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[UPDATE NOVEMBER 2015: In November 2015, Congress amended section 4312(c)(4)(A) of USERRA by adding sections 12304a and 12304b to the list of title 10 sections that call for involuntary recall to active duty and that are exempt from USERRA's five-year limit. The glitch discussed in this article has now been corrected, effective November 25, 2015.]

Does my Active Duty Time Count toward my Five-Year Limit under USERRA? Does the Time help me Qualify for Early Receipt of Reserve Retirement? That Depends on which Title 10 Section Applies.

By Captain Samuel F. Wright, JAGC, USN (Ret.)²
And Nathan Richardson³

1.3.1.2—Character and duration of service

1.8—Relationship between USERRA and other laws/policies

9.0--Miscellaneous

In October 2010, the Air Force Reserve Command (AFRC) established the Force Generation Center (FGC) to serve as the single path to request and receive as well as oversee and deliver Air Force Reserve forces and capability.⁴ The current Commander of the FGC is Brigadier General Edmund D. Walker, a life member of ROA. The FGC is located at Robins Air Force Base in Georgia.

The FGC publishes a monthly official newsletter called "Points of Fusion." A member of ROA sent us the May 2014 newsletter and asked us to confirm or clarify some of the newsletter's statements about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and also about the kinds of service that qualify the individual reservist to start receiving his or her Reserve Component retirement benefits early (prior to the individual's 60th birthday). We will discuss these two matters separately.

USERRA

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find almost 1,300 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) established this column in 1997, and we add new articles each week.

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³ Nathan Richardson graduated from the United States Air Force Academy in 2006 and served on active duty first in the Air Force and then in the Army, including service in Iraq. He left active duty in 2012 and began law school at George Washington University (Washington, DC) in September 2013. He has completed his first year of law school and is one of two summer associates at the Service Members Law Center in the summer of 2014, thanks to the generous support of Admiral McGrail Scholars.

⁴ This explanation comes directly from an AFRC press release in 2010.

Congress enacted USERRA (Public Law 103-353) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRRA), which was originally enacted in 1940, as part of the Selective Training and Service Act (STSA). The STSA is the law that led to the drafting of millions of young men (including my late father) for World War II. As originally enacted in 1940, the VRRRA only applied to draftees, but in 1941, as part of the Service Extension Act, Congress amended the VRRRA to make it apply to voluntary enlistees as well as draftees. For almost $\frac{3}{4}$ of a century, federal law has provided the right to reemployment to persons who leave civilian jobs for voluntary or involuntary military service.

I have been dealing with the VRRRA and USERRA for 32 years, in one capacity or another. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress, as his proposal, in early 1991. The version that President Bill Clinton signed into law on October 13, 1994 was about 85% the same as the Webman-Wright draft. USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice. Five years ago (June 2009), I retired from private practice and joined the full-time staff of ROA, as the first Director of the Service Members Law Center (SMLC).

As SMLC Director, I received and responded to 9,193 inquiries (766 per month on average) in 2013, from service members, military family members, attorneys, employers, ESGR volunteers, DOL investigators, congressional staffers, reporters, and others. Almost half the inquiries (48.6%) were about USERRA, and the other half were about everything you can think of that has something to do with military service and law.

As I explained in Law Review 1281 and other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing voluntary or involuntary service in the uniformed services—active duty, active duty for training, inactive duty training, etc.
- b. You must have given the employer prior oral or written notice, unless giving prior notice was precluded by military necessity or otherwise impossible or unreasonable.
- c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. More on this below.
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, you must have made a timely application for reemployment. After a period of service of 181 days or more, you have 90 days to apply for

reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

If you want to retain the option of returning to your pre-service civilian job after release from a period of uniformed service, you must keep track of your own five-year limit with respect to your current civilian employer. Do not expect the civilian employer, or AFRC, or ESGR, or DOL, or anybody else to keep track of this for you. I invite your attention to Law Review 201 (August 2005) for a detailed discussion of what counts and what does not count. Section 4312(c) of USERRA sets forth the five-year limit and its exemptions, as follows:

(c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service--

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is--

(A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty *under section 12304* of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or

(F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.

