APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRYAN ADAMS,
Petitioner

v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent

2020-1649

Petition for review of the Merit Systems Protection Board in No. DE-4324-19-0288-I-1.

Decided: July 2, 2021

BRIAN J. LAWLER, Pilot Law, P.C., San Diego, CA, for petitioner.

MARGARET JANTZEN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by CLAUDIA BURKE, JEFFREY B. CLARK, ROBERT EDWARD KIRSCHMAN, JR.

Before MOORE, *Chief Judge*[*], REYNA and HUGHES, *Circuit Judges*.

HUGHES, *Circuit Judge*.

Bryan Adams appeals a final decision of the Merit Systems Protection Board denying his request for differential pay for three separate periods of military service during which he performed duties in the Arizona Air National Guard. Because none of Mr. Adams's service meets the statutory requirements for differential pay, we affirm.

I

Mr. Adams worked as a human resources specialist with U.S. Customs and Border Patrol (the agency) and was also a member of the Arizona Air National Guard. From April to September 2018, Mr. Adams performed three periods of military service with the National Guard. Between April 11 and July 13, Mr. Adams was activated under 10 U.S.C. § 12301(d) to support a military personnel appropriation (MPA) tour in support of Twelfth Air Force. J.A. 199. Between July 18 and July 30, Mr. Adams was ordered to attend annual training under 32 U.S.C. § 502(a) at Davis-Monthan Air Force Base. J.A. 196. And between July 28 and September 30, Mr. Adams was again activated under § 12301(d) to support an MPA tour in support of legal assistance. J.A. 203. Both of Mr. Adams's § 12301(d) orders state that they are "non-contingency" activation orders. J.A. 199, 203.

Under 5 U.S.C. § 5538(a), federal employees who are absent from civilian positions due to certain military responsibilities may qualify to receive the difference between their military pay and what they would have been

[*] Chief Judge Kimberly A. Moore assumed the position of Chief Judge on May 22, 2021.

paid in their civilian employment during the time of their absence.

This entitlement is referred to as "differential pay." Here, Mr. Adams requested differential pay from the agency for each of his three periods of service. The agency denied his request because it determined that Mr. Adams's military service did not qualify for differential pay under the statute.

Mr. Adams appealed to the Merit Systems Protection Board (Board) alleging that the decision to deny differential pay violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (codified as amended at 38 U.S.C. §§ 4301–4335). An Administrative Judge issued an initial decision that the agency did not violate USERRA because Mr. Adams provided no evidence that his military service was a motivating factor in the denial of differential pay. *Adams v. Dep't of Homeland Sec.*, No. DE-4324-19-0288-I-1, 2020 WL 698369 (M.S.P.B. Feb. 4, 2020). Because Mr. Adams did not file a petition for review with the Board, this initial decision became final without further review.

Mr. Adams now appeals.

II

We affirm a Board decision unless it was "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c); *Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1311 (Fed. Cir. 2003). "We review the [Board]'s legal determinations, including its interpretation of a statute, de novo." *O'Farrell v. Dep't of Def.*, 882 F.3d 1080, 1083 (Fed. Cir. 2018).

Generally, an employee making a USERRA claim under 38 U.S.C. § 4311 must show that (1) they were denied a benefit of employment, and (2) the employee's military service was "a substantial or motivating factor" in the denial of such a benefit. *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001) (citation omitted). However, when the benefit in question is only available to members of the military, claimants do not need to show that their military service was a substantial or motivating factor. *See Butterbaugh v. Dep't of Just.*, 336 F.3d 1332, 1336 (Fed. Cir. 2003) ("[W]e agree with the Board that, in contrast to cases such as *Sheehan* . . . the question in this case is not whether Petitioners' military status was a substantial or motivating factor in the agency's action, for agencies only grant military leave to employees who are also military reservists."); *see also Maiers v. Dep't of Health & Hum. Servs.*, 524 F. App'x 618, 623 (Fed. Cir. 2013) ("In *Butterbaugh*, we determined that claimants need not show that their military service was a substantial motivating factor when the benefits at issue were only available to those in military service.").

