

LAW REVIEW¹ 26023

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Yes, You Are Entitled to Differential Pay under Section 5538 of Title 5 of the United States Code. OPM Must Revise its Guidance.

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

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¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2,300 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 44 years. 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 proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. As of 5/1/2026, I have come out of retirement and have joined Maher Legal Services in an "of counsel" role. You can reach me by e-mail at samuel@maherlegalservices.com or by telephone at (708) 468-8155.

10.1—Supreme Court Cases under the reemployment statute.

Feliciano v. Department of Transportation, 605 U.S. 38 (2025).³

Q: I am a Senior Airman (E-4) in the Air Force Reserve, and I am currently on active duty (voluntarily). My orders refer to section 12301(d) of title 10 of the United States Code. I left my civilian federal job to go on active duty for one year, from 10/1/2025 through 9/30/2026. I am losing money each pay period because my active-duty E-4 pay is less than my regular federal civilian salary.

I applied for differential pay under section 5538 of title 5 of the United States Code. The personnel office of the federal agency that employs me told me that, according to guidance published by the United States Office of Personnel Management (OPM) on its website, I am ineligible for differential pay because I volunteered for this active duty.

Is the personnel office correct in denying my application for differential pay?

Answer, bottom line up front:

No, the personnel office is wrong. The OPM guidance that the personnel office cited was specifically overruled by the United States Supreme Court on 4/30/2025, 14 months ago. **OPM needs to update**

³ This is a decision of the United States Supreme Court. The decision was announced on 4/30/2025, 14 months ago. The citation means that you can find this case in Volume 605 of *United States Reports*, starting on page 38. We have also addressed the *Feliciano* case in Law Review 25018 (May 2025) and in Law Review 25025 (July 2025).

its published guidance today. At the end of this article, I have placed a copy of a letter that I sent to the OPM Director.

The statutory basis for differential pay

Under section 5538(a) of title 5 of the United States Code, a federal civilian employee who is a member of a Reserve Component of the armed forces and who leaves his or her civilian job for active-duty service and thereby loses pay (because the military pay less is less than the person's regular federal civilian pay) is entitled to differential pay if he or she meets these conditions:

- (a) An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under section 12304b of title 10 *or a provision of law referred to in section 101(a)(13)(B) of title 10* shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which—
- (1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)
- (2) the amount of pay and allowances which (as determined under subsection (d))—
- (A) is payable to such employee for that service; and
- (B) is allocable to such pay period.⁴

⁴ 5 U.S.C. § 5538(a) (emphasis supplied).

A federal employee who is away from his or her federal civilian employment for active military duty, and who is receiving less pay on active duty than he or she would receive at the federal civilian job, is entitled to differential pay if he or she is on active duty under “*a provision of law referred to in section 101(a)(13)(B) of title 10.*”⁵ Here is the text of that subsection:

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

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

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 13 of this title, section 3714 of title 14, *or any other provision of law during a war or during a national emergency declared by the President or Congress.*⁶

Your current military orders refer to section 12301(d) of title 10, and that is not one of the United States Code sections specifically mentioned in section 101(a)(13) of title 10 (the definition of “contingency operation”), but you are entitled to differential pay under the final clause of section 101(a)(13): “or any other provision of law *during a war or national emergency declared by the President or Congress*” (emphasis supplied).

⁵ Id.

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

Today, during Feliciano’s active-duty period, and for many decades, our country has been continuously in a “national emergency” condition. The Supreme Court’s majority decision noted: “With the exception of a brief period in the 1970s, one declared national emergency or another has been ongoing in this country for many decades.”⁷

According to the OPM guidance, which has been affirmed by the Merit Systems Protection Board (MSPB) and the United States Court of Appeals for the Federal Circuit, more than a temporal connection between the individual’s specific military duties and the declared national emergency is necessary to make the individual eligible for differential pay under section 5538(a). Under the rule that was in effect until the Supreme Court decided *Feliciano* on 4/30/2025, it was necessary for the individual who claimed differential pay to show that his or her specific military duties during the active-duty period were in support of one or more of the declared national emergencies.