38 U.S.C. 4312(c) (emphasis supplied).

On page 2 of the May 2014 FGC newsletter, there is a chart titled "Mobilization/Activation Elements." The final column on the right margin is "Service exempt from USERRA 5-year limit." The chart indicates that if the individual Air Force Reservist volunteers to be activated under section

12301(d) of title 10 the period of service is exempted from the computation of the individual's five-year limit. This statement is somewhat oversimplified.

Please note that under section 4312(c)(4)(A) of USERRA (copied above) duty performed under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 is exempted from the computation of the individual's five-year limit. Section 12301(d) is not mentioned and duty performed under section 12301(d) normally will count toward the individual's five-year limit.

Voluntary active duty under section 12301(d) can be exempted from the computation of the individual's five-year limit under section 4312(c)(4)(B), section 4312(c)(4)(C), or section 4312(c)(4)(D), but only if the "secretary concerned"⁵ has made the necessary determination. That determination should be reflected in "magic words" included in the individual's military orders for the period in question or in his or her DD-214 received upon release from the period in question. Without the magic words, voluntary active duty under section 12301(d) *will count* toward the individual's five-year limit.

In an e-mail to me dated July 16, 2014, Philip D. Donohoe, Esq.⁶ stated:

The FGC newsletter, its chart, and particularly its reference to 10 USC section 12304b-described but voluntary active duty (served in accordance with 10 U.S.C. section 12301(d)) are all premised on the expectation that there will in fact be a Secretary of the Air Force "determination" issued in accordance with USERRA's section 4312(c)(4)(D), declaring such voluntary active duty performing section 12304b-described missions to be "in support of a critical mission" and thereby excluding such periods of active duty from USERRA's 5-year cumulative limit on the duration of the period or periods of uniformed service that the individual can perform and still have reemployment rights.

That information on the AFRC-expected "secretarial determination" was not included in the newsletter. However, it is the basis for the FGC newsletter chart's entry reading, "12301(d) Volunteer to be Activated - - Service Exempt from USERRA 5-Year Limit - - Yes." The expected secretarial "determination" was not mentioned in the newsletter or in the chart simply because the chart conveys AFRC's expectations related to section 12304b-described missions that will not be performed until Fiscal Year 2015 and/or Fiscal Year 2016. In that sense, the newsletter and its chart entries only sought to convey, "here's what we expect will occur in future regarding such active duty, based upon the knowledge we currently possess regarding the missions described in 10 USC section 12304b."

With this explanation, I agree that voluntary active duty performed under section 12301(d) of title 10 is exempted from the computation of the individual's five-year limit under USERRA *if the service*

⁵ The secretary concerned is the service secretary. For Air Force Reservists, this would be the Secretary of the Air Force.

⁶ Mr. Donohoe identifies himself as "Attorney-Advisor, Labor & Administrative Law, HQ AFRC/JAA."

secretary has made the required determination and there is evidence of the determination in the individual's orders or his or her DD-214.

To those Air Force Reservists who perform frequent and lengthy voluntary active duty tours and who expect to return to their civilian jobs, I have the following advice: *Be certain that the magic words are in your orders* before you agree to a voluntary tour of active duty. Under section 4312(f)(1)(B) of USERRA⁷ you are required to provide to your employer, upon the employer's request, documentation showing that you have not exceeded USERRA's five-year limit, when you apply for reemployment.

For example, Lieutenant Colonel Eager Beaver, USAFR left active duty in 2000, affiliated with the Air Force Reserve, and went to work for Big Deal Air Lines (BDAL) as a pilot. In the 13 years since the terrorist attacks of September 11, 2001, Beaver has been on active duty and away from his BDAL job for seven years cumulatively, including a two-year active duty period that is ending now. Because his cumulative periods of uniformed service, relating to his employer relationship with BDAL, exceed five years, Beaver will need to document that at least two of the seven years are exempt from the five-year limit, under section 4312(c) of USERRA. For voluntary active duty periods under section 12301(d) of title 10, Beaver needs to show the "magic words" in his orders or his DD-214.

The chart on page 2 of the May 2014 FGC newsletter indicates that *involuntary* active duty under section 12304b of title 10 *will count* toward the individual's five-year limit. Unfortunately, that is correct. Duty performed under section 12304 is exempted from the computation of the individual's five-year limit, but section 12304b is not mentioned and duty performed under section 12304b is not exempted from the computation of the individual's limit.

