role as a member of the uniformed services." *Martin*, 903 F.3d at 1164 (citing *As,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra*, at 125); *see also Kientz*, 954 F.3d at 1282 (giving the word "as" "the ordinary meaning of 'in the role, capacity, or function of" (quoting *As*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra*, at 76)). Thus, the

uniformed-services exception does not apply simply because an individual was a member of a uniformed service while working in noncovered employment. Rather, by its plain text, the uniformed-services exception is cabined to payments that are based exclusively on employment in the capacity or role of a uniformed-services member.

Babcock's CSRS pension is not such a payment. As its name suggests, the CSRS is for those employed "in the civilian service of the Government." 5 U.S.C. § 8332(b). Individuals covered under the CSRS may receive credit for periods of military service, but service in the military by itself, without civilian employment, does not make an individual eligible to participate in the CSRS. *See id.* § 8332(c), (j); *see also Vidal v. Office of Pers. Mgmt.*, 267 F. App'x 946, 948 (Fed. Cir. 2008) (per curiam) ("[M]ilitary service does not automatically count towards eligibility for benefits in the civil service system."). The only reason dual-status technicians like Babcock may participate in the CSRS, and receive a CSRS pension, is that they are "Federal civilian employee[s]" who are "assigned to a civilian position." 10 U.S.C. § 10216(a)(1)(C); *see also* 5 U.S.C. § 8332(b)(6) (providing that employment as a dual-status technician is civilian service for purposes of the CSRS); *N.J. Air Nat. Guard v. FLRA*, 677 F.2d 276, 279 n.2 (3d Cir. 1982) (noting that one of the primary reasons Congress created the position of dual-status technician was so that National Guard technicians would be considered federal civilian employees and eligible for civil-service retirement benefits). Therefore, by its very nature, a dual-status technician's CSRS pension is not a payment based

exclusively on employment in the capacity or role of a uniformed-services member.

The broader statutory context supports the conclusion that the uniformed-services exception does not encompass the CSRS pension of a dual-status technician. Within the Social Security Act, the uniformed-services exception operates as a qualification of the WEP, which broadly applies when a claimant separately receives a pension based on earnings from noncovered employment. *See* 42 U.S.C. § 415(a)(7)(A). As an exception to the general rule, the uniformed-services exception should be construed narrowly. *See Comm'r v. Clark*, 489 U.S. 726, 739 (1989) ("In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision."); *accord M.L. Johnson Family Props., LLC v. Bernhardt*, 924 F.3d 842, 854 (6th Cir. 2019). The uniformed-services exception should be construed narrowly with respect to a CSRS pension in particular because the various provisions of the Social Security Act, taken together, make plain that the WEP is meant to apply to former federal employees receiving a CSRS pension. *See* 42 U.S.C. §§ 410(a)(5), 415(a)(7); *see also, e.g.*, *Ward v. Comm'r of Soc. Sec.*, 211 F.3d 652, 655 (1st Cir. 2000) ("The reason behind the WEP was that an individual who had been employed as a federal employee with pension benefits and also was entitled to Social Security retirement benefits would receive a windfall because he [or she] would be eligible for both Social Security and federal civil service pension payments."). Thus, the broader statutory context and

the place of the uniformed-services exception in the overall statutory scheme support our conclusion that the plain text of the exception does not encompass a dual-status technician's CSRS pension.

Finally, we note that, in addition to his CSRS pension from the OPM, Babcock receives separate military retirement pay from the DFAS based on his work as a dual-status technician. There is no dispute that Babcock's military pension falls within the ambit of the uniformed-services exception. That Babcock receives a separate military pension to which the uniformed-services exception applies only bolsters the conclusion that his CSRS pension does not qualify for the uniformed-services exception.

C.

Babcock resists the conclusion that his CSRS pension falls outside the scope of the uniformed-services exception. He argues his CSRS pension is based entirely on his work as a dual-status technician, and this work is wholly indistinguishable from military employment because he had to maintain membership in the National Guard, hold the appropriate military grade for his position, wear a military uniform on a daily basis, and be prepared to be deployed on active duty. He argues, moreover, that his "status" as a civilian employee is irrelevant under the plain language of the statute.

We do not discount the fact that the job requirements of a dual-status technician overlap with those of other National Guard members—or that, from the perspective of the technician, the work of a dual-status technician may be materially similar to military employment. The plain language of the uniformed-services exception, however, instructs us

to look at "a payment" and ask whether that payment is based exclusively on employment in the capacity or role of a member of a uniformed service. *See* 42 U.S.C. § 415(a)(7)(A)(III). As we have explained, a CSRS pension must be based at least partly on some employment "in the civilian service of the Government," *see* 5 U.S.C. § 8332(b), and therefore, Babcock's CSRS pension is not a payment based exclusively on employment in the capacity or role of a uniformed-services member.

Additionally, though Babcock contends it is irrelevant, his designation as a "civilian" employee of the United States, "assigned to a civilian position as a technician," *see* 10 U.S.C. § 10216(a)(1)(C), is meaningful—and more than a mere "status"—in the context of Social Security retirement benefits. Because Babcock was a federal civilian employee, he was subject to the same General Schedule ("GS") pay scale as other federal civilian employees—ultimately retiring as a grade 13, step 10, Aircraft Flight Instructor. *See generally* 5 U.S.C. §§ 5331 *et seq.* (describing the GS pay rates and system). As a federal civilian employee hired before 1984, Babcock did not have Social Security taxes deducted from his GS-based civilian pay, unlike uniformed-services members in covered employment. *See* 42 U.S.C. §§ 410(a)(5), 410(1)(1). Most importantly, Babcock was eligible to participate in the CSRS, which non-technician members of the uniformed services (without some other civilian employment) are unable to do. *See* 5 U.S.C. § 8332(b)(6). These differences distinguish Babcock's service as a dual-status technician from that of other National Guard members and indicate that his dual-status

technician employment is not wholly "service as a member of a uniformed service" under the uniformed-services exception. *See* 42 U.S.C. § 415(a)(7)(A)(III); *see also Martin*, 903 F.3d at 1166 ("[E]ven if dual status technician employment is *essentially* military, it is not subject to the uniformed services exception if it is not *wholly* military in nature." (emphasis in original)).

Babcock argues that our precedents involving the *Feres* doctrine establish that employment as a dual-status technician is indeed military employment. *See Feres v. United States*, 340 U.S. 135 (1950). Several of our cases applying *Feres* hold that the position of a National Guard technician is "irreducibly military in nature." *Fisher v. Peters,* 249 F.3d 433, 443 (6th Cir. 2001); *accord Leistiko v. Stone*, 134 F.3d 817, 820-21 (6th Cir. 1998) (per curiam) (quoting *Leistiko v. Sec'y of the Army*, 922 F. Supp. 66, 75 (N.D. Ohio 1996)). But the *Feres* doctrine is about whether military personnel can sue their colleagues or the government for injuries resulting from military service. *See Feres*, 340 U.S. at 144-46; *see also Chappell v. Wallace*, 462 U.S. 296, 299 (1983) (applying *Feres* in the *Bivens* context); *Fisher*, 249 F.3d at 443 (extending *Feres* to Title VII claims). That the work of a dual-status technician is "irreducibly military" for purposes of suing other military personnel or the government does not resolve whether the role is wholly service as a member of a uniformed service for purposes of calculating Social Security retirement benefits, which focuses critically on the types and sources of a claimant's earnings. *See* 42 U.S.C. §§ 410, 415. As we have described, in terms of the types and sources of earnings, there are meaningful differences between

dual-status technicians and other members of the uniformed services. Therefore, our cases in the *Feres* context do not help Babcock here or undermine our conclusion that his CSRS pension falls outside the scope of the uniformed-services exception.

D.