The *Feliciano* case turned on the definition of the word “during.” The Supreme Court majority decision decided this point as follows:

At its core, the dispute before us turns on the meaning of the phrase “during a national emergency.” Does that language promise differential pay to certain federal civilian employees called to active-duty service while a national emergency is ongoing, as Mr. Feliciano argues? Or does it require a reservist to prove some additional, substantive connection between his service and a particular national emergency, as the Federal Circuit

⁷ *Feliciano*, 605 U.S. at 51.

held and the government contends? Several considerations persuade us that Mr. Feliciano’s interpretation is the sounder one.

Start with the word “during.” Normally, we have said, that word “denotes a temporal link” and means “contemporaneous with.” *United States v. Ressam*, 553 U. S. 272, 274-275, 128 S. Ct. 1858, 170 L. Ed. 2d 640 (2008). Any number of dictionaries from around the time of §101(a)(13)(B)’s adoption in 1991 offer up similar formulations. See, e.g., Black’s Law Dictionary 504 (6th ed. 1990) (defining “during” as “[t]hroughout the course of; throughout the continuance of; in the time of; after the commencement and before the expiration of”).

Conversely, the word “during” does not generally imply a substantive connection. The government itself has previously acknowledged as much. As its briefing in *Ressam* explained, “[t]he plain everyday meaning of ‘during’ is ‘at the same time’ or ‘at a point in the course of.’ It does not normally mean ‘at the same time *and in connection with.*’” Brief for United States in *United States v. Ressam*, O. T. 2007, No. 455, pp. 13-14 (emphasis added). Reading “during” to require a substantive connection, the government warned, risks “read[ing] in a relational element” that the word does not necessarily convey. Tr. of Oral Arg. In *United States v. Ressam*, O. T. 2007, No. 455, p. 31. Adopting just that view, this Court in *Ressam* held that a sentencing enhancement addressing those who carry an explosive “during” the commission of a felony applies to individuals who carry explosives “contemporaneous with” their felonies even in the absence of a substantive “relationship between the explosive carried and the

underlying felony.” 553 U. S., at 275, 128 S. Ct. 1858, 170 L. Ed. 2d 640.⁸

The Supreme Court gets the final word on the interpretation of a federal statute. The Court’s clear and unambiguous holding in *Feliciano* means that the OPM guidance and the Federal Circuit and MSPB precedents are obsolete and wrong. But OPM has not changed the guidance posted on its website, and many federal agencies and departments are continuing to apply the OPM guidance and are denying meritorious claims for differential pay.

OPM must correct the erroneous advice now. I am attaching, at the end of this article, a copy of my letter to OPM Director Scott Kupor.

Q: My older brother left a federal civilian job to go on active duty in 2015-16, and while he was on active duty he lost money because his military pay was less than his regular federal civilian pay. He inquired about applying for differential pay and was advised that he was ineligible because he had volunteered for the active duty. He relied on that advice and never made a formal application for differential pay. Is it too late for my brother to apply for differential pay? How far back can an individual go in applying for differential pay under these circumstances?

A: Section 5538 was enacted on 3/11/2009.⁹ It is possible to go back to that date to claim differential pay. USERRA does not have a statute of limitations, and it specifically precludes the application of other statutes of limitations. USERRA provides: “If any person seeks to file a

⁸ *Feliciano*, 605 U.S. at 44-45

⁹ Public Law 111-8, div. D, title VII, § 751(a), Mar. 11, 2009, 123 Stat. 693.

complaint or claim with the Secretary [of Labor], the Merit Systems Protection Board, or a Federal or State court under this chapter alleging a violation of this chapter, there shall be no limit on the period for filing the complaint or claim.”¹⁰

Q: Was *Feliciano* a USERRA case? Is my case a USERRA case? It seems to me that *Feliciano* was about determining the correct interpretation of section 5538 of title 5 and section 101(a)(13) of title 10. How is this a USERRA case?

