No._____

In the Supreme Court of the United States

MICHAEL G. FARIS,
Petitioner

v.

UNITED STATES AIR FORCE,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTORARI

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I. Questions Presented

1. Are federal employees considered a "person" for the purposes of USERRA and thereby entitled to the Rights and Benefits guaranteed to "any person" by Chapter 43 of Title 38 U.S. Code.
2. What are the characteristics of a leave of absence that may be considered in determining "comparability" between a leave of absence for service to the uniformed services and other leaves of absence, particularly for determination of benefits (and employee costs of benefits) that should be provided?
3. Did Congress mean what they said, through plain language, in 38 U.S.C. § 4318(a)(1), that a right provided under any Federal law governing pension benefits for governmental employees shall be determined by that section (unless precluded by 38 U.S.C. § 4302(a) because the other law provides greater rights or benefits)?
4. Are all periods of uniformed service while in a status included in the definition of "service to the uniformed services" at 38 U.S.C. § 4303(13) eligible for the pension rights and benefits under USERRA?
5. Should a Court of Appeals be authorized to reframe a contention in the public opinion in a manner that conceals the actual complaint and the law on which a contention is based?
6. Where does the burden of proof lie in a USERRA case brought forward against a federal government agency under 38 U.S.C. § 4312-4318?

II. Parties and Related Cases

All parties are listed in the caption of the case. There are no known proceedings in another state or federal court directly related to this case.

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V. Opinions Below

The decision by the Administrative Judge (AJ) from the Merit System Protection Board (MSPB) denying relief on February 1, 2022 is cited as "Faris v. Air Force (MSPB, 1 Feb 2022)". That decision is attached at Appendix ("App.") 1-20. The Court of Appeals for the Federal Circuit (CAFC) decision denying the appeal on the merits is cited as "Faris v. Air Force (CAFC, 22 Sep 2022)". The CAFC decision is attached at App. 21-29. The CAFC denial of a combined petition for rehearing and rehearing en banc is cited as "Faris CAFC Rehearing Denial (9 Nov 2022)". The denial of rehearing is attached at App. 30-31.

VI. Jurisdiction

The CAFC's decision for my appeal in Faris v. Air Force (CAFC, 22 Sep 2022) was entered on September 22, 2022 (App. 21). I timely requested a combined petition for rehearing and rehearing en banc, which was denied on both accounts on November 9, 2022 (App. 31). The Supreme Court of the United States has jurisdiction under 28 U.S.C. § 1254(1). In accordance with Rule 13.3 of the *Rules of the Supreme Court of the United States,* effective January 1, 2023 ("S. Ct. Rules") this petition for a writ of certiorari is timely filed, within 90 days, from the date of the denial of rehearing from CAFC.

VII. Statutory and Regulatory Provisions Involved

In accordance with S. Ct. Rule 14(f), only a list of references is provided in this certiorari due to the length of the citations. Full citations are attached at App. 32-40. All references are included in the table of authorities.

VIII. Statement of the Case

A. Issues of Concern

(1) The Air Force withholds pension credit (also referred to as "service credit") under the Federal Employee Retirement System (FERS) from civilian employees who were carried in a leave of absence without pay status for performance of uniformed service unless a "military service deposit" is paid, regardless of the duration of the period of uniformed service. (The leave of absence status may be referred to as "Absent-US" or "LWOP-US"). Meanwhile, employees carried in comparable leaves of absence without pay for reasons other than uniformed service receive service credit for up to 6 months aggregate in any calendar year and do not have to pay a service deposit for receipt of that pension credit[1]. Specifically, the Air Force required me to pay a "service deposit" in the amount of approximately $1,027 to receive pension credit for 14 distinct periods of uniformed service which ranged from 4 days to approximately 4 months in duration, intermittently during the timeframe of April 24, 2016 through March 12, 2020 (App. 94-97)[2].

(2) The Air Force disallows civilian pension credit for multiple types of uniformed service included in the definition of "service to the uniformed

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[1] The factuality of this statement was confirmed by the Air Force, the AJ from the MSPB, and by the CAFC (App. 6, n.3; 26)

[2] On the Defense Finance and Account Service (DFAS) Military Deposit Information sheets, interest accrual dates ("IAD") are 3 years from the date of return to civilian employment from the period of uniformed service; thus to determine the corresponding return date to civilian service, subtract 3 years from the IAD (App. 94-97).

services" at 38 U.S.C. § 4303(13), even for those periods of service that occur while employed with the Air Force. The Air Force does not even allow employees the opportunity to make a service deposit for these periods of service[3]. Specifically, the Air Force disallowed me from obtaining service credit for a period of "inactive duty training" that occurred during a period of leave of absence without pay for April 4-7, 2017 (and the Air Force does not have a process in place to allow me to apply for said service credit even with intentions of making a deposit).

B. Employment and Uniformed Service Background

I initially began federal civilian employment on November 19, 2012, as a Plumber (WG-9) with the U. S. Air Force, at Elmendorf Air Force Base (AFB), Alaska. This was after I was released from honorably serving four years of enlisted Active Duty with the Regular Air Force from September 16, 2008 through September 15, 2012, as a Water and Fuel System Maintainer. I also went directly into the Air Force Reserve upon my release from Active Duty and maintained the same specialty, serving in a Reserve unit at Elmendorf AFB. I had a break in federal civilian employment starting February 9, 2013, while I was working as a Police and Fire Officer at the Ted Stephens Airport in Anchorage, Alaska. I reapplied for my previous civilian position with the Air Force due to family

[3] The reason the federal government restricts certain uniformed service from eligibility for a service deposit is due interpretation of the differences in the definition of "military service" at 5 U.S.C. § 8401(31), which is used to determine FERS creditability under 5 U.S.C. § 8411, compared to the definition of "service to the uniformed services" at 38 U.S.C. § 4303(13), which is used to determine eligibility for benefits under USERRA, including pension benefits at 38 U.S.C. § 4318.

hardships causing conflict with my police and fire job and was reappointed as a Plumber (WG-9) in the Air Force on May 5, 2014. I was subsequently promoted to Utility System Repairer (WG-10) on October 5, 2014.

On or about May 15, 2015, I transferred from the Air Force Reserve to the Alaska Air National Guard due to a Congressional decision to shut-down my Reserve unit. Shortly after joining the Air National Guard, I was selected to commission as an officer. From April 24, 2016 through June 18, 2016, I went into Absent-US from my civilian employment with the Air Force. The purpose of that period of service conducted from April 24, 2016 through June 19, 2016 was to complete initial training to become a Personnel Officer in the Alaska Air National Guard. As I quickly found, the demands for my services in a uniformed status grew much greater in my new role as a commissioned officer - I went into Absent-US 13 more times[4] to perform uniformed service while a civilian employee of the Regular Air Force (App. 94-97). Meanwhile, I was selected to become an Engineering Technician (GS-11) in my civilian capacity with the Air Force, on October 14, 2018, and continued in that position, while still intermittently performing service to the uniformed services, until I transferred employment to become a Human Resources Officer as a Dual-Status Technician with the Alaska Air National Guard (GS-12) on March 29, 2020[5].

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[4] The purpose of the uniformed service was a mix of training and operational requirements, ranging from Personnel Officer School and annual training, to supporting homeland defense planning, hurricane relief, and the State and federal response to COVID-19.

[5] The focus of this case is the 14 periods of Absent-US that occurred between April 24, 2016 and March 12, 2020, and ranged anywhere from 4 days to about 4 months in duration. I was also on

C. Military Service Deposits and Attempts at Redress

I completed my first military service deposit on December 5, 2017, to garner FERS credit for my four years of pre-civil-service uniformed service and for the periods of uniformed service I performed during my break-in-service from federal employment. While researching the service deposit "requirements" published by the Air Force and the Office of Personnel Management (OPM) to make application for that deposit, I recognized several inconsistencies with the program when compared to actual requirements within the law, particularly with regard to uniformed service performed while eligible for entitlements under USERRA. The Air Force (through OPM guidance) required me to pay a service deposit to receive FERS credit for the periods of time I was in Absent-US, regardless of length, but allows up to 6 months of service credit in any calendar year for employees who are placed in an unpaid leave of absence for various other reasons without any required payment (App.3). This is clearly inconsistent with 38 U.S.C. § 4316(b)(4) which requires that employee costs of benefits not exceed the costs paid by an employee in a comparable status while on leaves of absence for reasons other than performance of uniformed service. It is also inconsistent with 38 U.S.C. § 4311(a) which prohibits discrimination for receipt of any benefit of employment based on performance of uniformed service[6]. My total leaves of absence without pay (to include leaves of

multiple periods of paid leaves of absence for uniformed service during this timeframe too, but those periods of paid leave are not of relevance here.

[6] "Rights and benefits under a pension plan" is explicitly included in the USERRA-definition of "Rights and benefits" at 38 U.S.C. § 4303(2).

absence for uniformed service) never exceeded 6 months aggregate in any calendar year, therefore, it became apparent to me that my employee cost for receipt of the pension credit should be no more than $0 for all the periods of service since that is what employees in a comparable leave status for other reasons are required to pay (App. 94-97).

The Air Force (based on OPM guidance) also prevented me from receiving pension credit for a period of inactive duty service I performed on April 4-7, 2017 because they determined inactive duty does not qualify for making a military service deposit (and as I established above they believe the only way to receive credit for periods of Absent-US is to make a deposit). It was apparent to me that this is clearly inconsistent with 38 U.S.C. § 4312(a) which requires that:

> "[Subject to stipulations that are undisputed that I met...] any person[7] whose absence from a position of employment is necessitated by reason of service to the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter".