Finally, we turn to Babcock's constitutional claims. Babcock asserts that his rights to due process and equal protection were violated because he was treated differently than a similarly situated resident of the Eighth Circuit. But "[n]o court has ever held that the mere existence of a circuit split on an issue of statutory interpretation violates due process or equal protection . . . ." *Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011); *see also Roberts v. Holder*, 745 F.3d 928, 933 (8th Cir. 2014) ("Disagreements among the courts of appeal, or between an agency and one or more of the courts of appeal, will not by itself [*sic*] create an equal protection violation."). Babcock cannot sustain a due-process or equal-protection claim solely on the basis of a circuit split.

III.

We hold that the uniformed-services exception does not apply to Babcock's CSRS pension. We accordingly affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID BABCOCK,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. 1:18-CV-255

May 22, 2019

HON. GORDON J. QUIST

ORDER ADOPTING REPORT AND RECOMMENDATION

Plaintiff, a retiree from the Michigan National Guard, filed a complaint pursuant to 42 U.S.C. § 405(g) seeking judicial review of the Commissioner of Social Security's final review of Plaintiff's challenge to the Commissioner's calculation of Plaintiff's retirement benefits under Title II of the Social Security Act. Plaintiff was employed from

1975 until 2009 as a National Guard dual status technician. On September 30, 2014, Plaintiff applied for retirement insurance benefits. At that time, Plaintiff was receiving a federal pension based on noncovered employment—that is, employment that was exempt from Social Security taxes. *See Martin v. Soc. Sec. Admin., Comm'r*, 903 F.3d 1154, 1156 (11th Cir. 2018). In most situations, individuals who, like Plaintiff, receive a pension from noncovered work receive a reduced monthly retirement insurance benefit pursuant to the Social Security Act's windfall elimination provision (WEP), 42 U.S.C. § 415(a)(7)(A). "[IT]he WEP was enacted to eliminate a windfall to individuals . . . who are eligible to receive pensions based on both covered and noncovered employment." *Holmes v. Comm'r*, No. 96-4088, 1997 WL 570387, at *2 (6th Cir. Sept. 11, 1997). There are a number of exceptions to the WEP, and Plaintiff claimed that he fell within the exception for "a payment based wholly on service as a member of a uniformed service" (the "uniformed services exception"). 42 U.S.C. § 415(a)(7)(A)(11).

At the time Plaintiff applied for retirement benefits, only the Eighth Circuit had addressed whether the uniformed services exception applies to dual status technicians such as Plaintiff. In *Peterson v. Astrue*, 633 F.3d 633 (8th Cir. 2011), the court found the meaning of the uniformed services exception "clear and unambiguous" and concluded that a National Guard dual status technician is covered by the uniformed services exception. The court reached this decision notwithstanding that under the National Guard Technician Act, Pub. L. No. 90-486, § 2(1), 82 Stat. 755, 755-56, codified as 32

U.S.C. § 709, a dual status technician is defined as a "Federal civilian employee" who "is assigned to a civilian position as a technician in the organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces." 10 U.S.C. § 10216(a)(1)(C). The court reasoned that because a dual status technician must maintain his or her membership in the National Guard and the military grade for his or her position and is required by statute to wear the grade-appropriate uniform while on duty, a dual status technician performs work "as a member of a uniformed service." *Id.* at 637.

Following *Peterson*, the Social Security Administration (SSA) issued Acquiescence Ruling 12-1(8) (AR 12-1(8)), 77 Fed. Reg. 51842-01 (Aug. 27, 2012), correction published 77 Fed. Reg. 54646-01 (Sept. 5, 2012), effective August 27, 2012. AR 12-1(8) explains that the SSA will apply *Peterson* only to eligible Social Security old-age or disability applicants (dual status technicians) who are permanent residents of a State within the Eighth Circuit. AR 12-1(8) further explains that for all applicants outside of the Eighth Circuit, the SSA will adhere to its policy that the WEP applies to persons who were employed in a noncovered civilian capacity as a National Guard dual status technician.

On September 7, 2018, after Plaintiff filed his complaint in this case, the Eleventh Circuit issued its decision in *Martin v. Social Security Administration, Commissioner*, 903 F.3d 1154 (11th Cir. 2018), which disagreed with *Peterson* and held that National Guard dual status technicians are not

covered by the uniformed services exception. The court, focusing on the word "wholly" in the exception, found the SSA's interpretation most persuasive:

> The critical issue is . . . how the word "wholly" interacts with the nature of the dual status technician position. By its plain meaning, "wholly" limits the payments covered by the uniformed services exception: even if dual status technician is *essentially* military, it is not subject to the uniformed services exception if it is not *wholly* military in nature. Accounting for all of the features of the dual status technician role, we find it difficult to conclude that a dual status technician wholly performs that role as a member of the National Guard.

Id. at 1166. Among other things, the court observed that dual status technicians perform much of their work as federal civilian employees. *Id.* at 1165.

On December 4, 2018, Magistrate Judge Phillip Green issued a Report and Recommendation (R & R) recommending that the Court affirm the Commissioner's decision applying the WEP to Plaintiff's retirement benefits. (ECF No. 20.) The magistrate judge noted the different outcomes in *Peterson* and *Martin*, found that "*Martin* provides a more detailed and persuasive analysis of why the WEP exception does not apply," and recommended that this Court adopt the *Martin* analysis. (*Id.* at PagelD.281.) In addition, the magistrate judge recommended that the Court reject Plaintiff's argument that application of AR 12-1(8) violates Plaintiffs due process and equal protection rights. (*Id.* at PagelD.283-84.)

Plaintiff has filed Objections to the R & R (ECF No. 21), and the Commissioner has filed a response. (ECF No. 22.) Pursuant to 28 U.S.C. § 636(b), upon receiving objections to a report and recommendation, the district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." After conducting a de novo review of the R & R, Plaintiff's Objections, the Commissioner's response, and the pertinent portions of the record, the Court concludes that the R & R should be adopted and the Commissioner's decision affirmed.

First, as to whether Plaintiff falls within the uniformed services exception to the WEP, the Court has reviewed *Peterson* and *Martin* and concurs with the magistrate judge that *Martin*'s analysis—particularly its focus on the word "wholly" as requiring that all of the claimant's employment must have been military in nature—is not only more persuasive than the *Peterson* court's analysis, but at bottom is based on the correct application of the language of the exception. At least two other district courts have likewise found *Martin* more persuasive than *Peterson*. *See Newton v. Comm'r of Soc. Sec.*, No. 18-751(RMB), 2019 WL 1417248, at *4 (D. N.J. Mar. 29, 2019) ("This Court agrees with the reasoning of the Eleventh Circuit [in *Martin*]."); *Kientz v. Berryhill*, No. 17-4067-SAC, 2018 WL 4538480, at *2 (D. Kan. Sept. 21, 2018) (adopting the opinion and analysis in *Martin*). Accordingly, the Commissioner properly applied the WEP.

With regard to Plaintiffs constitutional claims, the Court concurs with the magistrate judge that they

lack merit. As the magistrate judge correctly observed, the Commissioner did not apply AR 12-1(8) to Plaintiff. (ECF No. 9-2 at PagelD.42.) Plaintiff fails to cite any case that supports such a claim. While it is true that a circuit split did not exist at the time Plaintiff filed his complaint in this case, the SSA was not precluded from taking a different position outside of the Eighth Circuit. *See Roberts v. Holder*, 745 F.3d 928, 933-34 (8th Cir. 2014) ("Disagreements among the courts of appeal, or between an agency and one or more of the courts of appeal, will not by itself create an equal protection violation."). In short, the magistrate judge's observation that "[t]he *Peterson* and *Martin* decisions provide a good illustration why the initial circuit to address an issue does not compel the Commissioner to accede to that determination in every other circuit," was entirely apt. Therefore,

IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation issued December 4, 2018 (ECF No. 20) is **APPROVED AND ADOPTED** as the Opinion of this Court. Plaintiff's Objection (ECF No. 21) is **OVERRULED.**

IT IS FURTHER ORDERED that the Commissioner's decision is **AFFIRMED.**

A separate judgment will issue.