Because differential pay is only available to members of the military, we agree with Mr. Adams that the Board erred in its legal analysis by requiring that he show that his military service was a motivating factor in the agency's decision to deny differential pay. In order to establish a USERRA violation, Mr. Adams was only required to show that he was denied a benefit of employment. We therefore consider whether Mr. Adams was entitled to differential pay as a benefit of employment under the statutory provisions.

III

5 U.S.C. § 5538(a) states:

> An employee who is absent from a position of employment with the Federal Government in

> order to perform active duty in the uniformed services pursuant to a call or order to active duty under . . . a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled [to differential pay].

The provisions of law listed in 10 U.S.C. § 101(a)(13)(B) define what qualifies as a "contingency operation." Thus, for Mr. Adams to be entitled to differential pay, he must have served pursuant to a call to active duty that meets the statutory definition of contingency operation. We conclude that none of Mr. Adams's service qualifies as an active duty contingency operation.

A

We first consider Mr. Adams's title 32 orders to perform annual training and conclude that Mr. Adams is not entitled to differential pay for this period of service because training does not qualify as "active duty" as required by 5 U.S.C. § 5538(a). Active duty is defined as "full-time duty in the active military service of the United States . . . [but] [s]uch term does not include full-time National Guard duty." 10 U.S.C. § 101(d)(1). As relevant here, full-time National Guard duty is defined as:

> [T]raining or other duty, other than inactive duty, performed by a member of the . . . Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory . . . under section . . . 502 . . . of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

Id. § 101(d)(5).

Mr. Adams was ordered to annual training under 32 U.S.C. § 502(a). Since training under § 502 of title 32 is explicitly included in the definition of full-time National

Guard duty, and since full-time National Guard duty is explicitly excluded from the definition of active duty, Mr. Adams was not called to active duty during the period of service that he spent in training. Because only members of the military who are called to active duty are entitled to differential pay under 5 U.S.C. § 5538(a), Mr. Adams is not entitled to differential pay for his time spent in annual training.

B

We next consider Mr. Adams's title 10 activation orders to support MPA tours and conclude that Mr. Adams is not entitled to differential pay for these periods of service because his service did not qualify as a "contingency operation" as required by 5 U.S.C. § 5538(a). As relevant to this case, 10 U.S.C. § 101(a)(13)(B) defines the term "contingency operation" as:

> [A] military operation that . . . results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 13 of this title, section [3713] of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.

Mr. Adams was not called to duty under any enumerated section in the definition of contingency operation, and his orders expressly stated that they were "non-contingency" activation orders. Nevertheless, Mr. Adams argues that he was serving in a contingency operation because the statutory definition includes members of the military called to service under "any other provision of law" during a declared national emergency. Mr. Adams argues that he was called to duty under a provision of law, 10 U.S.C. § 12301(d), and that the United States has been in a continuous state of national

emergency since September 11, 2001. *See* 84 Fed. Reg. 48,545 (declaration of the President continuing the national emergency for the year 2019– 2020). Thus, Mr. Adams argues that every military reservist ordered to duty is performing a contingency operation so long as the national emergency continues.

We have previously rejected such an expansive reading of the definition of contingency operation. *See O'Farrell*, 882 F.3d at 1086 n.5 (explaining that not all reservists called to active duty during a national emergency are acting in support of a contingency operation). In *O'Farrell*, we considered 5 U.S.C. § 6323(b), which entitled military reservists to military leave benefits if they were called to active duty "in support of a contingency operation." There, we found that the Petitioner's activation orders under 10 U.S.C. § 12301(d) qualified for benefits because the Petitioner was called to active duty to replace a member of the Navy who had been deployed to Afghanistan, and we therefore reasoned that Petitioner was indirectly supporting the contingency operation in Afghanistan. *Id.* at 1087–88. We find no inconsistency between *O'Farrell* and the agency's decision to deny differential pay to Mr. Adams. The requirements to qualify for differential pay under § 5538(a) are stricter than those for entitlement to benefits under § 6323(b), because § 5538(a) does not entitle a claimant to benefits when they are activated "in support" of a contingency operation, only when they are directly called to serve in a contingency operation.[1] Moreover, unlike the Petitioner in *O'Farrell*, Mr. Adams