One of the reemployment rights and benefits included in Chapter 43 of Title 38 are pensions rights and benefits, which are explicitly included in the definition of

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[7] "Person" is not defined by USERRA, but it is defined in other portions of law. 18 U.S.C. § 2510(6) specifically includes employees and agents of the federal government in that definition of "person" while 1 U.S.C. § 8 simply requires a homo sapien to be born alive to be a "person". There is no reason to believe I, as a federal employee, am not to be considered a "person" for the purposes of USERRA, and therefore entitled to all rights and benefits under USERRA.

"rights and benefits" at 38 U.S.C. § 4303(2), and provisions of those rights under federal pension plans is expressly required by 38 U.S.C § 4318 (a)[8].

Part of my duties as a Personnel Officer is to counsel members of the Reserve Component on their rights under USERRA. Because of my familiarity with USERRA, the service deposit "requirements" stated in guidance from the Air Force and OPM did not make sense as I was reading through it, so I sought clarity through multiple inquiries to my local civilian personnel office, the Air Force Personnel Center, and to OPM's retirement services office. Ultimately, my inquiries with the Air Force and OPM did not lead to any clarification or reconciliation. The Air Force generally let on that they were simply adhering to OPM guidance, but were not doing anything to challenge or change it. OPM never responded directly to my multiple attempts to address the problems within the program. The most disappointment I experienced through this whole process is knowing that at any point the Air Force could have decided to do the right thing for uniformed service members and take an active role in fixing this injustice in partnership with me; but instead they decided to take the opposing stance and became the most significant obstacle I needed to work to overcome.

Under OPM guidance if a deposit is not paid within two years of initial employment or performance of the uniformed service then the deposit will incur

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[8] AS CAFC also pointed out, 38 U.S.C. § 4316(b)(6) clarifies that pension benefits are provided for under 38 U.S.C. § 4318(App. 26).

penalties in the form of interest accumulation[9]. See also App. 94-97. I avoided making additional deposits while conducting my research and inquiries until, over time, I resentfully completed additional service deposit payments, each paid off just prior to the respective two year marks of the earliest period of service covered by the deposit, as a way to avoid the interest accumulation[10].

When I became a fulltime Human Resources Officer with Alaska Air National Guard in March 2020, shortly after COVID-19 response begun to really spin up, I was responsible for bringing members on orders for the state response and briefing them on their benefits and entitlements (including on USERRA). It was during this time that I thought to myself how messed it is that so many of our reserve component members are also federal employees and thus not receiving the entitlements and service credit that they should, while putting themselves at risk to answer their Nation's call. Worse was that no one in the government with influence over personnel policy was doing anything to fix it. I began losing sleep over my convictions and it didn't take me long to decide that I am now someone in the government with the obligation to influence personnel policy, so I decided I would take it on myself to do something to fix it. The laws have already been in place

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[9] Interest bearing works a bit odd in that the interest is technically chargeable at 2 years, but interest payments aren't required until the 3-year anniversary. See IADs at App. 94-97.

[10] The CAFC addressed their concern that I "changed tack" by bringing forward a formal complaint in 2020 (App. 23). That is a false assessment of the situation – I have continually challenged the legitimacy of the service deposit program starting at the lowest levels (my local civilian personnel office, Air Force Personnel Center, and OPM's retirement website) before working my way up; I logically made the payments because it was necessary to avoid causing myself further harm through interest accrual.

since at least 1994...I just needed to get the attention of decision makers so federal government policy could be adjusted to match the laws.

On or about May 11, 2020, I filed a claim with the Department of Labor Veterans' Employment and Training Service (VETS) against the Air Force for mismanagement of pension credit for periods of uniformed service protected under USERRA. From day one, without even conducting any level of investigation to that point, the VETS investigator (Brandon Webb) determined they could not submit a finding that there was a USERRA violation because OPM has authority to promulgate regulations under USERRA and so the investigator asked me to withdrawal my claim[11] (App. 86-87). I refused to withdrawal and was eventually able to convince the investigator to look into the matter. *Id.* Although the investigator let on several times over the phone that the Air Force's approach and application of USERRA was odd and not something he would consider to be consistent with USERRA, the Air Force cited OPM guidance to support their conduct and so the VETS office made a determination that there was no violation of USERRA (App. 88). One of the two particular guidances that was cited, OPM Benefits Administration letter 95-101, says itself on the cover page that it is incomplete[12]; the other cited guidance, 5 C.F.R 842, Subpart C is outdated in that it

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[11] See 38 U.S.C. § 4331(b). Note, that as a condition of OPM's authority to promulgate regulations, Congress requires OPM regulations to be consistent with Department of Labor (DoL) "except that employees of the Federal Government may be given greater or additional rights."

[12] OPM Benefits Administration Letter (BAL) 95-101 only evaluated changes to Title 5 U.S. Code made by Public Law 103-353 (USERRA), but did not evaluate any requirements under Chapter 43 of Title 38; this is in spite of OPM mentioning in BAL 95-101 that the requirements of Chapter 43 of Title 38 are "expressly applicable to Federal retirement systems" (App. 92).

doesn't address anything specific to USERRA[13]. I submitted a rebuttal to the VETS office explaining the flaws of the Air Force rationale, and that rebuttal received no response, other than to confirm receipt. I subsequently filed two complaints with the DoL office of the Inspector General for the VETS failure to maintain integrity to meet their investigatory obligations (I felt they were just trying to evade a political quibble with OPM over who has authority to make USERRA determinations for federal employees rather than having the backbone needed to supporting service members in a manner we desperately need them to). The IG complaints received no response whatsoever. To date, the VETS office has not responded to any request to provide written explanation of how they arrived at their finding of no USERRA violation. They also have not responded to requests for input during these legal proceedings, even from the opposing counsel while at CAFC.

Around September of 2020, I filed a request for assistance with this matter to Senator Dan Sullivan's office. Senator Sullivan's office was finally able to get a response from OPM, which essentially said the service deposit program is in accordance with the applicable laws under Title 5, U.S. Code (confirming my consternation that OPM does not recognize the requirements of Chapter 43 of Title 38, U.S. Code, particularly requirements of 38 U.S.C. § 4316(b) and 38 U.S.C. § 4318) (App. 90-91). I requested further input, specifically an explanation to why OPM seems to believe federal government agencies do not have to meet employer

[13] The relevant portions of CFR § 842 Subpart C have not been updated since 1987, whereas USERRA was implemented in 1994.

obligations under Chapter 43 of Title 38 U.S. Code, but OPM said they considered the matter closed and Senator Sullivan's Office did not push for more information.

Around January 2021, I filed a request for assistance to Senator Lisa Murkowski's office to ask for clarification on the service credit issues. OPM responded with a link that shows methods of determining leave accrual rates for new employees and they told Senator Murkowski's office that they did all they were going to do and considered the matter closed. Senator Murkowski's office advised that I probably would not get any further without taking legal actions.

Subsequently, I requested legal representation from the Office of Special Counsel for representation before MSPB and I was denied with no explanation; I believe the denial was based solely on the VETS office finding of no USERRA violation. On May 27, 2021, I filed a pro se appeal with the Merit Systems Protection Board. At the AJ's behest I filed a supplemental claim on August 8, 2021, for a total of seven areas where the federal service deposit program is out of compliance with USERRA requirements. The AJ found 5 of those issues to have caused me no direct harm (thus he found there was no jurisdiction or no legal path for reconciliation) (App. 1-3, App. 9-12).

I filed an appeal with CAFC, authorized by 38 U.S.C. § 4324(d)(1), on two of the issues heard. For the requirement to pay a service deposit for qualifying military service, the Air Force referred to an unlawfully decided MSPB precedent[14] to

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[14] In phone discussions I revealed to the Air Force Counsel present at MSPB that this same issue was previously unlawfully decided in *Whittacre v. Office of Personnel Management*, 120 M.S.P.R. 114 (2013). It was an unlawful decision because OPM brought a USERRA claim against Whittacre

support their stance, and the AJ determined he was bound by that precedent (App. 6-7). For the issue of being disallowed service credit for inactive duty, the AJ irrationally reasoned on his own that because Public Law 103-353 (USERRA) also amended portions of Title 5 U.S. Code, specifically the definition of "military service" at 5 U.S.C. § 8401(31) and did not include inactive duty in that definition then it evinced Congress' intent to disallow pension credit for inactive duty service (App. 7-9). This determination is in spite of the explicit requirements of USERRA showing that all "service to the uniformed service" is required to be allowed for credit when conditions of USERRA apply, and OPM's own guidance at OPM BAL 95-101 showing that provisions of Chapter 43 of Title 38, U.S. Code are explicitly applicable to federal retirement systems (App. 92). Additionally, congress explicitly excepted the Thrift Savings Plan (TSP) from USERRA pension provisions (see 38 U.S.C 4318(a)(1)(B), so using the AJ's own logic, it is clear that if Congress intended to except all of FERS from 38 U.S.C. 4318 then they would have said so.

On appeal to CAFC the merits panel determined that 38 U.S.C. § 4316(b) is applicable to pensions (consistent with MSPB findings and core to the MSPB

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without standing to do so and convinced the board to use minimum provisions of USERRA to overturn a previous board decision, in Whittacre v. OPM, 118 M.S.P.R. 33 (2012), which originally granted pension benefits based on entitlements under Title 5 U.S.C. § 8411. The overturn was in opposition of the plain language of 38 U.S.C. § 4302(a) that nothing in USERRA would diminish greater rights and benefits allowed under another federal law. Particularly, the MSPB decision applied only *half* of 38 U.S.C. 4316(b)(4), as proof that employee shares of contributions could be required, but disregarded the part that limits payment to the extent required for other comparable leaves of absence to receive the same benefit.

precedent upon which the AJ made his determination)[15] (App. 26-27). CAFC determined, however, the pertintent question at hand in my first issue (having to pay a service deposit to receive any pension credit for a leave of absence without pay for uniformed service) is whether my leaves of absence without pay for uniformed service are "comparable" to the leaves of absence that receive pension credit without a deposit (App. 27). In contradiction to the plain language of the statutes, regulations, and other court decisions (including one of their own precedents) CAFC ultimately determined that leaves of absence without pay for uniformed service are not comparable to other leaves of absence without pay because uniformed service is authorized service credit in excess of 6 months in any calendar year by paying the deposit, "a distinction favoring members of the military". *Id.* See also Infra. 23.