This case is **concluded.**

Dated: May 22, 2019 /s/ Gordon J. Quist

GORDON J. QUIST

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISON

DAVID BABCOCK,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. 1:18-cv-255

Honorable Gordon J. Quist

December 4, 2018

REPORT AND RECOMMENDATION

This is a social security action brought under 42 U.S.C. § 405(g), seeking review of a final decision of the Commissioner of Social Security, rejecting plaintiff's challenge to the Commissioner's calculation of his retirement benefits under Title II of the Social Security Act. On September 30, 2014, plaintiff applied for retirement insurance benefits. (ECF No. 9-2, PageID.77-78). On October 19, 2014,

the Administration granted his application, but reduced his benefits under the windfall elimination provision. (*Id.* at PageID.94-96). Plaintiff requested reconsideration and the Administration upheld the initial determination. (*Id.* at PageID.87-88, 122-32).

On September 15, 2016, plaintiff received a hearing before an Administrative Law Judge (ALJ). (*Id.* at PageID.142-60). On September 28, 2016, the ALJ issued his decision upholding the Administration's calculation and holding that the claimed uniformed services exception to the windfall elimination provision did not apply. (*Id.* at PageID.48-51).

On November 7, 2017, the Appeals Council granted plaintiffs request for review. (*Id.* at PageID.137-41). On January 11, 2018, the Appeals Council issued its decision finding that plaintiff did not meet the requirements of Acquiescence Ruling 12-1; that none of the windfall elimination provision exceptions applied; and that the windfall elimination provision was correctly applied to plaintiffs retirement benefits. (*Id.* at PageID .42-44).

Plaintiff timely filed a complaint seeking judicial review of the Commissioner's decision. (ECF No. 1). Plaintiff argues that the Commissioner's decision should be overturned on the following grounds:

I. Did the Appeals Councils[1] correctly conclude that the Windfall Elimination Provision (WEP) applies to plaintiffs pension as a dual status technician?

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[1] Because the Appeals Council granted review, I have substituted Appeals Council in each place in plaintiffs statement of errors where the ALJ is mentioned. *See Sims v. Apfel*, 530 U.S. 103, 106-07 (2000) ("[I]f the Appeals Council

II. Does the Plaintiffs work as a dual status technician qualify as an exception to the Windfall Elimination Provision (WEP)?

III. Did the Appeals Council's application of Acquiescence Ruling 12-1 to deny Plaintiffs exception to the WEP because he was not a resident of the Eighth Circuit violate Plaintiffs Constitutional Due Process and Equal Protection rights?

(Plf. Brief at vi, ECF No. 17, PageID.222). For the reasons set forth herein, I recommend that the Court affirm the Commissioner's decision.

Standard of Review

When reviewing the grant or denial of social security benefits, this court is to determine whether the Commissioner's findings are supported by substantial evidence and whether the Commissioner correctly applied the law. *See Elam ex rel. Golay v. Commissioner*, 348 F.3d 124, 125 (6th Cir. 2003); *Buxton v. Halter*, 246 F.3d 762, 772 (6th Cir. 2001). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

The Appeals Council's Decision

The Appeals Council found that plaintiff "started receiving retirement insurance benefits for October 2014." (ECF No. 9-2, PageID.43). He was "already receiving a pension for work that was not covered by Social Security in 2014." (*Id.*). Plaintiff did not meet

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grants review of a claim, then the decision that the Council issues is the Commissioner's final decision.").

the requirements of Acquiescence Ruling 12-1 because he did not live in a state covered by that ruling. (*Id.*). None of the exceptions to the windfall elimination provisions applied. (*Id.*). The Administration correctly applied the windfall elimination provision to plaintiffs retirement benefits. (*Id.* at PageID.43-44).

Discussion

The "windfall elimination provision" (WEP) reduces the benefits received by certain individuals who also receive pensions for work that did not require them to pay social security taxes. *See* 42 U.S.C. § 415(a)(7); *Petersen v. Astrue*, 633 F.3d 633, 634 (8th Cir. 2011). " 'The WEP was enacted in 1983 to eliminate the unintended benefits windfall that occurs when workers who split their career between covered employment (required to pay Social Security taxes) and non-covered employment (exempt from Social Security taxes).' " *Parker v. Colvin*, 640 F. App'x 726, 728 (10th Cir. 2016) (quoting *Petersen,* 633 F.3d at 634); *see also Holmes v. Commissioner*, No. 96-4088, 1997 WL 570398, at *2 (6th Cir. Sept. 11, 1997) ("[T]he WEP was enacted to eliminate a windfall to individuals, such as [plaintiff], who are eligible to receive pensions based on both covered and noncovered employment, and the provision has been upheld against challenges under the Fourth and Fifth Amendments because it is rationally related to the achievement of that legitimate goal.").

1.

There are exceptions to the windfall elimination provision. Plaintiff argues that the Commissioner committed reversible error by finding that the

pension he receives for employment as a dual status technician with the Michigan National Guard did not fall within subsection 415(a)(7)(A)(III)'s exception for a "payment based wholly on service as a member of a uniformed service." (Plf. Brief at 5-23, ECF No. 17, PageID.227-45; Reply Brief at 1-5, ECF No. 19, PageID.272-76).

A circuit split has developed on this issue, with the Eighth Circuit holding that the above-referenced WEP exception applies to dual status technicians and the Eleventh Circuit holding that it does not. *Compare Martin v. Social Security Admin., Commissioner*, 903 F.3d 1154 (11th Cir. 2018) *with Petersen v. Astrue*, 633 F.3d 633 (8th Cir. 2011). I find the Eleventh Circuit's recent decision in *Martin* provides a more detailed and persuasive analysis of why the WEP exception does not apply. I recommend that the *Martin* analysis be adopted by this Court.

The Eighth Circuit's analysis in *Petersen* is very brief. It declined to accept the Social Security Administration's interpretation of the exception because it found that the "meaning and intent of section 415(a)(7)(A) [was] clear and unambiguous." 633 F.3d at 636. The Eighth Circuit emphasized that dual status technicians are required to maintain National Guard membership and to wear uniforms while on duty. *Id.* at 636-37. The Eighth Circuit stated that accepting the Administration's interpretation would require it to read a "military duty" requirement that did not appear in the statute. *Id.* at 637-38.

In *Martin*, the Eleventh Circuit held that the exception did not apply to dual status technicians. It rejected the Eighth Circuit's interpretation because

it failed to adequately address the statutory limitation that the payment be based "wholly" on service as a member of a uniformed service. 903 F.3d at 1168. The Eleventh Circuit observed that "Congress consistently refers to dual status technician employment as a civilian position." *Id.* at 1165. The Eleventh Circuit found that the critical issue was how the word "wholly" interacts with the nature of the dual status technician position. *Id.* at 1166. "Even the use of the title 'dual status' suggests that dual status technicians are employed not just in their capacity as members of the National Guard." *Id.* "By its plain meaning, 'wholly' limits the payments covered by the uniformed services exception: even if dual status technician employment is *essentially* military, it is not subject to the uniformed services exception if it is not *wholly* military in nature." *Id.* The Eleventh Circuit held that, given the civilian elements and dual nature of the role of a dual status technician, and the deference owed to the Administration's interpretation, it was affirming the Commissioner's decision finding that payments based on the plaintiffs employment as a dual status technician did not qualify for the WEP exception. *Id.* at 1168.

The District of Kansas recently considered the same circuit split. *See Kientz v. Berryhill*, No. 17-4067, 2018 WL 4538480 (D. Kan. Sept. 21, 2018). It rejected the Eighth Circuit's approach in *Petersen* and found the Eleventh Circuit's analysis in *Martin* to be more persuasive. The district court "agree[d] with the court's analysis in *Martin* that given the dual nature of the role" of a dual status technician and its "civilian elements," the employment was not

"performed wholly as a member of a uniformed service." 2018 WL 4538480, at *2. The WEP applied to the claimant's retirement benefits and the uniformed services exception did not apply. *Id.*

I find that the Eleventh Circuit's decision in *Martin* provides compelling analysis of the issue before the Court, and I recommend that it be followed. I recommend that the Commissioner's decision be affirmed.

2.