[1] Illustrative of the difference in the stringency of the statutes, here the agency awarded emergency military leave to Mr. Adams under § 6323(b)(2)(B), even while denying differential pay under § 5538(a). J.A. 342.

has not alleged any similar connection between his service and the declared national emergency.

In determining the meaning of the statutory phrase "any other provision of law," we consider the context of the enumerated provisions that qualify as a contingency operation under the statutory definition and find that all of the identified statutes involve a connection to the declared national emergency. *See* 10 U.S.C. § 688(c) (authorizing the activation of retired military personnel to perform duties that "the Secretary considers necessary in the interests of national defense"); § 12301(a) (authorizing activation of reservists "[i]n time of war or of national emergency"); § 12302 (authorizing activation in the Ready Reserve "[i]n time of national emergency"); § 12304 (authorizing activation of reservists "when the President determines that it is necessary to augment the active forces"); § 12305 (authorizing the suspension of laws relating to promotion, retirement, or separation for a member of the military that "the President determines is essential to the national security of the United States"); § 12406 (authorizing activation of service members when the United States "is invaded or is in danger of invasion by a foreign nation"); Chapter 13 (categorizing provisions including authorization to call state militia into federal service during time of insurrection "to suppress the rebellion"); 14 U.S.C. § 3713 (authorizing activation "to aid in prevention of imminent, serious natural or manmade disaster, accident, catastrophe, act of terrorism, or transportation security incident"). By contrast, § 12301(d) authorizes the activation of reservists "at any time . . . with the consent of that member." Under the principle of ejusdem generis, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Cir. City Stores, Inc. v. Adams*,

532 U.S. 105, 114 (2001) (alteration in original) (quoting 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991)). We find it implausible that Congress intended for the phrase "any other provision of law during a war or national emergency," to necessarily include § 12301(d) voluntary duty that was unconnected to the emergency at hand.

Our reading of § 5538(a) is consistent with the policy guidance from the Office of Personnel Management (OPM) on the matter. OPM guidance instructs that "qualifying active duty does not include voluntary active duty under 10 U.S.C. 12301(d)." *See OPM Policy Guidance Regarding Reservist Differential Under 5 U.S.C. § 5538 at 18* (available at https://www.opm.gov/policy-data-oversight/payleave/pay-administration /reservist -differential/ policy guidance. pdf). The guidance also explains that "[t]he term 'contingency operation' means a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force." *Id.* at 22. Mr. Adams does not allege that he was ordered to perform such service.

We conclude that Mr. Adams's service supporting MPA tours under § 12301(d) was not a contingency operation. Therefore, Mr. Adams is not entitled to differential pay for these periods of service.

IV

Because none of Mr. Adams's service qualifies as an active duty contingency operation, as required by 5 U.S.C. § 5538(a), the agency properly denied differential pay. We affirm the decision of the Board.

AFFIRMED

No costs.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

BRYAN ADAMS, Appellant,	DOCKET NUMBER DE-4324-19-0288-I-1
v.	
DEPARTMENT OF HOMELAND SECURITY, Agency.	DATE: February 4, 2020

Brian J. Lawler, Esquire, San Diego, California, for the appellant.

Dean L. Lynch, Esquire, Tucson, Arizona, for the agency.

Samantha Kooiker, Washington, D.C. for the agency.