In regard to the second issue (being denied the opportunity to receive service credit for the period of inactive duty performed between April 4-7 2017), CAFC denied my appeal because 5 U.S.C. § 8411 does not specifically authorize pension credit for inactive duty (based on definitions from 5 U.S.C. § 8401(31) and 10 U.S.C. § 101(d) which are used to determine creditable "military service" under Title 5, U.S. Code) (App. 28-29). In the written opinion CAFC reframed the issue in way that makes me question their integrity: specifically, CAFC made it seem as though I was looking to supplant the term "military service" from 5 U.S.C. § 8401(31) by using the term "service to the uniformed service" from 38 U.S.C. § 4303(13) to apply

[15] 38 U.S.C. 4316(b) applies to "benefits not determined by seniority". 5 C.F.R. 353.107 lists benefits determined by seniority and pension is not included. It has not been disputed that 38 U.S.C. 4316(b) applies; the contention rests on the proper application of 38 U.S.C. 4316(b)(4) specifically.

to provisions of 5 U.S.C. § 8411 (App. 28). CAFC completely disregarded the fact that I was claiming that an additional set of pension rights and benefits are guaranteed by USERRA through 38 U.S.C. § 4312(a), § 4316(b) and § 4318(a), and those rights and benefits are based on the definition of "service to the uniformed services" at 38 U.S.C. § 4303(13) (App. 65-68). It was clearly stated in my arguments that I held that 38 U.S.C. § 4318 is meant to be the primary approach for determining pension benefits following uniformed service covered by USERRA, while the changes to Title 5 U.S. Code show additional constraints on federal government agencies that are meant to be more beneficial to government employees, not more restrictive than USERRA (App.67-69).

IX. Reasons for Granting Certorari

A. CAFC Was Misleading In Their Public Opinion

I actually agree with the conclusion of CAFC based purely on the logic presented in their opinion of my second claim (my right to pension benefits for a period of inactive duty training) where they said:

> "*This set of statutory provisions* did not entitle Mr. Faris to be offered the opportunity to pay a deposit and receive service credit for his inactive-duty service" [emphasis added] (App. 29).

What I do disagree with is that, in their opinion, CAFC did not actually assess the set of statutory provisions on which my claim was based (App 28-29). I made a claim that 38 U.S.C. § 4312(a), § 4316(b)(6) & § 4318 explicitly requires pension benefit coverage (whether by a deposit or no deposit) for periods of inactive

duty training based on the definition of "service to the uniformed services" at 38 U.S.C. § 4303(13) (App. 65-68). I actually argued that there should be no deposit for the same reasons listed in my first issue (for being comparable to leaves that receive service credit without a deposit) and because I would have received the credit by being in a regular leave of absence status if I didn't demand protection of my seniority rights for that period of time. *Id.* However, I also argued that 38 U.S.C. 4318(b)(2) does in fact create a path to allow me to make a deposit even if the pension benefit actually was dependent upon the making of contributions. *Id.*

CAFC intentionally concealed the basis of my claim from the public to write their opinion in a way that still sounded rational for them to rule against me by making it sound like my claim was that the definition of "service to the uniformed services" at 38 U.S.C. § 4303(13) should be used in place of the term "military service" at 5 U.S.C. 8401(31) throughout 5 U.S.C. § 8411 (App 28-29). I see this as a serious integrity issue and it draws the legitimacy of the whole judicial system into question. I believe this is the most significant reason this court should step in to right this injustice and make it known that intentional lapses of integrity will not be taken lightly, regardless of how insignificant the amount of damages in the original claim may seem. I don't believe it was a simple mistake or misunderstanding either: I addressed the concern in my combined request for rehearing and CAFC passed up their opportunity to provide clarity to the record.

B. The Federal Government is the Single Largest Employer of Veterans

Many reports available from government sources show that the federal government is the single largest employer of military veterans. Estimates show that while veterans account for about 5 percent of the total U.S. work force[16], veterans account for about 31 percent of the civilian work force of the federal government[17], with some federal agencies (particularly the U.S. Air Force[18]) employing a significantly larger percentage. Data is less readily available on federal employees that are currently eligible for USERRA, but input provided by the Department of Defense to the Federal Register in 2020, addressing the need to more effectively screen principal civilian employment of military reservists, suggests a similar trend[19]. The Department of Defense estimated the federal government is "principal employer" to as many as 36 percent of the total Ready Reserve. *Id.* The same Federal Reserve entry shows there were 1,020,156 members of the Ready Reserve in 2020. *Id.* With an estimated 2.1 Million federal civilian employees[20], then these numbers show that approximately 17% of the federal civilian workforce is

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[16] https://blog.dol.gov/2021/11/9/veterans-in-the-labor-force-6-stats shows veterans represented 5.6% percent of the total U.S. workforce in 2020.

[17] Interagency Veterans Advisory Council, *State of Veterans in the Federal Workforce, 2021 Annual Report* (November 11, 2021).

[18] The Office of Personnel Management, *Employment of Veterans in the Federal Executive Branch Fiscal Year 2018* (November 2020) (p. 3) shows that in 2018, 56 percent of all Air Force civilian employees were military veterans.

[19] https://www.federalregister.gov/documents/2020/12/28/2020-28646/screening-the-ready-reserve

[20] Interagency Veterans Advisory Council, *State of Veterans in the Federal Workforce, 2021 Annual Report* (November 11, 2021) (p. 27) shows total federal employees between FY 2014 to FY2018 ranged from 1.99 Million to 2.04 million; while my estimate allows for growth it may actually be high and under represent those federal civilian employees truly eligible for USERRA.

potentially USERRA-eligible service members (which far exceeds the rate of all categories of veterans in other forms of employment). As the largest employer of veterans and USERRA-eligible employees, Congress made their intent very clear when they enacted USERRA that the federal government "should be a model employer in carrying out the provisions of [USERRA]" (38 U.S.C. § 4301(b)). Congress also specified that regulations providing federal employees benefits under USERRA should be consistent or greater than regulations for state and private sector employees (38 U.S.C. § 4331(b)). Yet, federal government agencies are simply choosing to disregard provisions of USERRA related to pensions, even though OPM admitted that pension provisions of USERRA are "expressly applicable to federal retirement systems" (App. 92).

C. Improper Application of Other Laws in Relation to USERRA

MSPB and CAFC are allowing federal agencies to disregard the requirements of USERRA, and they even say it is justified, based on a flawed understanding of the preexisting retirement laws and the relationship of USERRA to other laws, regulations, and policies (App. 4-9, 23-29). In the decisions from MSPB and CAFC they point to 5 U.S.C. § 8411(c)(1)(B) as proof of a requirement for a deposit for an employee to receive pension credit for periods of "military service" (App. 4-6, 26). They point to the same provisions as proof of a lack of eligibility to receive pension credit for other statuses included in the definition of "service to the uniformed services" at 38 U.S.C. § 4303(13) that are excluded from the definition of "military service" at 5 U.S.C. § 8401(31). (App. 7-9, 28-29).

The plain text contained in subparagraphs (c) and (d) of 5 U.S.C. § 8411 shows these provisions place *constraints on the federal government* and *direct the government agencies* to allow service credit at specific times. In relevant context, the plain language of 5 U.S.C. § 8411 (c)(1)(B) is showing that an employee "shall be allowed credit for [...(2)] each period of military service [...] if a deposit is made[...]". MSPB and CAFC have taken the stance that the only way to get service credit for uniformed service is for the service to be included in the definition of "Military Service" at 5 U.S.C. § 8401(31) and for a deposit to be paid (App. 7-9, 28-29). However, the plain language of the various statutes shows that nothing about that constraint, requiring the federal government to allow credit for any period of military service if a deposit is made, conveys that it is the only method to acquire service credit (App 83-85). See 38 U.S.C. § 4318. In fact, the plain language of 5 U.S.C. § 8411(c)(1)(B) simply conveys that the government *cannot deny credit* if the member performed any period of military service and pays a deposit. Likewise, USERRA places additional constraints *on the federal government* (as an employer) through 38 U.S.C. § 4316(b), by requiring provision of the same benefits that are allowed while continuously employed and provided to others in a comparable leave of absence, with the employee cost of the benefit limited to what other employees in leave of absence are required to pay (App. 82). USERRA also places additional constraints on the federal government by requiring them to allow pension benefits for any periods of "service to the uniformed services" through 38 U.S.C. § 4312(a),

4316(b)(6) and 4318(a), based on the definition provided 38 U.S.C. § 4303(13) (App 65-69).