Please note that section 12304b is *not the same thing* as section 12304(b). The United States Code contains multiple titles (broad subject areas). There are consecutively numbered sections within each title. Many titles are crowded, and sections with numbers like 12304a and 12304b can be found between section 12304 and section 12305. Section 12304(b) is subsection (b) of section 12304. Section 12304b is an entirely separate section of the United States Code. For purposes of comparison, here are the two sections:

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

(a) Authority. Notwithstanding the provisions of section 12302(a) or any other provision of law, when the President determines that it is necessary to augment the active forces for any named operational mission or that it is necessary to provide assistance referred to in subsection (b), he may authorize the Secretary of Defense and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, without the consent of the members concerned, to order any unit, and any member not assigned to a unit organized to serve as a unit, of the Selected Reserve (as defined in section 10143(a) of this title), or any member in

⁷ 38 U.S.C. 4312(f)(1)(B).

the Individual Ready Reserve mobilization category and designated as essential under regulations prescribed by the Secretary concerned, under their respective jurisdictions, to active duty for not more than 365 consecutive days.

(b) Support for responses to certain emergencies. The authority under subsection (a) includes authority to order a unit or member to active duty to provide assistance in responding to an emergency involving--

- (1) a use or threatened use of a weapon of mass destruction; or
- (2) a terrorist attack or threatened terrorist attack in the United States that results, or could result, in significant loss of life or property.

(c) Limitations.

(1) No unit or member of a reserve component may be ordered to active duty under this section to perform any of the functions authorized by chapter 15 or section 12406 of this title or, except as provided in subsection (b), to provide assistance to either the Federal Government or a State in time of a serious natural or manmade disaster, accident, or catastrophe.

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

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

(d) Exclusion from strength limitations. Members ordered to active duty under this section shall not be counted in computing authorized strength in members on active duty or members in grade under this title or any other law.

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

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

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

- (1) order of the President, or

(2) law.

(h) Relationship to War Powers Resolution. Nothing contained in this section shall be construed as amending or limiting the application of the provisions of the War Powers Resolution.

(i) Considerations for involuntary order to active duty.

(1) In determining which members of the Selected Reserve and Individual Ready Reserve will be ordered to duty without their consent under this section, appropriate consideration shall be given to--

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

(B) the frequency of assignments during service career;

(C) family responsibilities; and

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

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

(j) Definitions. In this section:

(1) The term "Individual Ready Reserve mobilization category" means, in the case of any reserve component, the category of the Individual Ready Reserve described in section 10144(b) of this title.

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

10 U.S.C. 12304.

§ 12304b. Selected Reserve: order to active duty for preplanned missions in support of the combatant commands

(a) Authority. When the Secretary of a military department determines that it is necessary to augment the active forces for a preplanned mission in support of a combatant command, the Secretary may, subject to subsection (b), order any unit of the Selected Reserve (as defined in section 10143(a) of this title), *without the consent of the members*, to active duty for not more than 365 consecutive days.

(b) Limitations.

(1) Units may be ordered to active duty under this section only if--

(A) the manpower and associated costs of such active duty are specifically included and identified in the defense budget materials for the fiscal year or years in which such units are anticipated to be ordered to active duty; and

(B) the budget information on such costs includes a description of the mission for which such units are anticipated to be ordered to active duty and the anticipated length of time of the order of such units to active duty on an involuntary basis.

(2) Not more than 60,000 members of the reserve components of the armed forces may be on active duty under this section at any one time.

(c) Exclusion from strength limitations. Members ordered to active duty under this section shall not be counted in computing authorized strength in members on active duty or total number of members in grade under this title or any other law.

(d) Notice to Congress. Whenever the Secretary of a military department orders any unit of the Selected Reserve to active duty under subsection (a), such Secretary shall submit to Congress a report, in writing, setting forth the circumstances necessitating the action taken under this section and describing the anticipated use of such unit.

(e) Termination of duty. Whenever any unit of the Selected Reserve is ordered to active duty under subsection (a), the service of all units so ordered to active duty may be terminated--

- (1) by order of the Secretary of the military department concerned; or
- (2) by law.

(f) Relationship to War Powers Resolution. Nothing contained in this section shall be construed as amending or limiting the application of the provisions of the War Powers Resolution.

(g) Considerations for involuntary order to active duty. In determining which units of the Selected Reserve will be ordered to duty without their consent under this section, appropriate consideration shall be given to--

- (1) the length and nature of previous service, to assure such sharing of exposure to hazards as national security and military requirements will reasonably allow;
- (2) the frequency of assignments during service career;
- (3) family responsibilities; and
- (4) employment necessary to maintain the national health, safety, or interest.