A: Section 4311 of USERRA¹¹ makes it unlawful for an employer to deny a person a “benefit of employment” based on the person’s membership in a uniformed service, application to join a uniformed service, or the performance or obligation or application to perform service in a uniformed service. The Federal Circuit has held that when a federal agency fails to accord such a benefit (differential pay or paid military leave) to a federal employee, which amounts to a violation of section 4311. Thus, enforcement of these benefits is through the USERRA enforcement mechanism.¹²

When there is a question about the interpretation of a federal statute like section 5538 or section 6323 of title 5, the MSPB makes the first call and the Federal Circuit reconsiders the question *de novo*.¹³

Q: What does “de novo” mean?

¹⁰ 38 U.S.C. § 4327(b).

¹¹ 38 U.S.C. § 4311.

¹² See *O’Farrell v. Department of Defense*, 882 F.3d 880 (Fed. Cir. 2018). See also Law Review 24052 (November 2024) for a detailed discussion of the USERRA enforcement for federal executive agencies as employers.

¹³ *Id.*

A: On questions of fact, the reviewing court gives great deference to the trial court or tribunal (like the MSPB). On questions of law, like the interpretation of the meaning of a statute, the reviewing court reviews the determination de novo (as of new) and gives no deference to the determination below.

Q: What is the Federal Circuit?

A: The United States Court of Appeals for the Federal Circuit is the specialized intermediate appellate court that sits in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from MSPB decisions.

Q: What is the MSPB?

A: On its website, the MSPB describes itself as follows:

The Merit Systems Protection Board is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems. The Board was established by Reorganization Plan No. 2 of 1978, which was codified by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454. The CSRA, which became effective January 11, 1979, replaced the Civil Service Commission with three new independent agencies: Office of Personnel Management (OPM), which manages the Federal work force; Federal Labor Relations Authority (FLRA), which oversees Federal labor-management relations; and, the Board.

The Board assumed the employee appeals function of the Civil Service Commission and was given new responsibilities to perform merit systems studies and to review the significant actions of OPM. The CSRA also created the Office of Special Counsel (OSC) which investigates allegations of prohibited personnel practices, prosecutes violators of civil service rules and regulations, and enforces the Hatch Act. Although originally established as an office of the Board, the OSC now functions independently as a prosecutor of cases before the Board. (In July 1989, the Office of Special Counsel became an independent Executive branch agency.)

For an explanation of your rights as a Federal employee, and for an in-depth review of the Board's jurisdiction and adjudication process, please review [An Introduction to the MSPB](#).

The mission of the MSPB is to "Protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." MSPB's vision is "A highly qualified Federal workforce that is fairly and effectively managed, providing excellent service to the American people." MSPB's organizational values are Excellence, Fairness, Timeliness, and Transparency. More about MSPB can be obtained from MSPB's Strategic Plan. MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies. In addition, MSPB reviews the significant actions of the Office of Personnel Management (OPM) to assess the degree to which those actions may affect merit.¹⁴

¹⁴ <https://www.mspb.gov/about/about.htm>.

Adjudicating claims that Federal executive agencies, as employers, have violated USERRA is one of the responsibilities of the MSPB.¹⁵

Q: You have written that Feliciano “applied for certiorari” and that the Supreme Court “granted certiorari.” What does that mean?

A: In a federal civil case, the final appellate step is to apply to the Supreme Court for certiorari (discretionary review). At least four of the Supreme Court’s nine Justices must vote for certiorari, or certiorari is denied, and the decision of the Court of Appeals becomes final. The Supreme Court denies certiorari in about 99% of the cases where a party seeks it.

Q: What role did the Reserve Organization of America (ROA) play in the *Feliciano* case?

A: It is much more likely that the Supreme Court will grant certiorari if an organization like ROA files an amicus curiae (“friend of the court”) brief pointing out the importance of the case and urging the Court to grant certiorari. ROA filed an amicus brief urging the Court to grant certiorari. After the Court agreed to hear the case, ROA filed a new brief on the merits.¹⁶

Q: Where can I find a lawyer to represent me in my claim for differential pay?

¹⁵ 38 U.S.C. § 4324. See also Law Review 24052 (November 2024) for a detailed description of USERRA’s enforcement mechanism with respect to Federal executive agencies as employers.

¹⁶ See Law Review 24028 (May 2024) for a detailed description of the amicus briefs that ROA files several times per year. **Q:**



A: Brian Lawler represented Nick Feliciano in the *Feliciano* case. He is an attorney in San Diego with a nationwide USERRA practice and a great record. Here is a link to Brian Lawler's law firm website: <https://pilotlawcorp.com/brian-j-lawler-founder-shareholder/>.