Plaintiff argues that "application" of Acquiescence Ruling 12-1(8) violates his rights under the Due Process and Equal Protection Clauses. (Plf. Brief at 23-24, ECF No. 17, PageID.245-46; Reply Brief at 5, ECF No. 19, PageID.276).

The short answer is the Appeals Council never applied this acquiescence ruling to plaintiff's claim. It held that plaintiff did not meet the requirement of Acquiescence Ruling 12-1(8) because he did not live in a state covered by that ruling. (ECF No. 92, PageID.43).

Acquiescence Rulings explain how the Administration will apply a holding by a United States Court of Appeals that is at variance with the Administration's national policies for adjudicating claims. *See Hagans v. Commissioner*, 694 F.3d 287, 301 (3d Cir. 2012). The Administration issued Acquiescence Ruling 12-1(8) in response to the Eighth Circuit's *Petersen* decision. The ruling is limited to permanent legal residents of a state within the Eighth Circuit. The Administration only applies *Petersen*'s interpretation within the Eighth Circuit, and it continues to treat dual status technicians as

ineligible for the exception everywhere else. *See* Social Security Acquiescence Ruling (AR)12-1(8), 77 Fed. Reg. 51842 (Aug. 27, 2012), as corrected by 77 Fed. Reg. 54646 (Sept. 5, 2012) (reprinted at 2012 WL 3638258 and 2012 WL 3807595); *see also Cochran v. Commissioner*, No. 1:13-cv-2628, 2014 WL 6604458, at *3 (N.D. Ohio Nov. 20, 2014) (Acquiescence Ruling 12-1(8) applies "only to dual-status retirees who reside in states located within the Eighth Circuit[.]").

Acquiescence Ruling 12-1(8), in accordance with 20 C.F.R. § 404.985, only applies in the circuit that issued the holding that conflicts with the Commissioner's interpretation of the Social Security Act. Plaintiffs equal protection and due process claims based on the acquiescence ruling are without merit. *See Loudermilk v. Barnhart*, 290 F.3d 1265, 1268 n.2 (11th Cir. 2002); *see also Habibi v. Holder*, 673 F.3d 1082, (9th Cir. 2011) ("No court has ever held that the mere existence of a circuit split on an issue of statutory interpretation violates due process or equal protection[.]"). The *Petersen* and *Martin* decisions provide a good illustration why the initial circuit to address an issue does not compel the Commissioner to accede to that determination in every other circuit.

Recommended Disposition

For the reasons set forth herein, I recommend that the Court affirm the Commissioner's decision.

Dated: December 4, 2018

/s/ Phillip J. Green
PHILLIP J. GREEN
United States
Magistrate Judge

APPENDIX D

SOCIAL SECRITY ADMINISTRATION OFFICE OF DISABILITY ADJUDICATION AND REVIEW

TRANSCRIPT

In the case of: David Babcock, Claimant

Account number: 374-60-3136

Claim for: Retirement Benefits

Transcript of Mr. Babcock's Testimony

Hearing Held

at: Lansing, Michigan

on: September 15, 2016

by: Lawrence E. Blatnik
(Administrative Law Judge)

APPEARANCES:

David Babcock, Claimant

Justin Barry, Attorney for Claimant

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PROCEEDINGS

* * *

[Transcript of Mr. Babcock's Testimony, pp. 1-19]

* * *

OPENING STATEMENT BY ADMINISTRATIVE LAW JUDGE

HR: This is the hearing of David Babcock, 374-60-3136, held before ALJ Blatnik in Lansing, Michigan on September 15, 2016. The claimant is represented by Justin Barry. The hearing recorder is Deborah Galley [PHONETIC].

ALJ: We're going to get started then. This proceeding involves the issues relating to the receipt of retirement insurance benefits by David Brian Babcock, Social Security number 374-60-3136. This hearing is being held after due notice on this 15th day of September, 2016 at approximately 9:00 a.m. in Lansing, Michigan. I am -- my name is Lawrence E. Blatnik, I am the administrative law judge assigned to conduct the hearing and decide the case. The claimant is present and represented. Counsel, could you please enter your appearance for the record?

ATTY: Yes. Justin Barry on behalf of the claimant.

ALJ: Okay. Seated to my right is Deborah Galley, the hearing monitor. She will be taking notes,

operating the recording equipment and assisting me during the hearing. Now, the law requires that all testimony provided here be given under oath, so just in case we need to take some testimony for you -- from you, Mr. Babcock, if you could please raise your right hand so I can administer the oath to you.

(The oath was administered.)

ALJ: Counsel, have you had an opportunity to discuss the issues in this case with your client?

ATTY: Yes, we have.

ALJ: Waive any additional statement as to the issues?

ATTY: I don't want to waive a -- can you give a statement from your end of the spectrum?

ALJ: Okay, well, I guess the --

ATTY: I know from our end, but --

ALJ: The issue before me is whether the Windfall Elimination Provision was properly applied in this case to reduce the level of retirement benefits received by the claimant based on some work he had done as the, I guess as a -- in the reserves, the National Guard during the period from 1975 to 2009. As you know, the Administration's position is that the Windfall Elimination Provision does apply to that type of employment.

However, there was a decision in the Eighth Circuit, Peterson B. Astrew [PHONETIC], which you've cited in your pre-hearing memorandum, which decided that that provision should not be applicable to the type of work that was done by Mr. Babcock in the past. The Administration recognize the applicability of that ruling, and is following it in

cases -- in states that are within the jurisdiction of the 8th circuit; the problem in this case is Mr. Babcock was a resident of Michigan, which is -- as you're -- I'm sure you're well aware, within the sixth circuit, outside the boundaries of the eighth circuit.

So the Administration's position is that the -- they're going to continue to follow their previously stated position; they're not bound to apply those -- the Peterson B. Astrew holding in this particular type of situation.

ATTY: Which -- yeah, we understand that. Is there any sort -- you say their position; is there any sort of ruling or?

ALJ: Well, there is an acquiescence ruling, 12.18, which was issued in -- on August 27, 2012. I have that in front of me; I'd be happy to make a copy of it available to you. I mean, I'm sympathetic with your client's position, and would like to be able to do something to help him, but I'm kind of bound by the law that I'm -- the Administration is telling me I need to follow in this case. It's essentially a legal issue; I don't -- I don't really see a need to take any testimony from the claimant. You're certainly free to --

ATTY: Yeah. We would like to put some testimony on the record, as I anticipate this case going up on appeal if you're unable to give a favorable, so.

ALJ: Okay.

ATTY: But our argument would be, obviously, that those -- the two poms [PHONETIC], the Windfall Elimination Provision accepts -- let's see, where's the exact language? It's RS 00605.362, and Section --

let's see here -- E applies to military service and military reservists.

ALJ: Right.

ATTY: And then RS 00605.383, the exclusion of military reservist from WEP, and we would argue that that does apply in this case.

ALJ: Okay.

ATTY: So we'd like to put the factual basis as to why that applies onto the record.

ALJ: Okay, well you can go ahead and proceed, and ask your client any questions you may feel you need to ask him at this point.

ATTY: Okay.

(Whereupon, DAVID BABCOCK, the claimant, having first been duly sworn, testified as follows:)

EXAMINATION OF THE CLAIMANT BY THE ATTORNEY:

Q State your name for the record.

A David Brian [PHONETIC] Babcock.

Q And when did you join the service?

A I joined the service in September 1970.

Q And tell us a little bit about your service with the National Guard.

A I joined the National Guard in 1970 as an enlisted soldier. Became an -- was trained as an aircraft mechanic. 1975 of -- would be March, I went to work full-time under a dual status as it's noted, which demands that you be a member of the Michigan National Guard if you're working for them at the time. And if at the time, you're not a member

of the National Guard or the Reserve, you will lose your job within 30 days.

I worked with them for approximately three and a half years as a aircraft mechanic enlisted soldier, at which time I decided to go to -- attend flight school, become an officer. At which point I had to sign a letter stating that if I became an officer, would no longer qualify for enlisted person's job -- mechanic -- at which point I would lose, my job within 30 days after becoming an officer.