MSPB and CAFC pointed to the fact that Congress changed definitions through USERRA in 1994 as proof of intent to allow discriminatory practices against some periods of "service to the uniformed services" (App. 9, 28-29). Specifically, MSPB asserts that the intent of Congress is shown because they changed the definition of "military service" at 5 U.S.C. § 8401(31) so it does now include "full-time National Guard duty" when it interrupts civilian employment, but the definition of "full-time National Guard duty" at 10 U.S.C. § 101(d)(5) that Congress referred in the definition of "military service", explicitly states that inactive duty is not included in the definition of "full-time National Guard duty" (App. 9). That is poor logic as the definition Congress chose to point to simply clarifies that inactive duty is not full-time National Guard duty... it does not say that inactive duty is not eligible for the very pension credit mandated by 38 U.S.C. § 4318(a). I do not disagree with CAFC that inactive duty is not full-time National Guard duty, and as such is not creditable under the terms of 5 U.S.C. § 8411(c)(1)(B) (App. 28-29). However, nothing about 5 U.S.C. § 8411(c)(1)(B) requiring the government to allow pension credit for "any period of military service" neutralizes the additional requirements Congress levied against all employers (explicitly including the government) in 38 U.S.C. § 4318 to also provide service credit for periods of "service to the uniformed services" that occurred while covered by USERRA (App.92).

On a similar note, as CAFC noted, 38 U.S.C. § 4318(b)(2) does place a constraint on the employee that is seemingly disruptive to my claims: authorizing receipt of pension credit "contingent on or derived from employee contributions only to the extent the person makes payment to the plan" (App.26). The connotation of the statute has been distorted by federal agencies to evade their express obligations under 38 U.S.C. 4316(b) and the meaning misunderstood by MPSB and CAFC. *Id.* The fact that employees on leave without pay for reasons other than uniformed service can receive pension credit without payment of a deposit shows that the plan is not truly "contingent on or derived from" the making of contributions for at least the first 6 months while in leave of absence without pay in any calendar year (App. 23-24, 63-64). To claim that a deposit is required specifically for receipt of credit because of constraints Congress placed on the government in 5 U.S.C. § 8411(c) (to allow credit for any period of service if a deposit is made) is contradictory to the non-discrimination provisions of 38 U.S.C. § 4301(a)(3) and § 4311(a). As the largest employer of veterans and the expected model employer under USERRA, CAFC is essentially saying that it is okay for employers (in this case the government) to contradict USERRA and hold benefits guaranteed by USERRA for ransom as long as the ransom is consistent with their other non-USERRA provisions for military service, even when employees on a comparable leave for other reasons do not have to pay ransom for the same benefit (App. 27-28).

The federal agencies and lower tribunals' understanding of the relationship of USERRA to other federal laws and policies is completely backward and often

inconsistent (App. 74). CAFC notes that the rules of statutory construction require all relevant laws to be construed together and to give meaning to all words of Congress (App. 28). See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). However 38 U.S.C. § 4302(b) requires that nothing in Chapter 43 of Title 38 U.S. Code will supersede any matter that is more beneficial to the employee and 38 U.S.C. § 4331(b) makes clear that Congress's intent is for federal employees to receive consistent or greater rights and benefits than state government and private sector employees. While 38 U.S.C. § 4318(b)(2) does not supersede or diminish the federal government's obligation to provide the benefit at a cost no greater than it is provided to employees on comparable leaves of absence for reasons other than to perform "service to the uniformed services", changes to Title 5 U.S. Code were meant to provide additional or greater rights to government employees (App. 68-69). Specifically, 38 U.S.C. § 4318(b)(2) put a time limit for any required employee-contributions to be complete and limits payments to the amount that would have been paid from civilian pay if the deposit is not made; through the requirement of 38 U.S.C. § 4302(a), that nothing in Chapter 43 of Title 38 U.S. Code will nullify or diminish greater benefits allowed by other laws, 5 U.S.C. § 8411 (c) & (d) simply requires the government to still allow credit for any periods of "military service" if a deposit is paid, even after expiration of the time limits prescribed in 38 U.S.C. § 4318(b)(2) and allows the contributions to be calculated based on military pay rates earned during the period of service (see 5 U.S.C. § 8422(e)). *Id.* I do agree that, under the requirements of Chapter 43 of Title 38 U.S. Code only, however, the

government may be within their rights to withhold credit until a deposit is paid for periods of service that exceed 6 months in a calendar year, since at that point the period of service likely becomes incomparable to the leaves of absence that do receive 6 months aggregate service credit without payment of a deposit (see 20 C.F.R. 1002.149-151)[21].

D. Inconsistent Application of Precedent, Rules, and Laws

For the issue of whether service credit should be provided without the need of a deposit for periods of leave without pay for uniformed service, the Air Force and CAFC admitted that the determination depends on whether my leave of absence for uniformed service is "comparable" to leaves of absence that do receive the service credit without a deposit (App. 27). Rules for determining benefit entitlements and "comparability" are listed in Department of Labor regulations at 20 C.F.R. 1002.149-151 and the issue has been decided by various Courts of Appeals[22]. *Id.* The "comparability" factors listed by the Department of Labor are: duration of the

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[21] In my claims to MSPB and CAFC I presented consternation that the wording of 5 U.S.C. § 8411(d) allows service credit without a deposit and without time limits – specifically leaves of absence for military service are not just *any* period of military service that are covered by §8411(c), but rather set aside as "special" ("generalia specialibus non derogant") as the government shows their gratitude to military service members as their civilian employer. I am not outright abandoning this argument, and this Court is welcome to act on it, but my concern and focus at this level is on the fact that CAFC has shown great inconsistency and an illogical approach in their application of USERRA-specific requirements and misapplication of their own (and other) precedent(s) in injustly deciding my case.

[22] Among the cases *are: Tully v. Department of Justice*, 481 F.3d 1367, 1368 (Fed. Cir. 2007); *Waltermyer v. Aluminum Co. of America*, 804 F.2d 821 (3d Cir.1986); *Travers v. FedEx* Corp., 567 F. Supp. 3d 542 (E.D. Pa. 2021). White v. United Airlines, Inc., 416 F. Supp. 3d 736 (N.D. Ill. 2019) in which the courts determined that specific attributes of the leave determine comparability; not one precedent allows consideration of benefits provided during the leaves to determine comparability.

leave[23], purpose of the leave, and ability to choose when to take the leave (see 20 C.F.R. 1002.150(b)). After the Air Force introduced the new "comparability" argument at CAFC, I provided 3 examples of leaves of absence without pay that are comparable to my leaves of absence for uniformed service, all of which receive service credit toward pensions without the need for a deposit(App. 70, 78, 81-82). Those leaves of absences listed are: (1) leave of absence for some periods of "uniformed service" that are not "military service" while carried in regular leave without pay rather than Absent-US, or when the discharge from uniformed service is not honorable so it no longer meets the definition of "military service" to be eligible for a deposit; (2) leave of absence for civil service connected illness or injury; (3) one-year mandatorily-approved leave of absence to Air Force employees who are also spouses of military members when the Air Force employee must move with the military member to a new duty station, along with the option to extend the leave of absence for a second year. *Id.* The Air Force, MSPB, and CAFC even referenced, and CAFC claimed to base their decision on, a precedent CAFC established addressing "comparability of leave" (App. 6-7, n. 3; App. 27). The case referenced by the tribunals is *Tully v. Dep't of Justice*., 481 F.3d 1367, 1369 (Fed. Cir. 2007). However, CAFC did not appropriately apply their own precedent from *Tully* (App. 27). In my case, CAFC focused only on the fact that as a military member, I can receive *more* than 6-months service credit in a calendar year, while other leaves of

[23] 20 C.F.R. 1002.150(b) says the duration of the leave may "be the most significant factor to compare".

absence cannot; "a distinction favoring members of the military". *Id.* This is an error on two fronts. First, CAFC was comparing benefits that are available to leaves of absence for uniformed service that are of *longer duration* than any of the leaves of absence in my claim, thus basing their decision on facts that are not pertinent to my claim and could make the leaves incomparable if my leaves were actually of longer duration (App. 94-97). Since I did not exceed 6 months total leave without pay (to include for military/uniformed service) in any calendar year or 6 months for any single period of service for the periods in question it is irrelevant that I could have received benefits unavailable to other leaves of absence if I did exceed 6 months. *Id.* Second, *Tully* specifically rebukes consideration of the benefits provided during a leave of absence in determining the "comparability" of leaves:

> "To allow differences in the available benefits to negate relief under section 4316(b)(1)(B) would undermine the effect of the statute, which is designed to remedy differences in the benefits provided for military leave and leave for other purposes" (*Tully* at 1371).

Throughout the MSPB and CAFC decisions they point to requirements on how to construe together the words of Congress (App. 9, 28). However, in their statutory construction, MSPB and CAFC did not actually consider the *explicit* words of Congress that contradict the very rationale they relied on... specifically, CAFC focused on what is not said in 5 U.S.C. § 8411 and § 8401(31), while they *blatantly ignored* explicit provisions of 38 U.S.C. § 4318(a). *Id.* 38 U.S.C. 4318(a)(1)

makes clear that all portions of 38 U.S.C. § 4318 apply to FERS because § 4318(a)(1) says that it applies to any federal employee retirement systems with the exception of the Thrift Savings Plan (TSP)...if Congress intended for FERS to be excepted from USERRA as well (specifically to adhere only to 5 U.S.C. § 8411), they would have said so (App. 27-28).

CAFC even relied on a portion of 38 U.S.C. § 4316(b)(4) as support that employees "*may be required to pay the employee cost, if any, of any funded benefits continued...*" [emphasis in original], but ignored the portion that says "to the extent other employees on furlough or leave of absence are so required" (App. 26). CAFC then says 38 U.S.C. § 4316(b)(4) is not applicable, (but only when in consideration of the portion that could benefit me) because the leaves are not comparable (App. 27). CAFC cannot have it both ways...either 38 U.S.C. 4316(b)(4) is applicable in whole, or it is not applicable at all. CAFC's determination of "non-comparability" is also in spite of the fact that I have shown that the leaves are comparable enough to get other continued benefits (specifically health benefits) at the same costs as other employees and then when the leaves become incomparable the costs of maintaining the benefits shift as well (App. 64).