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This article is one of more than 2,000 "Law Review" articles available at <https://roa.org/lawcenter/> — a free legal resource that the Reserve Organization of America (ROA) has built and maintained since 1997, adding new articles every month.

ROA is the only national military organization dedicated exclusively to America's reserve components — all eight of them. From the 6,179 members of the Coast Guard Reserve to the 329,705 soldiers of the Army National Guard, ROA exists to serve the nearly 773,000 men and women who answer the call while maintaining civilian lives. No other organization does what we do for the people we serve.

Our roots run deep. On October 2, 1922, veterans of the Great War gathered at Washington's historic Willard Hotel — at the invitation of General of the Armies John J. Pershing — to build something lasting. One of the junior officers in that room was Captain Harry S. Truman, who, as President, signed ROA's congressional charter in 1950. That charter gives us a clear mission: advocate for policies that ensure adequate national security. For more than a century, we've made the case that America's Reserve Components and National Guard are among the most cost-effective pillars of our national defense.



Beyond this library of legal resources, ROA files amicus curiae ("friend of the court") briefs in the Supreme Court and other courts, and actively educates service members, military spouses, attorneys, employers, legislators, and others about the legal rights of those who serve — and how to enforce them. We provide this information to all service members, regardless of membership. But it's ROA members — through their dues and contributions — who make it possible.

Your membership makes the mission possible.

If you are currently serving, or have ever served, in any of America's eight uniformed services, you are eligible to join ROA — and membership starts at just \$20 for a full year, or \$450 for life. Officers and enlisted personnel alike qualify, whether your service was in the Active Component, the National Guard, or the Reserve. ROA has also recently expanded eligibility to include ancestors and lineal descendants and spouses, widows, and widowers of past or present service members, so families can stand with those who serve. Join online at <https://roa.org> or call 800-809-9448.

If you are not eligible for membership but believe in this mission, your financial contribution directly funds this resource and the advocacy work that protects those who serve. Donations may be mailed to:

Reserve Organization of America
1 Constitution Ave. NE
Washington, DC 20002



Here is a copy of the letter that I sent to the Director of the Office of Personnel Management (OPM):

Samuel F. Wright
Captain, JAGC, USN (Ret.)
Samwright50@yahoo.com

May 13, 2026

Honorable Scott Kupor
Director, Office of Personnel Management
1900 E St. NW
Washington, DC 20415-1800

Re: Please correct the erroneous OPM website guidance to federal agencies about the circumstances under which a federal employee who is away from his or her civilian job for active military service is entitled to differential pay.

Dear Mr. Kupor:

Under section 5538 of title 5 and section 101(a)(13) of title 10, a federal civilian employee who is away from his or her federal civilian job for military duty and who is losing money because the military pay is less than the regular civilian pay is entitled to differential pay if his or her military duty qualifies as “contingency duty.” The contingency duty label applies if the duty is being performed under certain enumerated sections of title 10 and title 14 (Coast Guard) “or under any other



provision of law during a war or national emergency declared by Congress or the President.” 10 U.S.C. section 101(a)(13)(B).

Guidance to federal agencies posted on the OPM website erroneously states that the “emergency” service must be directly related to one or more declared national emergencies and that it is not sufficient that the service is being performed during a declared emergency. On 4/30/2025, more than a year ago, the Supreme Court clearly and unambiguously overruled this OPM interpretation. I invite your attention to *Feliciano v. Department of Transportation*, 605 U.S. 38 (2025).

The erroneous OPM guidance needs to be rewritten. Federal agencies are still reading and relying upon this guidance to deny meritorious differential pay claims. Please update the erroneous OPM guidance now.

I invite your attention to our Law Review 26031 (draft enclosed). This article will be published on the Reserve Organization of America (ROA) website in early July. If you can fix the OPM website in the next few weeks, I can amend the article to state that OPM has corrected its error.

Please call me or email me if you have any questions/

Very respectfully,



Samuel F. Wright

Enclosure (as stated)