

Mobilized Military Personnel Have New Tool to Seek Differential Pay from Government at Court of Federal Claims

July 2021

Military personnel employed by the federal government who have been voluntarily mobilized in support of contingency operations should take note of a recent development regarding their ability to seek recovery when they have been denied differential pay under 5 U.S.C. § 5538. The U.S. Court of Federal Claims confirmed that claims for differential pay are actionable under the Tucker Act, 28 U.S.C. § 1491 in *Downey v. United States*, 147 Fed. Cl. 171 (2020).

Section 5538 states that “[a]n employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive . . . [differential pay.]” 10 U.S.C. § 101(a)(13)(B), in turn states the following: “The term ‘contingency operation’ means a military operation that . . . results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.”

Since Section 5538 went into effect in March 2009, Office of Personnel Management (OPM) policy guidance has expressly declared personnel mobilized under the so-called “voluntary” authority of 10 U.S.C. § 12301(d) ineligible for differential pay. Over the intervening years, federal employees have challenged OPM’s guidance on the basis that it violates the Uniformed Services Employment and Reemployment Rights Act (USERRA), with some success.

Authors

Scott A. Felder
Partner
202.719.7029
sfelder@wiley.law

Practice Areas

Government Contracts

For example, in *Gregory A. Marchand v. Government Accountability Office*, Case No. 12-GA-05 (VT) (Office of Compliance, Dec. 27, 2012), a neutral hearing officer of the Office of Compliance (OOC)¹ ruled that OPM's policy violated USERRA. There, the OOC hearing officer found that OPM's "narrow construction" of section 5538 "is not supported by the broader context of the statute as a whole." Indeed, the OOC hearing officer went so far as to conclude that OPM's guidance is irrelevant in light of Congress' clear "intent that § 5538 applies to 'any other provision of law during a war or national emergency declared by the President or Congress.'" Because the GAO admitted that the only basis upon which it was denying differential pay was the fact that the Complainant had been voluntarily mobilized, and that he would have been afforded differential pay had he been involuntarily mobilized, the hearing officer concluded that the agency had violated USERRA by denying a statutory benefit of employment on the basis of the Complainant's military service.

Executive branch employees, however, must pursue their USERRA claims before the Merit Systems Protection Board (MSPB). Results before the MSPB have been mixed, however, with Board members expressing conflicting views about whether a reservist voluntarily mobilized under section 12301(d) is entitled to differential pay. See *Marquiz v. Department of Defense*, 123 M.S.P.R. 479 (July 12, 2016). Moreover, the longstanding inability of the MSPB to issue final decisions due to a lack of quorum made it even less of a viable a forum for the potential restoration of differential pay that had been denied contrary to USERRA.

Recognizing these challenges, the plaintiff in *Downey* decided to present his claim for denied differential pay to the Court of Federal Claims under the Tucker Act. The Government moved to dismiss for lack of subject matter jurisdiction, arguing that Plaintiff was required to bring his claim before the Merit Systems Protection Board under either USERRA or the Civil Service Reform Act (CSRA).

The court denied the Government's motion. As a threshold matter, the court noted that well-settled law requires any claim under the Tucker Act to be premised on "a money-mandating constitutional provision, statute, or regulation; an express or implied contract with the United States; or an illegal exaction of money by the United States." *Id.* at 177. Against this jurisdictional backdrop, the court found that the plain language of 5 U.S.C. § 5538, which provides that a reservist "shall be entitled" to differential pay, establishes that the reservist differential pay statute is money-mandating, allowing the court to hear the plaintiff's claim. *Id.*

The court next rejected the Government's argument that the plaintiff was required to bring his claims under either USERRA or the CSRA. As to the former, the court found that plaintiff was not alleging a discrimination claim, but rather, simply, that he had been denied pay to which he was entitled. As such, USERRA was not applicable to plaintiff's claim.

Somewhat similarly, the CSRA "covers claims based upon major adverse personnel actions against civilian government employees, including a reduction in pay." *Id.* at 179. The court rejected the Government's effort to recharacterize plaintiff's claim as a complaint about pay reduction, however, recognizing that plaintiff never alleged that his civilian pay had been reduced—only that he had not properly been paid as mandated under Section 5538. *Id.*

Downey was recently resolved through a settlement including payment of the plaintiff's differential pay, in full, with interest. Thus, the court never had occasion to opine on the propriety of OPM's differential pay guidance, which continues to expressly exclude 12301(d) mobilizations from eligibility. Nevertheless, *Downey* makes clear that a federal employee mobilized to active duty and denied differential pay has the additional option to seek redress before the Court of Federal Claims. Not only does this option not require pleading or proving discrimination prohibited by USERRA, it may be the only way for executive branch employees to achieve meaningful relief, so long as the MSPB continues to operate without a quorum.

¹ The Office of Compliance is an independent, non-partisan agency established to administer and enforce the Congressional Accountability Act (CAA). Under section 206 of the CAA, the OOC applies certain rights and protections of USERRA for employees of legislative branch agencies. The OOC provides an administrative hearing process for employees bringing claims under the CAA.