The tribunals also ignored burden of proof requirements explicitly stated in MSPB Burden of Proof Rules (requiring the burden of proof to be placed on government agencies to prove they actually met their USERRA requirements). CAFC instead claims I didn't meet a burden they made up in their opinion of showing "disfavor" compared to employees in leaves of absence without pay for

other reasons (App. 27). First off, I did clearly show disfavor: I had to pay over $1,000 to receive a benefit other comparable leaves receive at no cost (App. 94-97). Second, I prepared my arguments to support exactly the elements that the rules of the tribunals show as important to the type of claim made under 38 U.S.C. § 4312-4318: MSPB rules on burden of proof specifically show that the presumption is to be in my favor while the agency is required to prove they met their USERRA obligations; as such the rules and burden of proof specifically do not require me to show disfavor (App. 101). Additionally, the only reason I had to pay a deposit is because the purpose for the leave was for performance of service to the uniformed services, which is a clear show of discrimination: that is another reason the burden of proof is on the employer, according to 38 U.S.C. § 4311(c)(1) and MSPB rules (App. 99).

X. Conclusion

This Court's intervention is crucial because my rights as a citizen and as a government employee under USERRA are being trod down by the government. The executive branch and lower levels of the judicial branch are banding together to support the government's stance and keep this major error swept under the rug. Rather than the judicial branch separating itself and taking an impartial and fair consideration of these issues, they are helping to keep the issue concealed and even reframing the issue to hide what I actually put forward as a claim (App. 28-29, Supra. 14-15). I ask that this Court restore the balance and order that comes with separation of powers; ensure the realization of the sense of Congress that the

Federal government should be a model employer under USERRA; and this Court's intent that the various laws should be construed as liberally to the benefit of the member the veteran as the various provisions allow (*Fishgold vs Sullivan Drydock and Repair Corp*, 328 US 275, 285 (1946)).

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 21, 2023.

//Signed//
MICHAEL G. FARIS
Petitioner (Pro Se)

No._____

In the Supreme Court of the United States

MICHAEL G. FARIS,
Petitioner

v.

UNITED STATES AIR FORCE,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appendix to Petition for Writ of Certorari

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Pro Se

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

MICHAEL G. FARIS,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency,

and

OFFICE OF PERSONNEL MANAGEMENT
Intervenor.

DOCKET NUMBER
SF-4324-21-0370-I-1

DATE: February 1, 2022

Michael G. Faris, Anchorage, Alaska, pro se.

Bobbie Garrison, Joint Base Andrews, Maryland, for the agency.

Chief Labor Law, Joint Base Andrews, Maryland, for the agency.

Angerlia Johnson, Washington, DC, for the intervenor

BEFORE
Christoph Riddle
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant filed an appeal contending that the agency violated the Uniformed Services Employment and Reemployment Rights Act (USERRA). Initial Appeal File (IAF), Tab 1. The Board has jurisdiction over this appeal

pursuant to 38 U.S.C. § 4324(b). The appellant waived his right to a hearing. IAF, Tab 1 at 2. For the reasons set forth below, the appellant's request for corrective action is DENIED.

ANALYSIS AND FINDINGS

Background

The following facts are undisputed unless otherwise noted. At all relevant times the appellant held civilian positions with the agency in Anchorage, Alaska. IAF, Tab 1 at 1, 7-50. During multiple periods between 2016 and 2020, the appellant was absent from his civilian position in order to perform military service. *Id.* at 13-48. The appellant made deposits for periods of absence for military service in order to receive credit under the Federal Employees Retirement System (FERS). *Id.* at 59-62. However, the agency did not permit the appellant to make a service deposit for inactive duty National Guard training. Separately, according to the appellant, the agency discouraged him from delaying his return to civilian employment after completing military service on or about May 31, 2018. IAF, Tab 10 at 10-11; Tab 27 at 21-22.

The appellant filed a complaint with the Department of Labor (DOL), which DOL closed on July 8, 2020. IAF, Tab 1 at 63-68. This appeal followed.

I determined that the appellant made nonfrivolous allegations of Board jurisdiction under USERRA as to some, but not all, of his asserted claims.[1] IAF,

[1] The appellant reasserts previously-made objections to my jurisdictional rulings in his close of record submission. IAF, Tab 27 at 22. I note that the appellant failed to timely object to my Order dated August 13, 2021, in which I ruled that the Board lacked jurisdiction over two of the appellant's claims. *See* IAF, Tab 13. He thus waived any objection to those rulings. *Id.* at 3 (noting objections not filed by August 18, 2021, would be deemed waived). The appellant timely objected to my jurisdictional Order of September 3, 2021. IAF, Tabs 20-22. The appellant's timely objections are OVERRULED, but are preserved for the record.

Tabs 9, 13, 20. The agency moved the Board to invite the Office of Personnel Management (OPM) to intervene. IAF, Tab 11. I granted the agency's motion. IAF, Tab 12. OPM intervened but made no substantive submissions. IAF, Tab 18.

I set a close of record schedule, both parties made submissions, and the record closed. IAF, Tabs 14, 17, 21-23, 27. Additional facts are discussed below.

Issues

The issues for determination are whether the appellant has proved by preponderant evidence that the agency violated USERRA by:

1. requiring that the appellant make deposits to receive credit under Federal Employees Retirement Act (FERS) for periods that he was absent from his civilian position to perform military duty;
2. denying the appellant the opportunity to make a service deposit under FERS for inactive duty National Guard service between approximately April 3 and 7, 2017; and
3. disallowing the appellant from delaying his return to duty following the conclusion of military service on or about May 31, 2018, in violation of 38 U.S.C. § 4312(e)(1)(C).

Applicable Law

Generally, an employee making a USERRA claim under 38 U.S.C. § 4311 must show that (1) they performed, applied to perform, or was obligated to perform duty in a uniformed service of the United States, (2) 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. Department 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. *Adams v. Department of Homeland Security*, 3 F.4th 1375,

1377–78 (Fed. Cir. 2021); *see Butterbaugh v. Department of Justice*, 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. Department of Health & Human Services*, 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.").

Here, there is no dispute that the appellant performed military service and each of the appellant's claims concern benefits only available to military servicemembers. Under the appellant's first two claims, civilian service credit for periods of military duty is only available to members of the military. Likewise, under the appellant's third claim, the claimed right to delay return to civilian duty after military service is exclusive to members of the military. Thus, in each of his claims the appellant must establish that he was denied a benefit of employment under 38 U.S.C. § 4311(a).

The agency did not violate USERRA by requiring the appellant to make deposits to obtain FERS credit for periods of absence for military duty.

The appellant contends that the agency violated USERRA by requiring that he make deposits to obtain credit under FERS for periods that he was absent from his civilian position to perform military duty.

Ordinarily, an employee's retirement contributions are funded through deductions from his pay. 5 U.S.C. § 8422. No deductions are made when an employee is in a nonpay status, such as military LWOP. The FERS statutes and OPM's implementing regulations require that an employee make a deposit in order to obtain credit under FERS for periods when he was absent from his

civilian position in a nonpay status to perform military service.[2] 5 U.S.C. § 8411(c)(1); 5 C.F.R. § 842.306(a)(2); *see* 5 U.S.C. §8422(e); 5 C.F.R. § 842.307.

38 U.S.C. § 4316(b)(1) provides that an employee absent from civilian employment to perform military service is "deemed to be on furlough or leave of absence while performing such service." However, such an employee "shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed" and "may be required to pay the employee cost, if any, of any funded benefit continued ... to the extent other employees on furlough or leave of absence are so required." 38 U.S.C. § 4316(b)(3-4). Upon reemployment, an individual is entitled to pension benefits only to the extent he makes employee contributions that would otherwise be required had he remained continuously employed during the relevant period. 38 U.S.C § 4318(b)(2).

The Board addressed the requirement to make deposit for periods of LWOP for military service under USERRA in *Whittacre v. Office of Personnel Management*, 120 M.S.P.R. 114, 120 (2013). Whittacre retired from a civilian position and began collecting an annuity under FERS. *Id.* at 116. OPM subsequently determined it had erred in calculating Whittacre's annuity and had overpaid him by including periods when the appellant was absent from his position for military service but had not made deposits. *Id.* Whittacre challenged the overpayment arguing, *inter alia*, that under USERRA he was entitled to service credit for his absences for military duty without making a deposit. *Whittacre v. Office of Personnel* Management, MSPB Docket No. DC-0845-11-0740-I-1, Slip Op. at 3 (September 20, 2011). After reviewing the statutes cited

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[2] A deposit is not required for military service performed before January 1, 1957. 5 U.S.C. § 8411(c)(1); 5 C.F.R. § 842.306(a)(1). None of the military service at issue here occurred prior to 1957.

above, the Board held that "where, as here, military service interrupts civilian service, a deposit not exceeding the amount that would have been deducted and withheld from his basic pay had he remained in civilian service during the period in question is required." *Whittacre*, 120 M.S.P.R at 120. Thus, the Board concluded that a deposit was required as set forth in 5 C.F.R. § 842.303(c) to obtain credit for periods of LWOP for military service.

The appellant argued that *Whittacre* is inapplicable because the factual circumstances were different and because it was not a USERRA appeal. I disagree. Although not a USERRA appeal but an overpayment case, the Board squarely addressed the identical legal issue: whether, under USERRA, a deposit is required to obtain service credit for periods of absence for military duty. The Board answered this question in the affirmative and without exception. I do not find that either the facts or the legal posture of *Whittacre* materially distinguish it from the issue before me.