BEFORE

Evan J. Roth
Administrative Judge

INITIAL DECISION

On May 30, 2019, Bryan Adams ("the appellant") filed an initial appeal in which he alleged he was denied differential pay contrary to the Uniformed Services Employment and Reemployment Rights Act of 1994 (codified as amended at 38 U.S.C. §§ 4301-4335) ("USERRA") (Initial Appeal File ("IAF"), Tab 1). On

June 29, 2019, I granted the appellant's motion to amend his claim to include an allegation the agency also violated USERRA by requiring him to "buy back" time for military service periods when he was in a Leave Without Pay ("LWOP") status (IAF, Tab 11). On August 5, 2019, the appellant waived a hearing in favor a decision based on written submissions (IAF, Tab 21). On September 13, 2019, the record closed (IAF, Tab 21). For the reasons below, I DENY corrective action.

The appellant failed to carry his burden of proof

In a USERRA discrimination appeal, the appellant bears the burden to establish by preponderant evidence that his military service was a motivating factor in the challenged actions. *DeJohn v. Department of the Army*, 106 M.S.P.R. 574, ¶ 6 (2007), aff'd, 298 F. App'x 991 (Fed. Cir. 2008). Preponderant evidence is the "degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.4.

Here, I find the appellant failed to carry that burden. Indeed, I find the appellant failed to provide any credible supporting or rebuttal evidence.

Specifically, on May 30, 2019, the appellant filed his initial appeal in the form of a complaint (IAF, Tab 1). The complaint was signed by the appellant's attorney, but the appellant did not swear to the allegations (IAF, Tab 1). The same is true of the amended complaint (IAF, Tab 10).

On August 5, 2019, I set the merits briefing schedule (IAF, Tab 21). Among other things, I explained that "[f]actual assertions need to be supported by sworn affidavits or declarations" (IAF, Tab 21). I specifically provided the parties with the 28 U.S.C. § 1746 declaration format (IAF, Tab 21, n.2). I also explained that a declaration made under penalty of perjury is entitled to

considerable weight unless it is rebutted" (IAF, Tab 21, n.3).

On September 5, 2019, the appellant filed his opening brief, but he did not support his factual assertions with any affidavits or declarations (IAF, Tab 24). In contrast, the agency's opening brief was supported by the declaration of Michelle Griffith, Supervisory Accountant in the agency's Payroll Branch (IAF, Tab 25, pages 13-16 of 60). I credit the Griffith declaration because it was plausible, detailed, consistent with the record, under penalty of perjury, and based on first-hand knowledge. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). On September 13, 2019, the appellant filed his response brief, but again there were no affidavits or declarations (IAF, Tab 26).[1] Accordingly, the agency's Griffith declaration was unrebutted and entitled to considerable weight. *Vercelli v. U.S. Postal Service*, 70 M.S.P.R. 322, 327 (1996). The agency's reply brief essentially rested on its prior assertions, together with a correction regarding agency retirement credit (IAF, Tab 27, pages 4-5 of 12).

In sum, as a factual matter, I find the appellant failed to carry his burden of proof because he failed to provide credible affirmative or rebuttal evidence. In contrast, I find the agency's Griffith declaration was unrebutted and entitled to considerable weight.

"[A]n essential element of a [USERRA] discrimination claim is that the contested agency decision was based on an improper motivation." *Clavin v. U.S.*

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[1] Instead of providing affidavits for declarations, the appellant made an evidentiary objection to the agency's "Venn Diagram," which showed the overlapping relationship among various statutes (IAF, Tab 26). I DENY the appellant's objection, and I accept the agency's Venn Diagram as demonstrative evidence, which I found helpful to explain the somewhat complicated statutory structure.