(h) Policies and procedures. The Secretaries of the military departments shall prescribe policies and procedures to carry out this section, including on determinations with respect to orders to active duty under subsection (g). Such policies and procedures shall not go into effect until approved by the Secretary of Defense.

(i) Defense budget materials defined. In this section, the term "defense budget materials" has the meaning given that term in section 231(f)(2) of this title.

10 U.S.C. 12304b (emphasis supplied).

Under section 12304b (enacted December 31, 2011), the Secretary of the Air Force or another service secretary can call a reserve unit to active duty *involuntarily*—“*without the consent of the members.*” Because this service is involuntary, *it should be exempt from the five-year limit*, but it is not exempt. The basic premise of section 4312(c) of USERRA is that *involuntary service does not put a person over the five-year limit and cause the individual to lose his or her civilian job.*

As enacted in 1994, section 4312(c) exempted from the five-year limit *all involuntary service* and some voluntary service. When Congress amends title 10 and creates a new provision for

involuntary call-up of Reserve Component personnel, Congress needs to make a corresponding amendment to section 4312(c) of USERRA, and add the new title 10 section to the list of sections that are exempt from the five-year limit. *This did not happen* on December 31, 2011, when Congress added section 12304b to title 10.

How did it happen that Congress failed to make a corresponding amendment to title 38 (USERRA) when Congress amended title 10? This happened because of the way Congress is organized. In the Senate and also in the House of Representatives, separate congressional committees have jurisdiction over discrete titles of the United States Code. The Senate Armed Services Committee (SASC) and the House Armed Services Committee (HASC) have jurisdiction over title 10 (armed forces). The Senate Veterans Affairs Committee (SVAC) and House Veterans Affairs Committee (HVAC) have jurisdiction over title 38 (veterans' affairs).

Each year, as part of the enactment of the National Defense Authorization Act (NDAA) for that fiscal year, the SASC and HASC make multiple amendments to title 10, and that is what happened in 2011, when Congress enacted section 12304b. When an amendment to title 10 necessitates a corresponding amendment to title 38, the corresponding amendment cannot usually be made as part of the NDAA process, because of the objections of the HVAC and SVAC. It is necessary to get the attention of the HVAC and SVAC and to come back, in separate legislation, to make the corresponding amendments to title 38. We (ROA) are working on that, but it has not happened.

To understand the importance of this need to amend section 4312(c), let us consider the hypothetical but realistic Colonel Jimmy Doolittle, USAFR. He graduated from the Air Force Academy and was commissioned a Second Lieutenant in May 1991. He remained on active duty until May 2000 and then affiliated with the Air Force Reserve, and at about the same job he began his civilian career as a pilot at Big Deal Air Lines (BDAL).

After the terrorist attacks of September 11, 2001, Doolittle interrupted his BDAL career multiple times for active duty tours of varying durations and under different legal authorities. Several of his active duty tours were voluntary but were exempt from the five-year limit because of "magic words" in the orders. One of his active duty tours was involuntary and was exempt from the five-year limit on that basis. Several other tours are not exempt and count toward his five-year limit with respect to his employer relationship with BDAL. Doolittle's nine-year period of active duty prior to May 2000 does not count toward his five-year limit because it was before he began his employer relationship with BDAL.

Doolittle has read Law Review 201 and is very much aware of the periods that count toward his limit. As of now, he has used four years and ten months of his five-year limit. He knows that he must not volunteer for any more active duty unless the new period is clearly exempt from the limit, because he has only two months of "head room" on his five-year limit.

In 2016, Doolittle is a traditional Air Force Reservist, not on active duty, and is the commander of an Air Force Reserve unit that is called to active duty under section 12304b of title 10. Doolittle is called to active duty along with the unit. This new period of active duty, when added to the four years and ten months of non-exempt duty that Doolittle has already performed, puts him over the

five-year limit, meaning that he does not have the right to reemployment at BDAL at the end of the new active duty period, in 2017. We need a statutory amendment so that Doolittle will not lose his civilian job because of an involuntary call to active duty.