I have considered the appellant's additional arguments, including his contention that requiring a deposit subjects him to less favorable treatment than an employee on LWOP for reasons other than military service.[3] These arguments

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[3] A person reemployed following military service "may be required to pay the employee cost, if any, of any funded benefit ... to the extent other employees on furlough or leave of absence are so required." 38 U.S.C. § 4316(b)(4). The appellant correctly notes that a civilian employee in LWOP (or other nonpay) status for reasons other than military service is entitled to service credit for up to six months per calendar year of LWOP without making a deposit. *See* 5 U.S.C. § 8411(d); 5 C.F.R. § 842.304(a)(4); *Bain v. Office of Personnel Management*, 978 F.2d 1227, 1230 (Fed. Cir. 1992); Office of Personnel Management, "Fact Sheet: Effect of Extended Leave Without Pay (LWOP) (or Other Nonpay Status) on Federal Benefits and Programs," https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/effect-of-extended-leave-without-pay-lwop-or-other-nonpay-status-on-federal-benefits-and-programs/. Though *Whittacre* did not explicitly address this putative discrepancy, it did consider section 4316(b)(4) in holding a deposit is required. 120 M.S.P.R. at 120. I thus conclude that *Whittacre's* holding forecloses me from reaching a contrary conclusion. While I need not address the aptness of the appellant's comparison between nonmilitary and military LWOP in light of *Whittacre's* controlling precedent, I note that an employee absent because of military service is not necessarily

are unavailing in light of the Board's holding in *Whittacre*.[4] I conclude, under *Whittacre*, that the appellant is required to make a deposit to obtain civilian service credit for periods of absence for military duty. The appellant has not established that the agency denied him a benefit of employment by requiring he make such a deposit. The appellant's request for corrective action as to this claim is DENIED.

The agency did not violate USERRA by denying service credit for inactive National Guard training duty.

The appellant claims that the agency violated USERRA by denying him the opportunity to make a service deposit or otherwise awarding service credit under FERS for military service from April 3 to 7, 2017. IAF, Tab 27 at 20. The appellant performed inactive duty training with the National Guard during this period. IAF, Tab 17 at 10-15; *see* IAF, Tab 10 at 10. The appellant correctly notes that 5 U.S.C. § 8411 allows FERS credit for only certain types of military service. Specifically, military service creditable under FERS is limited to "active service" and

> does not include service in the National Guard except when ordered to active duty in the service of the United States or full-time National Guard duty (as such term is defined in section 101(d) of title 10) if such service interrupts creditable civilian service under this subchapter and is followed by reemployment in accordance with chapter 43 of title 38 that occurs on or after August 1, 1990.

5 U.S.C. § 8401(31); *see* 5 U.S.C. § 8411. 10 U.S.C. § 101(d)(5) in turn defines "full-time National Guard duty" as

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entitled to the most favorable treatment the agency provides to employees on leave; he is only entitled to treatment commensurate with that provided to employees on comparable leave. *Tully v. Department of Justice*, 481 F.3d 1367, 1369-1370 (Fed. Cir. 2007).

[4] To the extent that the appellant contends that *Whittacre* was wrongly decided, I cannot consider that argument here as I am bound by precedential decisions of the Board. The appellant may raise such an argument on appeal.

> training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or 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, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 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.

10 U.S.C. § 101(d)(5). It is undisputed that the appellant's period of inactive National Guard duty is not creditable under the terms of 5 U.S.C. §§ 8401 and 8411.

The appellant contends that the agency violated USERRA by applying this statutory scheme to his inactive duty service, disallowing him from making a FERS deposit, and thereby barring him from receiving FERS credit for that five-day period. IAF, Tab 10 at 10; Tab 27 at 20-21. The appellant argues that 38 U.S.C § 4318(a)(1)(A), which governs the pension rights of civilian employees reemployed following military service, requires that his inactive duty be creditable under FERS based on the broader definition of "service in the uniformed services" in 38 U.S.C. § 4303(13). *See* 38 U.S.C. § 4312(a). Specifically, the definition in section 4303(13), unlike that in 5 U.S.C. § 8401(31), includes inactive duty training.

While it is true that the broader definition of "service in the uniformed services" in section 4303(13) encompasses the appellant's inactive duty service between April 3 and 7, 2017, it does not follow that the appellant's service is creditable under FERS. The appellant offers no authority for the proposition that the broader definition in section 4303(13) properly defines the type of service that is creditable under FERS. Further, the legislative history does not support the appellant's position. When Congress enacted USERRA in 1994, it amended the definition of military service creditable under FERS in 5 U.S.C § 8401(31) to include full time national guard active duty. Uniformed Services Employment and Reemployment Rights Act of 1994, PL 103–353 § 5(c), October 13, 1994.

Congress did not include inactive duty National Guard training or any form of inactive duty. *Id.* I conclude that Congress' action evinces an intent that such service not be creditable under FERS even in light of USERRA. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Cleaton v. Department of Justice*, 122 M.S.P.R. 296, 300 ("[W]hen Congress has enumerated specific things to which a statute applies, it should not be assumed that other things that could have been listed were meant to be included; rather, the specific mention of certain things implies the exclusion of others.").

The appellant has not established entitlement to credit under FERS for his period of inactive duty training. The appellant has thus not shown he was denied a benefit of employment and his request for corrective action under this claim is DENIED.

USERRA does not confer a right to a rest period following a return from military duty.

The appellant alleges that after completing military service from April 16 to approximately May 31, 2018, the agency deterred him from delaying his return to duty in violation of 38 U.S.C. § 4312(e)(1)(C). IAF, Tab 10 at 10-11; Tab 27 at 21-22; *see* Tab 1 at 38-39. According to the appellant, the agency initially informed him that he could not delay his return to duty at all and subsequently told him that he could use regular LWOP if it was approved by his supervisor, but would not receive USERRA protection during any period of leave. IAF, Tab 10 at 10; Tab 27 at 21. It is undisputed that the appellant did not delay his return to duty and returned to his civilian position on May 31, 2018. IAF, Tab 1 at 39; Tab 27 at 21.

In relevant part, 38 U.S.C. § 4312(e)(1) provides that an individual absent from a civilian position to perform military service

> shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:
>
> ...
>
> (C) In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.

38 U.S.C. § 4312(e)(1).

Neither the Board nor the Federal Circuit has addressed the appellant's contention that 4312(e)(1) confers a right to a rest period prior to returning to civilian duty. However, the Third Circuit confronted the question in *Gordon v. Wawa, Inc.*, 388 F.3d 78 (3d Cir. 2004). In *Gordon*, the plaintiff, Gordon's estate, alleged that Gordon stopped by his civilian employer on his way home from Army Reserve duties to pick up his paycheck and obtain his work schedule for the upcoming week. *Id.* at 80. Gordon's employer allegedly ordered the plaintiff to work the night shift and threatened to fire him if he refused. *Id.* Gordon complied. While driving home the next morning, Gordon lost consciousness, crashed his vehicle, and died. *Id.* The plaintiff brought a claim in district court alleging, inter alia, that the defendant denied Gordon the eight-hour rest period guaranteed by USERRA between his military duties and returning to work. *Id.* The district court dismissed the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Noting that USERRA is to be construed liberally in favor of the service member, the Third Circuit considered the language of section 4312(e)(1).[5] The court explained:

> By its plain terms, § 4312(e) sets forth the requirements of an employee to notify the employer of the employee's intention to return to work. The eight-hour period referred to in § 4312(e)(1)(A)(i) marks the outer limit of the time by which the employee must report to the employer upon returning home from military service. As the District Court concluded, § 4312(e) is written entirely in terms of an employee's duties, as opposed to an employer's obligations. There is no way to construe this statutory language as conferring a substantive right to eight hours of rest for the returning employee.

Gordon, 388 F.3d at 81-82. Further, the court noted that the context of section 4312(e) buttresses this conclusion:

> the remainder of the section sets forth the other requirements for an employee to secure USERRA's reemployment guarantee, or the exceptions thereto. Section 4312(a) requires the employee to give the employer advance notice of leave, requires that the employee's cumulative leave be no longer than five years, and requires the employee to report to the employer in compliance with § 4312(e). Section 4312(b) contains an exception to the advance notice requirement. Subsection (c) contains exceptions to the five-year

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[5] Because Gordon's service lasted fewer than 31 days, the court considered section 4312(e)(1)(A), which provides that an individual shall notify his employer of his intent to return to employment

> In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer--
>
> (i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or
>
> (ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.

> absence limit, and subsection (d) sets forth the conditions under which an employer need not re-engage an employee. The remaining subsections impose other duties on the employees, and the section concludes with the guarantee of USERRA rights to employees who satisfy § 4312's requirements, including "the *notification requirements* established in subsection (e)...." 38 U.S.C. § 4312(h) (emphasis added).

Id. at 82. The court concluded that "in § 4312(e) Congress sets forth a returning employee's requirement for providing notice of intent to return to work in order to reclaim his or her former job, and contains no rights-creating language. *Id.* at 83-84.

Though the Third Circuit's decision in *Gordon* is not binding on the Board, I find the decision's analysis persuasive and its conclusion fully supported by the statutory text. Like section 4312(e)(1)(A), considered in *Gordon*, section 4312(e)(1)(C) sets the "outer limit of time" by which an employee absent for 30 to 180 days of military service must "submit[] an application for reemployment with the employer." *Gordon*, 388 F.3d at 81; 5 U.S.C. § 4312(e)(1)(C). The provision confers no right to a rest period. Rather, as the court explained in *Gordon*, it sets out the "requirements for an employee to obtain a guarantee of reemployment under USERRA." *Gordon*, 388 F.3d at 82.