Postal Service, 99 M.S.P.R. 619, 623 (2005); *Swidecki v. Department of Commerce*, 113 M.S.P.R. 168, 173 (2010) ("the appellant must prove by preponderant evidence that his military status was at least a motivating or substantial factor in the agency's decision to deny him employment"). Discriminatory motivation or intent may be proven by direct or circumstantial evidence. *McMillan v. Department of Justice*, 812 F.3d 1364, 1372 (2016) (citing *Sheehan v. Department of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001)). Military service is a motivating factor if the employer "relied on, took into account, considered, or conditioned its decision" on it. *McMillan*, 812 F.3d at 1372 (quoting *Erickson v. U.S. Postal Service*, 571 F.3d 1364, 1368 (Fed. Cir. 2009)). Because employers rarely concede an improper motivation, employees may satisfy their burden with evidence that such a motive may be fairly inferred. *McMillan*, 812 F.3d at 1372. The analysis is guided by the following four nonexclusive factors: (1) proximity in time between the employee's military activity and the adverse employment action; (2) inconsistencies between the proffered reason and other actions of the employer; (3) an employer's expressed hostility towards members protected by the statute together with knowledge of the employee's military activity; and (4) disparate treatment of certain employees compared to other employees with similar work records or offenses. *McMillan*, 812 F.3d at 1372 (citing *Sheehan*, 240 F.3d at 1014).

Here, the first factor (proximity in time) is fairly clear from the underlying documents, but the appellant failed to provide credible evidence regarding any of the other factors. In contrast, the agency provided credible evidence that it did not discriminate, which the appellant failed to rebut. Accordingly, I find the appellant failed to carry his USERRA burden of proof because he failed to

provide evidence (let alone credible evidence) of an improper motivation.

The agency proved it did not discriminate

With respect to discrimination claims, USERRA provides, in pertinent part, that a person who has performed (or has an obligation to perform) service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of performance of that service or obligation. 38 U.S.C. § 4311(a). In this case, there is no dispute the appellant is a member of the Arizona Air National Guard (IAF, Tab 1). The issue was whether the agency discriminated on account of the appellant's uniformed service.

The appellant raises two forms of alleged discrimination. In both cases, I find the agency proved it did not discriminate. I address each in turn below.

First, the appellant contends it was discrimination to deny him "differential pay," which was a benefit of employment (IAF, Tabs 1, 10). The appellant sought differential pay for three periods of time: (1) April 11, 2018 to July 13, 2018, when the appellant was mobilized on 10 U.S.C. § 12301(d) orders; (2) July 16, 2018 to July 30, 2018, when the appellant was performing Annual Training pursuant to 32 U.S.C. § 502(a) orders; and (3) July 28, 2018 to September 30, 2018 when the appellant was again mobilized on 10 U.S.C. § 12301(d) orders (Griffith Declaration ¶ 4). However, for each of those periods of time, the agency proved it had legitimate non-discriminatory reasons to deny differential pay.

In order to qualify for differential pay, the appellant was required to be on "active duty" for certain specified operations, generally known as "contingency operations" (Griffith Declaration ¶¶ 3, 6, 7, 10, 11). However, for the time periods at issue, the appellant did not qualify.

Specifically, for the first and third time periods, the appellant was mobilized pursuant to 10 U.S.C. § 12301(d) orders, which did not qualify (Griffith Declaration ¶ 4), as confirmed by Office of Personnel Management ("OPM") guidance (Griffith Declaration ¶ 6). In addition, for the second time period, the appellant was performing Annual Training, pursuant to 32 U.S.C. § 502(a) orders, which likewise did not qualify (Griffith Declaration ¶ 11), as further confirmed by OPM (Griffith Declaration ¶ 12). I find those were legitimate non-discriminatory reasons for the agency to deny the appellant's differential pay request. Accordingly, I DENY USERRA corrective action regarding the appellant's first claim.

Second, the appellant contends it was discrimination to require him to "buy back" retirement credit for his activated military service between April and September 2018. For that issue, I find the agency proved it did not discriminate (Griffith Declaration ¶ 13). In accordance with OPM guidance, the appellant was treated the same as other Federal Employee Retirement System ("FERS") employees who are required to make a deposit in order to "buy back" credit (Griffith Declaration ¶ 15). When an employee is in a Leave Without Pay ("LWOP") status while in National Guard/Reserve service, the employee has the option to "buy back" credit (Griffith Declaration ¶ 15). In contrast, when an employee is in a paid leave status, retirement credit automatically accrues (Griffith Declaration ¶ 16). I find the agency's decision to require the appellant to "buy back" retirement credit was based on legitimate and non-discriminatory reasons that applied equally to other FERS employees. Accordingly, I DENY USERRA corrective action regarding the appellant's second claim.