I decided to go to flight school and become an officer, came back, was notified I was losing my job in 30 days, luckily found another job that was -- and had to apply -- and received another job within the organization as a pilot. I worked as a pilot until January 2009, at which point I left the National Guard and left my -- my job as a technician.

Q So at any point, if you would've lost your National Guard status, would you have been able to maintain your employment?

A Absolutely not. A number of my friends who were removed from the National Guard for one reason or another, did not meet height/weight standard but could still perform their job during the week, lost their jobs when they were dismissed from the military, not for any action that was necessarily adverse. Also, they had some people lose their job just because of the fact that they increased in rank, or had gone 20 years in the National Guard and were no longer retained in the National Guard. At which point, they were allowed to -- they were fired from the -- their weekly job, and were allowed to draw unemployment.

ALJ: Where exactly were you performing this work?

CLMT: Grand Ledge, actually.

ALJ: Okay.

CLMT: I worked in Grand Ledge the whole period, 38 years. Yeah.

BY THE ATTORNEY:

Q Okay. And you had to wear your uniform while you were --

A I have a picture of me standing in front of a helicopter in Grand Ledge, just as I'd go to work everyday.

Q Okay.

A With my rank and all my unit insignia on it. If you were a civilian doing this job and there were Department of -- we call them DACs, they would wear the same uniform and the only thing they would have would be their name on their badge, they wouldn't have their rank. I had to wear my rank at all times, to loop people, call people sir, yes, sir when refer to higher ranking officers.

It's -- we actually -- I gave Mr. Barry the copy of what I was required -- what was required of a dual status technician, and you have to perform all the military courtesies, wear your rank, wear the uniform. If I went outside other than on the flight line, as we called it, where the helicopters were, I had to wear my hat, salute as I passed the flags, salute officers. There was no difference between me and someone on active duty or on post.

ALJ: Okay.

BY THE ATTORNEY:

Q Tell us a little bit about, when you say rank-related job positions. I understand that there's two sides of it, so can you explain to the judge a little bit about that?

A Okay. If you just think about in the military, enlisted soldiers, I will say, do the hard -- well, we'll say do the hard labor: the lifting and the shoveling. You have to -- but an officer, for an example, is not allowed to be a mechanic on a helicopter turner wrench. And therefore, when I changed although I was hired on as a mechanic, when I became an officer, I no longer could be a mechanic.

The other thing would be that if you were a lieutenant or a captain or a major -- I happened to be a warrant officer -- a world warrant [PHONETIC] officer, if you were an instructor pilot and that was your job title during the week, you could be a lieutenant or a captain, or you could be a warrant officer 1, 2 or a 3 if you were an instructor, and you have to progress in the service.

A captain, once you become a captain, six -- he has three years to make major; if he doesn't make major in three years, he has another three years. If he doesn't make major after six years of being a captain, they thank him for his service and he's removed from the military. And you either progress or you're out.

ALJ: So you have to keep moving up the ladder.

CLMT: If you don't move up, you move out.

ALJ: And when were you designated as a warrant officer?

CLMT: I became a warrant officer in would be March of 1979. I made my ranks on all dates.

ALJ: So how did your job duties -- you said you couldn't become a -- you couldn't be a mechanic after you became an officer, so how did your job duties change after that?

CLMT: Oh, after I became -- after I became an officer, I actually -- my boss immediately sent me off to another school, and I became a test pilot, along with the -- I was already a pilot; I became a test pilot, one of the youngest ones in the state, but when I came back, he moved me into a position that was an officer's position, which was an inspector of aircraft.

ALJ: I see.

CLMT: And I fulfilled that for a few years, then I became an instructor pilot. He kept sending me to military schools throughout my career. In fact, my last military school was six months prior to retirement, so I'm --

ALJ: Where was that conducted? Where did you go for the military --

CLMT: I went to Fort Rucker a lot. I also went to Arizona, Tucson, Arizona, which was the western area training site. Eastern area training site in Pennsylvania, Fort Eustis, Virginia, those are just some I can think of off the top -- I went to school so many --

ALJ: So it sounds like you got a lot of training during your [INAUDIBLE], yeah.

CLMT: I did. I went to school a lot. My wife was getting a little tired of it.

BY THE ATTORNEY:

Q And tell us about the letter that you were required to sign when you went to flight school.

A Actually, I actually had a -- it was a statement: you are aware that becoming an officer no longer qualifies you for your mechanics position. You will be -- you'll have to give up your job, you'll be fired, basically. And I had to sign a statement that I acknowledged that fact, and -- but I decided I wanted to be a pilot more than I wanted to -- I figured I'd go to work in GM if I had to, you know. So.

Q So your job was -- inexplicably tied to your service in the National Guard?

A Correct. I have to be -- it actually states that you're supposed to be a member of the unit that the weekly day job supports.

Q Okay. What about these military review boards?

A After you reach 20 years of service and are eligible for retirement from the military, although you will not -- if you're a National Guardsman, you don't receive -- and which I reached at age 38 or 39, I mean -- you cannot collect military retirement until age 60 from the National Guard, unlike the active duty.

When I reached 20 years of service, enlisted and officer combined, your records go before a review board every year and it's a military review board, nobody from the technician's side. And they look at your records, determine whether or not they're going to keep you, if you're an officer, one more year, if you're enlisted, two more years.

If they determine that they're not going to keep you -- in other words, you haven't continued schooling,

progressed in rank fast enough, gotten any awards, then they just go, okay. Put you in pile A and they send you a letter and it said, thank you for your service, you're no longer needed in the Michigan National Guard, saw those letters. I didn't get one; I did that for 18 years. Every year I had to sweat it out come March.

Q And if you were terminated from the National Guard, what would happen with your position?

A 30 days later you were terminated from your technician job.

Q So you've read through the poms rule 605.383 excludings for military reservists? I'm just going to read an excerpt that says, the Windfall Elimination Provision no longer applies to benefits or retired or disabled workers receiving military pensions based in part on inactive duty including weekend drills from 1957 to 1987. Was your pension based on -- in part on inactive duty?

A All my Social Security money that was deducted from my checks came from my military paycheck. It was solely from that until after I retired from my dual status technician job in the military. After that, I went into the civilian world and flew med evac helicopter for Sparrow Hospital here in the city for approximately four years and then two years in Saginaw for St. Mary's Hospital. So I did have some Social Security deductions after I'd retired out of the service.

ALJ: I see.

CLMT: But prior to that, all the money that was deducted for Social Security came from military wages.

BY THE ATTORNEY:

Q All right. And your civilian job, did that pay overtime?

A No. It did not pay overtime. It paid what they called compensatory time, which meant that if I worked an hour over, I was supposed to get an hour off the next day, which didn't necessarily happen, but a --

Q Did you have to work weekends sometimes?

A I had to work whenever my boss said. Yes, I worked weekends quite a bit.

Q So how were you compensated if your civilian pay wouldn't pay you on those weekends that you were working?

A They were supposed to give me time -- equal time off during the week.

Q But they didn't?

A Well, they were -- they -- you know, unless the mission -- as they called it, the mission dictated, they would normally give -- grant me the time off, you know.

Q Did they ever write it off as military time?

A Yes. Quite often, what they would do is ask us to take additional training time -- military training time as opposed to taking time off. They would ask us to work evening -- we worked evenings. I would normally work two to three evenings after I completed my eight-hour shift during the day. A week. It was not unusual. They told us -- by the time I retired, we had 72 additional training periods a year, which is more than one a week, of course, that we had to do besides our normal weekend drills as a

pilot. And they encouraged us, was the word, to use those for our overtime work.

Q And then you talked about that National Guard handbook, I think it was 32 USC Section 709, technicians employment use status. Except as authorized in Subsection C, a person employed under Subsection A must meet the following requirements: be a military technician; be a member of the National Guard; hold a military grade specified by the secretary concerned for that position; and while performing military or performing duties as a military technician (dual status), wear the uniform appropriate for members grade component of the armed forces. You did all those things?

A Yes, I did.