The appellant has not established entitlement to a rest period following his return to duty on or about May 31, 2018. Thus, even accepting the appellant's claims regarding the agency's actions, the appellant has not proven the agency denied him a benefit of employment.[6] The appellant's request for corrective action under this claim is DENIED.[7]

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[6] The agency offered no evidence regarding the actions claimed by the appellant. Though the appellant offered no evidence beyond his own statements in his submissions, I afford his statements evidentiary weight because he made them under penalty of perjury. IAF, Tab 10 at 3; Tab 27 at 3.

[7] To the extent that the appellant also suggested the agency violated by USERRA because the appellant would have suffered harm to his seniority or pension benefits had he delayed his return to duty, the appellant has not established a USERRA violation.

DECISION

The appellant's request for corrective action is DENIED.

FOR THE BOARD: /S/

Christoph Riddle
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **March 8, 2022**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

As noted above, USERRA does not confer the right claimed by the appellant and, regardless, the Board cannot redress a hypothetical harm that might have occurred had the appellant elected a different course of action.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in

which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of

authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court

within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of

discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section

2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

MICHAEL FARIS,
Petitioner

v.

DEPARTMENT OF THE AIR FORCE,
Respondent

2022-1561

Petition for review of the Merit Systems Protection Board in No. SF-4324-21-0370-I-1.

Decided: September 22, 2022

MICHAEL FARIS, Prattville, AL, pro se.

DANIEL F. ROLAND, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for respondent. Also represented by BRIAN M. BOYNTON, TARA K. HOGAN, PATRICIA M. MCCARTHY.

Before MOORE, *Chief Judge*, HUGHES and STARK, *Circuit Judges*.

STARK, *Circuit Judge.*

Michael Faris appeals from an order of the Merit Systems Protection Board ("MSPB") denying his request for corrective action. Because we agree with the MSPB's determination, we affirm.

I

Mr. Faris was hired as a civilian employee by the United States Air Force ("USAF") in 2012 and continued in that position until his resignation in 2013. SAppx. 7-9.[1] In 2014, Mr. Faris returned to his position and later that year he was promoted. SAppx. 10-12.

During his civilian service, Mr. Faris was intermittently put on leave without pay ("LWOP") status while he served in the military. *See, e.g.*, SAppx. 13-48. This happened several times between April 2016 and March 2020. *Id.* In addition, between April 3 and April 7, 2017, Mr. Faris participated in inactive duty training with the National Guard. SAppx. 118-23; Appx. 7.[2]

As the MSPB explained, "[o]rdinarily, an employee's retirement contributions are funded through deductions from his pay. 5 U.S.C. § 8422. No deductions are made when an employee is in a nonpay status, such as military LWOP." Appx. 4. Mr. Faris wanted to continue to receive retirement credit when he was on LWOP status. The Federal Employees' Retirement System ("FERS") requires that "to receive credit for this period of military service toward civilian retirement," an employee on LWOP status must pay a military deposit. SAppx. 51; *see also* Appx. 2.

[1] "SAppx." citations refer to the appendix filed concurrently with Respondent's brief.

[2] "Appx." citations refer to the appendix filed concurrently with Petitioner's brief.

Therefore, Mr. Faris initially paid a military service deposit for each period he was on LWOP from his civil-service job. *See* SAppx. 55-62.

In 2020, after having paid the deposit several times over the course of years, Mr. Faris changed tack and filed a Form 1010 with the Department of Labor, alleging that the deposit requirement violated the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301-4335. *See, e.g.*, SAppx. 63-66. USERRA provides employment protections for military service members. *See* 38 U.S.C. § 4311(a) ("A person who . . . performs, [or] has performed, . . . service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that . . . performance of service . . . .").

After reviewing Mr. Faris' submissions, the Department of Labor concluded that the evidence did not support a USERRA violation. SAppx. 67-68. Mr. Faris appealed that determination to the MSPB, SAppx. 1-6, which denied his request for corrective action, Appx. 1-20.

Mr. Faris, appearing pro se, timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9) and 5 U.S.C. § 7703(b)(1)(A).

II

We review the MSPB's interpretation of a statute or regulation de novo. *Bannister v. Dep't of Veterans Affs.*, 26 F.4th 1340, 1342 (Fed. Cir. 2022). We set aside its "action, findings, or conclusions" only if we find they are "(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).

To make out a USERRA claim under 38 U.S.C. § 4311, an employee 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." *Adams v. Dep't of Homeland Sec.*, 3 F.4th 1375, 1377 (Fed. Cir. 2021). "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." *Id.* at 1377-78. Therefore, because Mr. Faris' claims "concern benefits only available to military servicemembers," he need only show that he was denied a benefit of employment. Appx. 4. Also, in considering the applicable statutory provisions, where there is doubt as to the meaning of Congress' chosen text, we "give each [statutory provision] as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

III

Mr. Faris argues that he was denied a benefit of employment because he was required to make deposits to obtain FERS credit during the times he was on LWOP status for military service. *See, e.g.*, Pet. Br. 4. Mr. Faris also argues that he was denied a benefit of employment when the agency did not allow him to make a deposit and receive FERS service credit during his week of inactive duty National Guard training in April 2017. *Id.* We consider each claim of error in turn.[3]

[3] In coming to our conclusion, we have considered, in conjunction with our review of the entire record, Mr. Faris' informal brief (ECF No. 8), his informal reply brief (ECF No. 18), and the memorandum he filed in lieu of oral argument (ECF No. 24).

A

Mr. Faris argues that the FERS statutory scheme, by requiring him to pay a deposit to receive FERS credit for periods of military service while he was on LWOP from his civilian job, denies him the USERRA-protected benefit of receiving FERS credit *without* paying a deposit. *See* Pet. Br. 4-25. Mr. Faris' contentions are defeated by the clear language of the applicable statutory provisions.

The FERS statute provides that "an employee or Member shall be allowed credit for . . . *each period of military service* performed after December 31, 1956 . . . *if a deposit* (including interest, if any) *is made* with respect to such period in accordance with section 8422(e)."[4] 5 U.S.C. § 8411(c)(1)(B) (emphasis added). Plainly, § 8411(c)(1)(B) requires that an employee seeking credit for a period of military service must make a deposit in order to have such a credit allowed. This unambiguous statutory language compels us to conclude that Mr. Faris is not entitled to credit without paying the deposit. *See Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

In attempting to evade this straightforward analysis, Mr. Faris points to § 8411(d), which provides that "[c]redit under this chapter shall be allowed for leaves of absence without pay granted an employee while performing military service . . . ." Mr. Faris argues he should be able to "claim rights to benefits" under this provision. Pet. Br. 8-9. However, reading the statute as a whole, as we must, *see, e.g., Corley v. United States*, 556 U.S. 303, 314 (2009)

[4] Section 8422(e)(1) describes how to calculate the deposit amount and references the "deposit payable."

("A statute should be construed so that effect is given to all its provisions . . . ."), § 8411(d) merely clarifies that an employee on LWOP status to perform military service is *eligible* to receive FERS credit for his service. It does not absolve him of the obligation to comply with the conditions for obtaining such a credit, including making the deposit required by § 8411(c)(1)(B).

USERRA does not support a different conclusion. To the contrary, the statute explicitly contemplates that "a person who is absent from a position of employment by reason of service in the uniformed services . . . *may be required to pay the employee cost, if any, of any funded benefit continued* . . . ." 38 U.S.C. § 4316(b)(1) & (4) (emphasis added). Another provision of USERRA, § 4316(b)(6), further provides that "[t]he entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318;" and § 4318 explains that "[a] person reemployed under this chapter shall be entitled to accrued benefits . . . that are contingent on the making of . . . employee contributions . . . *only to the extent the person makes payment to the plan* with respect to such contributions . . . ." 38 U.S.C. § 4318(b)(2) (emphasis added). Hence, USERRA is entirely consistent with the military-deposit requirement.

As Mr. Faris points out, and the USAF does not dispute, a civilian employee in LWOP status who is *not* serving in the military can receive FERS credit for up to six months in any calendar year without making a deposit. *See Bain v. Off. of Pers. Mgmt.*, 978 F.2d 1227, 1230 (Fed. Cir. 1992) ("Taken as a whole, the statutory scheme[] of FERS . . . allow[s] federal employees up to six months per year of retirement credit for leaves of absence . . . ."). This does not make for a USERRA violation, however. As the USAF correctly responds, USERRA expressly provides that a person serving in the military while on LWOP status from their civil-service job may "be required to pay the employee cost, if any, of any funded benefit continued

pursuant to paragraph (1) *to the extent other employees on furlough or leave of absence are so required.*" 38 U.S.C. § 4316(b)(1) & (4) (emphasis added); *see also* Resp. Br. 12-14. For his USERRA claim, the pertinent comparison is between Mr. Faris' LWOP and employees "having similar seniority, status, and pay" who are on similar "furlough or leave of absence . . . ." 38 U.S.C. § 4316(b)(1)(B); *see also Tully v. Dep't of Just.*, 481 F.3d 1367, 1369 (Fed. Cir. 2007) (holding that "leave of absence" that "triggers a right to equivalent treatment" is one that is "comparable to the leave provided to the service member for military service," and rejecting petitioner's argument that he was entitled to "the best benefits available to any employee for any leave of absence"). Mr. Faris has not shown how such a comparison disfavors him. Moreover, as the USAF states, "employees on LWOP for reasons besides military service cannot receive more than six months of service credit in a calendar year, whereas employees on LWOP for military service do not face this limitation – a distinction favoring members of the military." Resp. Br. 14.