Conclusion

For the foregoing reasons, I find the appellant failed to carry his burden of proving USERRA discrimination. I also find the agency proved the absence of USERRA discrimination. Accordingly, I DENY USERRA corrective action.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD: /S/
Evan J. Roth
Administrative Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRYAN ADAMS,
Petitioner

v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent

2020-1649

Petition for review of the Merit Systems Protection Board in No. DE-4324-19-0288-I-1.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, O'MALLEY, REYNA, TARANTO, CHEN, HUGHES, STOLL, AND CUNNINGHAM, *Circuit Judges*.

PER CURIAM.

ORDER

Bryan Adams filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by The Department of Homeland Security. Reserve Organization of America requested leave to file a brief as amicus curiae, which the court granted. The petition was referred to the

panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on January 5, 2022.

FOR THE COURT

December 29, 2021
Date

/s/ Peter R. Marksteiner
Peter Marksteiner
Clerk of Court

APPENDIX D

5 U.S.C. § 5538 - Nonreduction in pay while serving in the uniformed services or National Guard

(a) An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under section 12304b of title 10 or a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which—

(1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)

(2) the amount of pay and allowances which (as determined under subsection (d))—

(A) is payable to such employee for that service;

and

(B) is allocable to such pay period.

(b) Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee's civilian employment had not been interrupted)—

(1) during which such employee is entitled to re-employment rights under chapter 43 of title 38 with respect to the position from which such employee is absent (as referred to in subsection (a)); and

(2) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee

is entitled by virtue of such employee's civilian employment with the Government.

(c) Any amount payable under this section to an employee shall be paid—

(1) by such employee's employing agency;

(2) from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and

(3) to the extent practicable, at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted.

(d) The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section.

(e)(1) The head of each agency referred to in section 2302(a)(2)(C)(ii) shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.

(2) The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.

(f) For purposes of this section—

(1) the terms "employee", "Federal Government", and "uniformed services" have the same respective meanings as given those terms in section 4303 of title 38;

(2) the term "employing agency", as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency referred to in section 2302(a)(2)(C)(ii)) with respect to which such

employee has reemployment rights under chapter 43 of title 38; and

(3) the term "basic pay" includes any amount payable under section 5304.

APPENDIX E

5 U.S.C. § 6323 - Military leave; Reserves and National Guardsmen

* * * *

(b) Except as provided by section 5519 of this title, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who—

(1) is a member of a Reserve component of the Armed Forces, as described in section 10101 of title 10, or the National Guard, as described in section 101 of title 32; and

(2)(A) performs, for the purpose of providing military aid to enforce the law or for the purpose of providing assistance to civil authorities in the protection or saving of life or property or the prevention of injury—

(i) Federal service under section 331, 332, 333, or 12406 of title 10, or other provision of law, as applicable, or

(ii) full-time military service for his State, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States; or

(B) performs full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10;

is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating. Leave granted by this subsection shall not exceed 22 workdays in a calendar year. Upon the request of an employee, the period for

which an employee is absent to perform service described in paragraph (2) may be charged to the employee's accrued annual leave or to compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave.

APPENDIX F

10 U.S.C. § 101 - Definitions

(a) IN GENERAL.—The following definitions apply in this title:

* * * *

(13) The term "contingency operation" means a military operation that—

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 13 of this title, section 3713 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.

APPENDIX G

10 U.S.C. § 12301 - Reserve components generally

* * * *

(d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State concerned.