Q Anything else we haven't talked about that you'd like the judge to know?

A It is not legally pertinent, but it's just my opinion: they hired me under one contract and then changed it 20 years after I'd been working for them, and didn't even tell me about it. I mean, it wasn't really something -- the WEP wasn't something that they came out and gave a briefing, said, hey, by the way, all you guys have been working here are now -- we're going to apply this to your pension. I found that out when I got ready to retire.

Q In fact, they made a specific exclusion for people like you.

A Right.

Q And that was that -- in -- or the pom that we had read earlier.

A Correct. I mean, I was a -- as far as I was concerned, I was in the military. They just were paying me out of one pot to do one thing, and one pot to do another. Which the government has a tendency to do a lot.

Q And going back to the same technicians' handbook, Section F1A states that a person employed under Section A who is a military technician and otherwise subject to requirements of Subsection B who is separated from the National Guard or ceases to hold the military grade specified by the secretary concerned for that position, shall be promptly separated from military technician dual status employment by the adjunct general jurisdiction concerned. That was true.

A That's true. It's still happening today.

Q And you saw that --

A We've got three -- eight people happened this past year, in 2015.

Q And you saw that happen while you were there, too?

A Oh, many times. Many of my friends were separated.

ATTY: I don't have any other questions.

ALJ: All right. One other just procedural matter I'm going -- we didn't address this at the beginning of the hearing, but I'm going to admit into the record the exhibits contained in the claimant's case file. They aren't numbered, they're basically just jurisdictional documents and his work record.

Well, as I indicated at the beginning of the hearing, I mean, the -- under this acquiescence ruling that I

am bound to follow, there are three criteria for when the -- Windfall Elimination Provision is not applied to people in your client's position. He seems to meet two of the criteria, but the -- unfortunately the third one is you have to have permanent legal residence in one of the states within the eighth circuit: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota or South Dakota, so I know it seems a little bit unfair to determine whether that WEP applies based on your state of residence, but unfortunately that's the law as it exists currently.

I wish I could -- would be able to help you, but I'm unfortunately going to -- bound to follow the law as it exists at this time. I certainly -- I understand that part of what you're doing here is to provide a basis for appeal so you can pursue this at federal court, and you know, maybe you can get a favorable ruling by some judge at a higher level than I am.

But I'll certainly consider all the evidence that you've laid out today, but it's really a legal impediment that I have to overcome to overrule the Administration's ruling in this case. So we'll do our best to get a written decision out to you as soon as you can, and then you can pursue whatever legal avenues that you feel are appropriate after that.

CLMT: There is one other thing I forgot.

ALJ: Okay.

CLMT: That I'd like to put on record, and that was as a federal employee, there are two types of federal employees: competitive and dual status. And the dual status means -- is what I am.

ALJ: That's what you were, right.

CLMT: Except actually it's not dual status, it's called excepted.

ALJ: Okay.

CLMT: And that's the military --

ALJ: Excepted service?

CLMT: Excepted service, exactly. As opposed to competitive. And which would be people that work for the Social Security Administration, for an example, are competitive.

ALJ: Right. Yeah. As a long-term federal employee, absolutely, yeah, I understand what you're talking about there.

CLMT: Just forgot about that. Put it in.

ALJ: All right. Well, I appreciate your coming in today and I think we have all the evidence we need to provide a basis for a decision, so we'll conclude the hearing and I wish you the best of luck, Mr. Babcock.

CLMT: Thanks, Your Honor.

ATTY: Thank you.

ALJ: All right.

CLMT: I appreciate the time.

ALJ: Okay.

(The hearing closed at 9:30 a.m., on September 15, 2016.)

APPENDIX E

CERTIFICATE OF RELEASE OR DISCHARGE
FROM ACTIVE DUTY

---

1. NAME (Last First Middle)	BABCOCK, DAVID BRYON
2. DEPARTMENT, COMPONENT AND BRANCH	ARMY / ARNGUS / AV
3. SOCIAL SECURITY NUMBER	[redacted] – [redacted] – 3136
4a. GRADE, RATE OR RANK	CW5
b. PAY GRADE	W05
5. DATE OF BIRTH (YYYYMMDD)	19510915
6. RESERVE OBLIGATION TERMINATION DATE (YYYYMMDD)	00000000
7a. PLACE OF ENTRY INTO ACTIVE DUTY	GRAND LEDGE, MICHIGAN
b. HOME OF RECORD A TIME OF ENTRY (City and state, or complete address if known)	2440 LEDGEND WOODS GRAND LEDGE MICHIGAN 48837

8a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND	0238AVCO F MNT EAC FC
b. STATION WHERE SEPARATED	FORT MCCOY, WI 54656-5150
9. COMMAND TO WHICH TRANSFERRED	TAG, ARNG MI, 2500 SOUTH WASHINGTON AVENUE, LANSING, MI 48913
10. SGLI COVERAGE AMOUNT:	$400,000.00
11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)	152G0 00 AH-1 ATTACK PILOT(RC) – 26 YRS 9 MOS / / 153A0 00 ROTARY WING AVIATOR – 26 YRS 9 MOS / / NOTHING FOLLOWS

12. RECORD OF SERVICE	YEAR(S)	MONTH(S)	DAY(S)
a. DATE ENTERED AD THIS PERIOD	2004	11	05
b. SEPARATION DATE THIS PERIOD	2005	11	25
c. NET ACTIVE SERVICE THIS PERIOD	0001	00	21

d. TOTAL PRIOR ACTIVE SERVICE	0003	07	11
e. TOTAL PRIOR INACTIVE SERVICE	0030	06	03
f. FOREIGN SERVICE	0000	10	07
g. SEA SERVICE	0000	00	00
h. EFFECTIVE DATE OF PAY GRADE	2001	12	14

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)	BRONZE STAR (2ND AWARD) / / ARMY ACHIEVEMENT MEDAL (3RD AWARD) / / ARMY RESERVE COMPONENTS ACHIEVEMENT MEDAL (2ND AWARD) / / NATIONAL DEFENSE SERVICE MEDAL (3RD AWARD) / / ARMED FORCES RESERVE MEDAL W/ M DEVICE / / USA AVIATOR BADGE / / GLOBAL WAR ON TERRORISM EXPEDITIONARY MEDAL / / GLOBAL WAR ON / / CONT IN BLOCK 18
14. MILTARY EDUCATION (Course	NONE / / NOTHING FOLLOWS

title, number of weeks, and month and year completed)	
15a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM	☐ YES ■ NO
b. HIGH SCHOOL GRADUATE OR EQUIVALENT	■ YES ☐ NO
16. DAYS ACCRUED LEAVE PAID	0.5
17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION	☐ YES ■ NO
18. REMARKS	SERVICE IN IRAQ 2004/12/28-2005/11/03 / / INDIVIDUAL COMPLETED PERIOD FOR WHICH ORDERED TO ACTIVE DUTY FOR

	PURPOSE OF POST SERVICE BENEFITS AND ENTITLEMENTS / / ORDERED TO ACTIVE DUTY IN SUPPORT OF OPERATION IRAQI FREEDOM IAW 10 USC 12302 / / MEMBER HAS COMPLETED FIRST FULL TERM OF SERVICE / / SERVED IN A DESIGNATED IMMINENT DANGER PAY AREA / / CONT FROM BLOCK 13: TERRORISM SERVICE MEDAL / / NOTHING FOLLOWS
19a. MAILING ADDRESS AFTER SEPARATION (Include ZIP Code)	2440 LEDGEND WOODS DRIVE GRAND LEDGE MICHIGAN 48837
b. NEAREST RELATIVE (Name and address – include ZIP Code)	BETTY L BABCOCK 300 E GIER ST LANSING MICHIGAN 48906
20. MEMBER REQUESTS COPY 6 BE SENT TO ___MI___ DIRECTOR OF VETERANS AFFAIRS	■ YES □ NO

21. SIGNATURE OF MEMBER BEING SEPARATED	/s/ David B Babcock
22. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title and signature)	/s/ Britnie Rewey BRITNIE M REWEY, PRES ASST LEAD

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)	
23. TYPE OF SEPARATION	RELEASE FROM ACTIVE DUTY
24. CHARACTER OF SERVICE (Include upgrades)	HONORABLE
25. SEPARATION AUTHORITY	AR 600-8-24, PARA 2-27A
26. SEPARATION CODE	LBK
27. REENTRY CODE	NA
28. NARRATIVE REASON FOR SEPARATION	COMPLETION OF REQUIRED ACTIVE SERVICE
29. DATES OF TIME LOST DURING THIS PERIOD (YYYYMMDD)	NONE
30. MEMBER REQUESTS COPY 4 (Initials)	/s/ DBB

APPENDIX F

STATUTORY PROVISIONS INVOLVED

1. **10 U.S.C. § 10216 provides:**

Military technicians (dual status)

(a) In general.--(1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who--

(A) is employed under section 3101 of title 5 or section 709(b) of title 32;

(B) is required as a condition of that employment to maintain membership in the Selected Reserve; and

(C) is assigned to a civilian position as a technician in the organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

(2) Military technicians (dual status) shall be authorized and accounted for as a separate category of civilian employees.