Our conclusions are consistent with *Whittacre v. Office of Personnel Management*, 120 M.S.P.R. 114 (2013), on which the MSPB relied in declining to adopt Mr. Faris' interpretation of the relevant statutes. Appx. 5-7. In *Whittacre*, the MSPB considered the same statutes we have discussed here and held that when "military service interrupts civilian service, a [FERS] deposit not exceeding the amount that would have been deducted and withheld from his basic pay had he remained in civilian service during the period in question is required." 120 M.S.P.R. at 120.

Because the statutes required Mr. Faris to pay a deposit if he wished to receive FERS credit for his military service time, he was not entitled to receive FERS credit without making a deposit, and therefore Mr. Faris was not denied an employment benefit to which he was entitled. Accordingly, his USERRA claim fails, and the MSPB did not err in denying his request for corrective action.

B

Mr. Faris also argues that he should have been able to pay a deposit so he could receive FERS credit for his service while he was on LWOP to participate in inactive duty National Guard training from April 3 to 7, 2017. Pet. Br. 25-29. We disagree.

Title 5, § 8411(c)(1) allows for the accrual of FERS credit for military service. "Military service" is expressly defined as "active service." 5 U.S.C. § 8401(31) ("[T]he term 'military service' means honorable active service . . . ."). Therefore, Mr. Faris' inactive duty training is not eligible for FERS credit.

Mr. Faris asserts that the USERRA definition of "service in the uniformed services," which includes "inactive duty training," 38 U.S.C. § 4303(13), governs which "military service" can count for FERS credit. Pet. Br. 25-26. We are not persuaded. "In construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Adopting Mr. Faris' view of the statutory scheme would effectively read the definition of "military service" Congress provided in § 8401(31) out of the statute. Therefore, we conclude that Mr. Faris' interpretation of the statutory scheme is incorrect.

Our conclusion is strengthened by the amendment Congress made to § 8401(31) in connection with the enactment of USERRA. At that time, in 1994, Congress amended FERS' § 8401(31) definition of "military service" to add "full-time National Guard duty (as such term is defined in section 101(d) of title 10)," but it did *not* also add "inactive duty training." USERRA, Pub. L. No. 103-353 § 5(c), 108 Stat. 3149, 3174. This omission was clearly intended, as the provision cited to, 10 U.S.C. § 101(d)(5), provides that "'full-time National Guard duty' means training or other duty, *other than inactive duty* . . . ." (emphasis added).

This set of statutory provisions did not entitle Mr. Faris to be offered the opportunity to pay a deposit and receive service credit for his inactive-duty service. Hence, Mr. Faris was not denied an employment benefit under USERRA. The MSPB did not err in denying his request for corrective action.

IV

For the foregoing reasons, we conclude that the MSPB's decision denying Mr. Faris' request for corrective action is supported by substantial evidence and is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. We have considered Mr. Faris' additional arguments and find them unpersuasive. Accordingly, we affirm.

AFFIRMED

COSTS

No costs.

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

MICHAEL FARIS,
Petitioner

v.

DEPARTMENT OF THE AIR FORCE,
Respondent

2022-1561

Petition for review of the Merit Systems Protection Board in No. SF-4324-21-0370-I-1.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

PER CURIAM.

ORDER

Michael Faris filed a combined petition for panel rehearing and rehearing en banc. 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 November 16, 2022.

FOR THE COURT

November 9, 2022
Date

/s/ Jarrett B. Perlow
Jarrett B. Perlow
Chief Deputy Clerk

Statutes and Regulations

1 U.S. Code § 8 - "Person", "human being", "child", and "individual" as including born-alive infant.

(a) In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words "person", "human being", "child", and "individual", shall include every infant member of the species homo sapiens who is born alive at any stage of development.

(b) As used in this section, the term "born alive", with respect to a member of the species homo sapiens, means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

(c) Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being "born alive" as defined in this section.

5 U.S. Code § 8411 - Creditable service

(c)

(1) Except as provided in paragraphs (2), (3), and (5), an employee or Member shall be allowed credit for—

(A) each period of military service performed before January 1, 1957; and

(B) each period of military service performed after December 31, 1956, and before the separation on which title to annuity is based, if a deposit (including interest, if any) is made with respect to such period in accordance with section 8422(e).

5 U.S. Code § 8411 - Creditable service

(d) Credit under this chapter shall be allowed for leaves of absence without pay granted an employee while performing military service, or while receiving benefits under subchapter I of chapter 81. An employee or former employee who returns to duty after a period of separation is deemed, for the purpose of this subsection, to have been on leave of absence without pay for that part of the period in which that individual was receiving benefits under subchapter I of chapter 81. Credit may not be allowed for so much of other leaves of absence without pay as exceeds 6 months in the aggregate in a calendar year.

5 U.S. Code § 8422 - Deductions from pay; contributions for other service; deposits

(e)
(1)
(A) Except as provided in subparagraph (B), and subject to paragraph (6), each employee or Member who has performed military service before the date of the separation on which the entitlement to any annuity under this subchapter, or subchapter V of this chapter, is based may pay, in accordance with such regulations as the Office shall issue, to the agency by which the employee is employed, or, in the case of a Member or a Congressional employee, to the Secretary of the Senate or the Chief Administrative Officer of the House of Representatives, as appropriate, an amount equal to 3 percent of the amount of the basic pay paid under section 204 of title 37 to the employee or Member for each period of military service after December 1956. The amount of such payments shall be based on such evidence of basic pay for military service as the employee or Member may provide, or if the Office determines sufficient evidence has not been so provided to adequately determine basic pay for military service, such payment shall be based on estimates of such basic pay provided to the Office under paragraph (4).
(B) In any case where military service interrupts creditable civilian service under this subchapter and reemployment pursuant to chapter 43 of title 38 occurs on or after August 1, 1990, the deposit payable under this paragraph may not exceed the amount that would have been deducted and withheld under subsection (a)(1) from basic pay during civilian service if the employee had not performed the period of military service.

18 U.S. Code § 2510 – Definitions

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

28 U.S. Code § 1254 - Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

38 U.S. Code § 4301 - Purposes; sense of Congress

(a) The purposes of this chapter are—

(3) to prohibit discrimination against persons because of their service in the uniformed services.

38 U.S. Code § 4301 - Purposes; sense of Congress

(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.

38 U.S. Code § 4302 - Relation to other law and plans or agreements

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

38 U.S. Code § 4303 - Definitions

(2) The term "benefit", "benefit of employment", or "rights and benefits" means the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

(13) The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, State active duty for a period of 14 days or more, State active duty in response to a national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.), State active duty in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170), a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, a period for which a person is absent from a position of employment due to an appointment into service in the Federal Emergency Management Agency as intermittent personnel under section 306(b)(1) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5149(b)(1)), and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

38 U.S. Code § 4311 - Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, 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 by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited—

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

38 U.S. Code § 4312 - Reemployment rights of persons who serve in the uniformed services

(a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if—

(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;
(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and
(3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).

38 U.S. Code § 4316 - Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

(b)
(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be—
(A) deemed to be on furlough or leave of absence while performing such service; and
(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.
(2)
(A) Subject to subparagraph (B), a person who—
(i) is absent from a position of employment by reason of service in the uniformed services, and
(ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service,
is not entitled to rights and benefits under paragraph (1)(B).
(B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).
(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.
(4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.

(5) The entitlement of a person to coverage under a health plan is provided for under section 4317.
(6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.

38 U.S. Code § 4318 - Employee pension benefit plans

(a)
(1)
(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.
(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.
(2)
(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.
(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.
(b)
(1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of

the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated—
(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or
(B) if the sponsor does not provide—
(i) to the last employer employing the person before the period served by the person in the uniformed services, or
(ii) If such last employer is no longer functional, to the plan.
(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.
(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—
(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or
(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).
(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.

38 U.S. Code § 4324 - Enforcement of rights with respect to Federal executive agencies

(d)
(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United

States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

38 U.S. Code § 4331 - Regulations

(b)

(1) The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights.

5 C.F.R. § 353.107 - Service credit upon reemployment.

Upon reemployment, an employee absent because of uniformed service or compensable injury is generally entitled to be treated as though he or she had never left. This means that a person who is reemployed following uniformed service or full recovery from compensable injury receives credit for the entire period of the absence for purposes of rights and benefits based upon seniority and length of service, including within-grade increases, career tenure, completion of probation, leave rate accrual, and severance pay.

20 C.F.R.§ 1002.149 - What is the employee's status with his or her civilian employer while performing service in the uniformed services?

During a period of service in the uniformed services, the employee is deemed to be on furlough or leave of absence from the civilian employer. In this status, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of service. For example, if the employer characterizes the employee as "terminated" during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on furlough or leave of absence, and therefore entitled to the non-seniority rights and benefits generally provided to employees on furlough or leave of absence.

20 C.F.R.§ § 1002.150 - Which non-seniority rights and benefits is the employee entitled to during a period of service?

(a) The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice,

or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. They also include those rights and benefits that become effective during the employee's period of service and that are provided to similarly situated employees on furlough or leave of absence.

(b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.

20 C.F.R.§ § 1002.151 - If the employer provides full or partial pay to the employee while he or she is on military leave, is the employer required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

Yes. If the employer provides additional benefits such as full or partial pay when the employee performs service, the employer is not excused from providing other rights and benefits to which the employee is entitled under the Act.

20 C.F.R.§ § 1002.152 - If employment is interrupted by a period of service in the uniformed services, are there any circumstances under which the employee is not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

If employment is interrupted by a period of service in the uniformed services and the employee knowingly provides written notice of intent not to return to the position of employment after service in the uniformed services, he or she is not entitled to those non-seniority rights and benefits. The employee's written notice does not waive entitlement to any other rights to which he or she is entitled under the Act, including the right to reemployment after service.

Additional material from this filing is available in the Clerk's Office.