APPENDIX H

10 U.S.C. § 12304 - Selected Reserve and certain Individual Ready Reserve members; order to active duty other than during war or national emergency

(a) AUTHORITY.—Notwithstanding the provisions of section 12302(a) or any other provision of law, when the President determines that it is necessary to augment the active forces for any named operational mission or that it is necessary to provide assistance referred to in subsection (b), he may authorize the Secretary of Defense and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, without the consent of the members concerned, to order any unit, and any member not assigned to a unit organized to serve as a unit of the Selected Reserve (as defined in section 10143(a) of this title), or any member in the Individual Ready Reserve mobilization category and designated as essential under regulations prescribed by the Secretary concerned, under their respective jurisdictions, to active duty for not more than 365 consecutive days.

(b) SUPPORT FOR RESPONSES TO CERTAIN EMERGENCIES.— The authority under subsection (a) includes authority to order a unit or member to active duty to provide assistance in responding to an emergency involving—

(1) a use or threatened use of a weapon of mass destruction; or

(2) a terrorist attack or threatened terrorist attack in the United States that results, or could result, in significant loss of life or property.

(c) LIMITATIONS.—(1) No unit or member of a reserve component may be ordered to active duty under this section to perform any of the functions authorized by chapter 13 or section 12406 of this title or, except as

provided in subsection (b), to provide assistance to either the Federal Government or a State in time of a serious natural or manmade disaster, accident, or catastrophe.

(2) Not more than 200,000 members of the Selected Reserve and the Individual Ready Reserve may be on active duty under this section at any one time, of whom not more than 30,000 may be members of the Individual Ready Reserve.

(3) No unit or member of a reserve component may be ordered to active duty under this section to provide assistance referred to in subsection (b) unless the President determines that the requirements for responding to an emergency referred to in that subsection have exceeded, or will exceed, the response capabilities of local, State, and Federal civilian agencies.

(d) EXCLUSION FROM STRENGTH LIMITATIONS.— Members ordered to active duty under this section shall not be counted in computing authorized strength in members on active duty or members in grade under this title or any other law.

(e) POLICIES AND PROCEDURES.— The Secretary of Defense and the Secretary of Homeland Security shall prescribe such policies and procedures for the armed forces under their respective jurisdictions as they consider necessary to carry out this section.

(f) NOTIFICATION OF CONGRESS.— Whenever the President authorizes the Secretary of Defense or the Secretary of Homeland Security to order any unit or member of the Selected Reserve or Individual Ready Reserve to active duty, under the authority of subsection (a), he shall, within 24 hours after exercising such authority, submit to Congress a report, in writing, setting forth the circumstances necessitating the action taken under this section and describing the anticipated use of these units or members.

(g) TERMINATION OF DUTY.— Whenever any unit of the Selected Reserve or any member of the Selected Reserve not assigned to a unit organized to serve as a unit, or any member of the Individual Ready Reserve, is ordered to active duty under authority of subsection (a), the service of all units or members so ordered to active duty may be terminated by—

(1) order of the President, or

(2) law.

(h) RELATIONSHIP TO WAR POWERS RESOLUTION.— Nothing contained in this section shall be construed as amending or limiting the application of the provisions of the War Powers Resolution (50 U.S.C. 1541 et seq.).

(i) CONSIDERATIONS FOR INVOLUNTARY ORDER TO ACTIVE DUTY.—(1) In determining which members of the Selected Reserve and Individual Ready Reserve will be ordered to duty without their consent under this section, appropriate consideration shall be given to—

(A) the length and nature of previous service, to assure such sharing of exposure to hazards as the national security and military requirements will reasonably allow;

(B) the frequency of assignments during service career;

(C) family responsibilities; and

(D) employment necessary to maintain the national health, safety, or interest.

(2) The Secretary of Defense shall prescribe such policies and procedures as the Secretary considers necessary to carry out this subsection.

(j) DEFINITIONS.— In this section:

(1) The term "Individual Ready Reserve mobilization category" means, in the case of any reserve component, the category of the Individual

Ready Reserve described in section 10144(b) of this title.

(2) The term "weapon of mass destruction" has the meaning given that term in section 1403 of the Defense Against Weapons of Mass Destruction Act of 1996 (50 U.S.C. 2302(1))