(3) A military technician (dual status) who is employed under section 3101 of title 5 may perform the following additional duties to the extent that the performance of those duties does not interfere with the performance of the primary duties described in paragraph (1):

(A) Supporting operations or missions assigned in whole or in part to the technician's unit.

(B) Supporting operations or missions performed or to be performed by--

(i) a unit composed of elements from more than one component of the technician's armed force; or

(ii) a joint forces unit that includes--

(I) one or more units of the technician's component; or

(II) a member of the technician's component whose reserve component assignment is in a position in an element of the joint forces unit.

(C) Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of--

(i) active-duty members of the armed forces;

(ii) members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);

(iii) Department of Defense contractor personnel; or

(iv) Department of Defense civilian employees.

(b) Priority for management of military technicians (dual status).--(1) As a basis for making the annual request to Congress pursuant to section 115(d) of this title for authorization of end strengths for military technicians (dual status) of the Army and Air Force reserve components, the Secretary of Defense shall give priority to supporting

authorizations for military technicians (dual status) in the following high-priority units and organizations:

(A) Units of the Selected Reserve that are scheduled to deploy no later than 90 days after mobilization.

(B) Units of the Selected Reserve that are or will deploy to relieve active duty peacetime operations tempo.

(C) Those organizations with the primary mission of providing direct support surface and aviation maintenance for the reserve components of the Army and Air Force, to the extent that the military technicians (dual status) in such units would mobilize and deploy in a skill that is compatible with their civilian position skill.

(2) For each fiscal year, the Secretary of Defense shall, for the high-priority units and organizations referred to in paragraph (1), seek to achieve a programmed manning level for military technicians (dual status) that is not less than 90 percent of the programmed manpower structure for those units and organizations for military technicians (dual status) for that fiscal year.

(3) Military technician (dual status) authorizations and personnel shall be exempt from any requirement (imposed by law or otherwise) for reductions in Department of Defense civilian personnel and shall only be reduced as part of military force structure reductions.

(c) Information required to be submitted with annual end strength authorization request.--(1) The Secretary of Defense shall include as part of the

budget justification documents submitted to Congress with the budget of the Department of Defense for any fiscal year the following information with respect to the end strengths for military technicians (dual status) requested in that budget pursuant to section 115(d) of this title, shown separately for each of the Army and Air Force reserve components:

(A) The number of military technicians (dual status) in the high priority units and organizations specified in subsection (b)(1).

(B) The number of technicians other than military technicians (dual status) in the high priority units and organizations specified in subsection (b)(1).

(C) The number of military technicians (dual status) in other than high priority units and organizations specified in subsection (b)(1).

(D) The number of technicians other than military technicians (dual status) in other than high priority units and organizations specified in subsection (b)(1).

(2)(A) If the budget submitted to Congress for any fiscal year requests authorization for that fiscal year under section 115(d) of this title of a military technician (dual status) end strength for a reserve component of the Army or Air Force in a number that constitutes a reduction from the end strength minimum established by law for that reserve component for the fiscal year during which the budget is submitted, the Secretary of Defense shall submit to the congressional defense committees with

that budget a justification providing the basis for that requested reduction in technician end strength.

(B) Any justification submitted under subparagraph (A) shall clearly delineate the specific force structure reductions forming the basis for such requested technician reduction (and the numbers related to those reductions).

(d) Unit membership requirement.--(1) Unless specifically exempted by law, each individual who is hired as a military technician (dual status) after December 1, 1995, shall be required as a condition of that employment to maintain membership in--

(A) the unit of the Selected Reserve by which the individual is employed as a military technician; or

(B) a unit of the Selected Reserve that the individual is employed as a military technician to support.

(2) Paragraph (1) does not apply to a military technician (dual status) who is employed by the Army Reserve in an area other than Army Reserve troop program units.

(3) Paragraph (1) does not apply to a military technician (dual status) who is employed by the Air Force Reserve in an area other than the Air Force Reserve unit program, except that not more than 50 of such technicians may be assigned outside of the unit program at the same time.

(e) Dual status requirement.--(1) Funds appropriated for the Department of Defense may not (except as provided in paragraph (2)) be used for compensation as a military technician of any individual hired as a military technician (dual

status) after February 10, 1996, who is no longer a member of the Selected Reserve.

(2) Except as otherwise provided by law, the Secretary concerned may pay compensation described in paragraph (1) to an individual described in that paragraph who is no longer a member of the Selected Reserve for a period up to 12 months following the individual's loss of membership in the Selected Reserve if the Secretary determines that such loss of membership was not due to the failure of that individual to meet military standards.

(f) Authority for deferral of mandatory separation.--The Secretary of the Army and the Secretary of the Air Force may each implement personnel policies so as to allow, at the discretion of the Secretary concerned, a military technician (dual status) who continues to meet the requirements of this section for dual status to continue to serve beyond a mandatory removal date, and any applicable maximum years of service limitation, until the military technician (dual status) reaches age 60 and attains eligibility for an unreduced annuity (as defined in section 10218(c) of this title).

(g) Retention of military technicians who lose dual status due to combat-related disability.--(1) Notwithstanding subsection (d) of this section or subsections (a)(3) and (b) of section 10218 of this title, if a military technician (dual status) loses such dual status as the result of a combat-related disability (as defined in section 1413a of this title), the person may be retained as a non-dual status technician so long as--

(A) the combat-related disability does not prevent the person from performing the non-dual status functions or position; and

(B) the person, while a non-dual status technician, is not disqualified from performing the non-dual status functions or position because of performance, medical, or other reasons.

(2) A person so retained shall be removed not later than 30 days after becoming eligible for an unreduced annuity and becoming 60 years of age.

(3) Persons retained under the authority of this subsection do not count against the limitations of section 10217(c) of this title.

2. **10 U.S.C. § 10217 provides:**

Non-dual status technicians

(a) Definition.--For the purposes of this section and any other provision of law, a non-dual status technician is a civilian employee of the Department of Defense serving in a military technician position who--

(1) was hired as a technician before November 18, 1997, under any of the authorities specified in subsection (b) and as of that date is not a member of the Selected Reserve or after such date has ceased to be a member of the Selected Reserve;

(2) is employed under section 709 of title 32 in a position designated under subsection (c) of that section and when hired was not required to maintain membership in the Selected Reserve; or

(3) is hired as a temporary employee pursuant to the exception for temporary employment provided

by subsection (d) and subject to the terms and conditions of such subsection.

(b) Employment authorities.--The authorities referred to in subsection (a) are the following:

(1) Section 10216 of this title.

(2) Section 709 of title 32.

(3) The requirements referred to in section 8401 of title 5.

(4) Section 8016 of the Department of Defense Appropriations Act, 1996 (Public Law 104-61; 109 Stat. 654), and any comparable provision of law enacted on an annual basis in the Department of Defense Appropriations Acts for fiscal years 1984 through 1995.