Credit toward early receipt of reserve retirement

Until 1948, it was necessary to serve at least 20 years of full-time active duty or to suffer a serious disability in the line of duty in order to qualify for military retirement pay. On June 29, 1948, President Harry S. Truman signed into law Public Law 80-810⁸, and Title III of that Public Law created the reserve component retirement system that I enjoy today⁹ along with thousands of other ROA members. Age 60 has always been the start point for this benefit, but in 2008 Congress amended this law and provided for Reserve Component members to qualify for early receipt (before age 60) of this benefit, under some very limited circumstances. Here is the text of the pertinent subsection, as amended in 2008:

(f) (1) Subject to paragraph (2), the eligibility age for purposes of subsection (a)(1) is 60 years of age.

(2) (A) In the case of a person who as a member of the Ready Reserve serves on active duty or performs active service described in subparagraph (B) after January 28, 2008, the eligibility age for purposes of subsection (a)(1) shall be reduced below 60 years of age by three months for each aggregate of 90 days on which such person so performs in any fiscal year after such date, subject to subparagraph (C). A day of duty may be included in only one aggregate of 90 days for purposes of this subparagraph.

(B) (i) Service on active duty described in this subparagraph is service on active duty pursuant to a call or order to active duty under a provision of law *referred to in section 101(a)(13)(B) or under section 12301(d) of this title*. Such service does not include service on active duty pursuant to a call or order to active duty under section 12310 of this title.

(ii) Active service described in this subparagraph is also service under a call to active service authorized by the President or the Secretary of Defense under section 502(f) of title 32 for purposes of responding to a national emergency declared by the President or supported by Federal funds.

(iii) If a member described in subparagraph (A) is wounded or otherwise injured or becomes ill while serving on active duty pursuant to a call or order to active duty under a provision of law referred to in the first sentence of clause (i) or in clause (ii), and the member is then ordered to active duty under section 12301(h)(1) of this title to receive medical care for the wound, injury, or illness, each day of active duty under that order for medical care shall be treated as a continuation of the original call or order to active duty for purposes of reducing the eligibility age of the member under this paragraph.

(iv) Service on active duty described in this subparagraph is also service on active duty pursuant to a call or order to active duty authorized by the Secretary of Homeland Security under

⁸ Here at ROA headquarters, we have the pen that President Truman used to sign this law.

⁹ I turned 60 in May 2011 and started drawing my Navy Reserve retired pay, based on more than 20 “good years” for retirement purposes and 4,401 retirement points.

section 712 of title 14 for purposes of emergency augmentation of the Regular Coast Guard forces.

(C) The eligibility age for purposes of subsection (a)(1) may not be reduced below 50 years of age for any person under subparagraph (A).

(3) The Secretary concerned shall periodically notify each member of the Ready Reserve described by paragraph (2) of the current eligibility age for retired pay of such member under this section, including any reduced eligibility age by reason of the operation of that paragraph. Notice shall be provided by such means as the Secretary considers appropriate taking into account the cost of provision of notice and the convenience of members.

10 U.S.C. 12731(f) (emphasis supplied).

The chart on page 2 of the May 2014 FGC newsletter indicates that *voluntary* active duty under 10 U.S.C. 12301(d) qualifies the individual reservist for early receipt of reserve retired pay (before age 60) but that *involuntary* active duty under 10 U.S.C. 12304b does not qualify the individual for early receipt of reserve retired pay. We have determined that the FGC chart is correct in this respect.

Section 12731(f)(2)(B)(i) provides that duty “referred to in section 101(a)(13)(B) or under section 12301(d) of this title” qualifies as “contingency service” that qualifies the individual for early receipt of reserve retired pay. Thus, it is clear that section 12301(d) duty qualifies the individual for early receipt—section 12301(d) is specifically mentioned in section 12731(f)(2)(B)(i).

Does involuntary active duty under section 12304b qualify the individual for early receipt of reserve retired pay? To answer that question, we need to review the language of section 101(a)(13) of title 10. That subsection reads as follows:

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

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

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 15 of this title, section 712 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.

10 U.S.C. 101(a)(13) (emphasis supplied).

Section 101(a)(13)(B) lists section 12304 and section 12304a, but not section 12304b, among the title 10 sections that qualify as “contingency service.” Thus, duty performed under section 12304b does not qualify the person for early receipt of reserve retired pay.

We (ROA) believe that involuntary service under section 12304b *should* qualify the individual for early receipt of reserve retired pay. Accomplishing this will require a statutory amendment, and we are working on that.