(5) Any memorandum of agreement between the Department of Defense and the Office of Personnel Management providing for the hiring of military technicians.

(c) Permanent limitations on number.--(1) The total number of non-dual status technicians employed by the Army Reserve may not exceed 595 and by the Air Force Reserve may not exceed 90. If at any time the number of non-dual status technicians employed by the Army Reserve and Air Force Reserve exceeds the number specified in the limitation in the preceding sentence, the Secretary of Defense shall require that the Secretary of the Army or the Secretary of the Air Force, or both, take immediate steps to reduce the number of such technicians in order to comply with such limitation.

(2) The total number of non-dual status technicians employed by the National Guard may not exceed

1,950. If at any time the number of non-dual status technicians employed by the National Guard exceeds the number specified in the limitation in the preceding sentence, the Secretary of Defense shall require that the Secretary of the Army or the Secretary of the Air Force, or both, take immediate steps to reduce the number of such technicians in order to comply with such limitation.

(3) An individual employed as a non-dual status technician as described in subsection (a)(3) shall not be considered a non-dual status technician for purposes of paragraphs (1) and (2).

(d) Exception for temporary employment.--(1) Notwithstanding section 10218 of this title, the Secretary of the Army or the Secretary of the Air Force may employ, for a period not to exceed two years, a person to fill a vacancy created by the mobilization of a military technician (dual status) occupying a position under section 10216 of this title.

(2) The duration of the temporary employment of a person in a military technician position under this subsection may not exceed the shorter of the following:

(A) The period of mobilization of the military technician (dual status) whose vacancy is being filled by the temporary employee.

(B) Two years.

(3) No person may be hired under the authority of this subsection after January 6, 2013.

(e) Conversion of positions.--(1) No individual may be newly hired or employed, or rehired or reemployed, as a non-dual status technician for purposes of this section after September 30, 2017.

(2) By not later than October 1, 2017, the Secretary of Defense shall convert all non-dual status technicians to positions filled by individuals who are employed under section 3101 of title 5 or section 1601 of this title and are not military technicians.

(3) In the case of a position converted under paragraph (2) for which there is an incumbent employee on October 1, 2017, the Secretary shall fill that position, as converted, with the incumbent employee without regard to any requirement concerning competition or competitive hiring procedures.

(4) Any individual newly hired or employed, or rehired or employed, to a position required to be filled by reason of paragraph (1) shall be an individual employed in such position under section 3101 of title 5 or section 1601 of this title.

3. **32 U.S.C. § 709 provides:**

Technicians: employment, use, status

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in--

(1) the organizing, administering, instructing, or training of the National Guard;

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces; and

(3) the performance of the following additional duties to the extent that the performance of those duties does not interfere with the performance of the duties described by paragraphs (1) and (2):

(A) Support of operations or missions undertaken by the technician's unit at the request of the President or the Secretary of Defense.

(B) Support of Federal training operations or Federal training missions assigned in whole or in part to the technician's unit.

(C) Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of--

(i) active-duty members of the armed forces;

(ii) members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);

(iii) Department of Defense contractor personnel; or

(iv) Department of Defense civilian employees.

(b) Except as authorized in subsection (c), a person employed under subsection (a) must meet each of the following requirements:

(1) Be a military technician (dual status) as defined in section 10216(a) of title 10.

(2) Be a member of the National Guard.

(3) Hold the military grade specified by the Secretary concerned for that position.

(4) While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

(c)(1) A person may be employed under subsection (a) as a non-dual status technician (as defined by section 10217 of title 10) if the technician position occupied by the person has been designated by the Secretary concerned to be filled only by a non-dual status technician.

(2) The total number of non-dual status technicians in the National Guard is specified in section 10217(c)(2) of title 10.

(d) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title to employ and administer the technicians authorized by this section.

(e) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

(f) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned--

(1) a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who--

(A) is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician

(dual status) employment by the adjutant general of the jurisdiction concerned; and

(B) fails to meet the military security standards established by the Secretary concerned for a member of a reserve component under his jurisdiction may be separated from employment as a military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(2) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(3) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(4) a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned when the appeal concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components;

(5) with respect to an appeal concerning any activity not covered by paragraph (4), the provisions of sections 7511, 7512, and 7513 of title 5, and section 717 of the Civil Rights Act of 1991 (42 U.S.C. 2000e-16) shall apply; and

(6) a technician shall be notified in writing of the termination of his employment as a technician

and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.

(g)(1) Except as provided in subsection (f), sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

(2) In addition to the sections referred to in paragraph (1), section 6323(a)(1) of title 5 also does not apply to a person employed under this section who is performing active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10).

(h) Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(i) The Secretary concerned may not prescribe for purposes of eligibility for Federal recognition under section 301 of this title a qualification applicable to technicians employed under subsection (a) that is not applicable pursuant to that section to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved.

(j) In this section:

(1) The term "military pay status" means a period of service where the amount of pay payable to a technician for that service is based on rates of military pay provided for under title 37.

(2) The term "fitness for duty in the reserve components" refers only to military-unique service requirements that attend to military service generally, including service in the reserve components or service on active duty.

4. **42 U.S.C. § 415 provides in pertinent part:**

Computation of primary insurance amount

(a) Primary insurance amount

* * * * *

(7)(A) In the case of an individual whose primary insurance amount would be computed under paragraph (1) of this subsection, who--

(i) attains age 62 after 1985 (except where he or she became entitled to a disability insurance benefit before 1986 and remained so entitled in any of the 12 months immediately preceding his or her attainment of age 62), or

(ii) would attain age 62 after 1985 and becomes eligible for a disability insurance benefit after 1985,

and who first becomes eligible after 1985 for a monthly periodic payment (including a payment determined under subparagraph (C), but excluding (I) a payment under the Railroad Retirement Act of 1974 or 1937, (II) a payment by a social security system of a foreign country based on an agreement concluded between the United

States and such foreign country pursuant to section 433 of this title, and (III) a payment based wholly on service as a member of a uniformed service (as defined in section 410(m) of this title)) which is based in whole or in part upon his or her earnings for service which did not constitute "employment" as defined in section 410 of this title for purposes of this subchapter (hereafter in this paragraph and in subsection (d)(3) referred to as "noncovered service"), the primary insurance amount of that individual during his or her concurrent entitlement to such monthly periodic payment and to old-age or disability insurance benefits shall be computed or recomputed under subparagraph (B).

(B)(i) If paragraph (1) of this subsection would apply to such an individual (except for subparagraph (A) of this paragraph), there shall first be computed an amount equal to the individual's primary insurance amount under paragraph (1) of this subsection, except that for purposes of such computation the percentage of the individual's average indexed monthly earnings established by subparagraph (A)(i) of paragraph (1) shall be the percent specified in clause (ii). There shall then be computed (without regard to this paragraph) a second amount, which shall be equal to the individual's primary insurance amount under paragraph (1) of this subsection, except that such second amount shall be reduced by an amount equal to one-half of the portion of the monthly periodic payment which is attributable to noncovered service performed after 1956 (with such attribution being based on the proportionate number of years of such

noncovered service) and to which the individual is entitled (or is deemed to be entitled) for the initial month of his or her concurrent entitlement to such monthly periodic payment and old-age or disability insurance benefits. The individual's primary insurance amount shall be the larger of the two amounts computed under this subparagraph (before the application of subsection (i)) and shall be deemed to be computed under paragraph (1) of this subsection for the purpose of applying other provisions of this subchapter.

(ii) For purposes of clause (i), the percent specified in this clause is--

(I) 80.0 percent with respect to individuals who become eligible (as defined in paragraph (3)(B)) for old-age insurance benefits (or became eligible as so defined for disability insurance benefits before attaining age 62) in 1986;

(II) 70.0 percent with respect to individuals who so become eligible in 1987;

(III) 60.0 percent with respect to individuals who so become eligible in 1988;

(IV) 50.0 percent with respect to individuals who so become eligible in 1989; and

(V) 40.0 percent with respect to individuals who so become eligible in 1990 or thereafter.

* * * * *