

RESERVES

Reduced Eligibility Age for Reserve Retirement Pay

You have asked whether active duty service under a provision of law other than 10 U.S.C. § 12301(d) or those listed in 10 U.S.C. § 101(a)(13)(B) may be used to reduce Reserve retirement pay age under 10 U.S.C. § 12731. We conclude it may not. Only active duty service under the following provisions qualifies for early-retirement credit: 10 U.S.C. §§ 688, 12301(a), 12301(d), 12302, 12304, 12304a, 12305, 12406; and 10 U.S.C. Chapter 15 (§§ 331-335).

The 2008 National Defense Authorization Act (P.L. 110-181) amended § 12731 to allow members of the Ready Reserve who serve particular types of active duty or who perform particular types of active service to reduce their Reserve retirement pay eligibility age from 60 years down to a minimum of 50 years in three-month increments for each aggregate of 90 days served during any fiscal year. To qualify, the active duty must be pursuant to 10 U.S.C. § 12301(d) or to a contingency operation as defined in 10 U.S.C. § 101(a)(13)(B). This latter section enumerates eight specific provisions of law pertaining to active duty during contingency operations: 10 U.S.C. §§ 688, 12301(a), 12302, 12304, 12304a, 12305, 12406; and 10 U.S.C. Chapter 15 (§§ 331-335).¹ It also includes a general “national emergency provision” in which the call or order to, or retention on active duty under “any other provision of law during a war or during a national emergency declared by the President or Congress” may qualify. Qualifying “active service” includes service under 32 U.S.C. § 502(f) for purposes of responding to a national emergency declared by the President or supported by Federal funds.

Active duty pursuant to a call or order to active duty under 10 U.S.C. § 12310 is specifically excluded from § 12301(d) service that would otherwise qualify for retirement pay age reduction. (Section 12301(d) is the authority to order Reserve component members to active duty under § 12310 for “organizing, administering, recruiting, instructing, or training the Reserve

¹ 10 U.S.C. §12301(d): At any time a Reserve component member ordered to active duty with consent of the member

10 U.S.C. § 688: During a contingency operation, a retired member ordered to active duty

10 U.S.C. § 12301(a): During a war or national emergency declared by Congress, or when authorized by law, a Reserve component unit (or member not assigned to a unit) ordered to active duty, without the member’s consent

10 U.S.C. § 12302: During a national emergency declared by the President, or when authorized by law, a Ready Reserve unit (or member not assigned to a unit), without the member’s consent

10 U.S.C. § 12304: For a named operational mission, a Selected Reserve unit (or member not assigned to a unit) or essential Individual Ready Reserve member, without the member’s consent

10 U.S.C. § 12304a: Pursuant to a Governor’s request for assistance responding to a major disaster or emergency, a Reserve unit (or member not assigned to a unit), without the member’s consent

10 U.S.C. § 12305: During “stop loss” orders

10 U.S.C. § 12406: During invasion of the U.S. or rebellion against the U.S. Government

10 U.S.C. Chapter 15: During insurrections in States

components,” which is typically referred to as “AGR duty.”) Thus, § 12310 active duty service may not be used to reduce Reserve retirement pay age under § 12731.

The legislative history of efforts to lower the age for eligibility to receive Reserve retirement benefits is instructive. Legislative efforts to lower the Reserve retirement age have been under way at least since 2002 when Sen. Jon Corzine introduced a bill to lower the retirement age from 60 to 55. 148 Cong. Rec. S3436 (Apr. 25, 2002). At the time, Sen. Corzine indicated the purpose of the bill was to assist with recruitment and retention by making Reserve component service more attractive. Sen. Corzine argued that increased frequency and duration of Reserve deployments made continued service less appealing. When he reintroduced the bill in 2005, Sen. Corzine again focused on recruitment, pointing to the tolls of “lengthy deployments and combat roles previously reserved to regular active duty forces.” 151 Cong. Rec. S2852 (Mar. 16, 2005). One year later, Sen. John Kerry introduced a similar bill, making a similar argument. 152 Cong. Rec. S2338 (Mar. 16, 2006). These efforts failed until the 2008 National Defense Authorization Act was passed and § 12731 was amended. While the earlier proposals simply lowered the retirement pay age for all Reservists, the measure ultimately adopted provided a more limited approach wherein only certain types of service qualified to reduce Reserve retirement pay age and the credit only applied in 90-day blocks. In 2010, Sen. Saxby Chambliss – the author of the adopted provision – said that his intent had been “to reward reservists who were deploying or serving an active duty tour for a significant period of time.” 156 Cong. Rec. S10936 (Dec. 22, 2010). He made this statement during the debate over the 2011 National Defense Authorization Act concerning a proposed section that would have clarified the age and service requirements of § 12731. Sen. John McCain also weighed in, explaining that the intent of the 2008 provision “was to expand the eligibility for earlier retired pay to members of the Ready Reserve who deploy on active duty in support of contingency operations for significant periods.” *Id.* Ultimately, the 2011 Act included a “Sense of Congress” provision that the 2008 amendments to § 12731 were intended to reduce the retirement pay age for Reserve component members “according to time spent deployed.” P.L. 111-383, Sec. 635.

Although it appears it was Congress’ intent to provide early-retirement credit for servicemembers who were deployed in support of contingency operations, the text of the law focuses on the authority under which a given reservist is called to active duty. Thus, a reservist ordered to active duty under § 12301(d) is entitled to the credit, even if that reservist is performing a non-contingency, multi-year tour in her hometown, so long as the member’s service does not also include service on active duty pursuant to an order to active duty under § 12310.²

With this background, we turn to the specific question whether service pursuant to an order to active duty under a provision not specifically enumerated in § 12731 qualifies for reduced retirement pay age credit. The common rule of statutory construction, *expression unius est exclusio alterius* (“the express mention of one thing excludes all others”) means credit under § 12731 is only available for those provisions explicitly mentioned. Service pursuant to other authorities falls outside the ambit of § 12731 and, therefore, does not qualify for the credit, unless the service falls within the “national emergency” provision.

² 10 U.S.C. § 12310 duty is a subset of 10 U.S.C. §12301(d) duties when performed voluntarily.

There are estimated to be over 450 dormant “national emergency provisions” within the U.S. Code.³ However, these “national emergency provisions” are not self-executing. Instead, to trigger a “national emergency provision” the President must comply with the National Emergencies Act (50 U.S.C. §§ 1601-1651) by formally declaring a national emergency and specifying the statutory authorities to be affected by the emergency. Thus for an active duty tour to qualify as “active duty . . . under . . . any other provision of law during a national emergency declared by the President or Congress” as referenced in § 101(a)(13)(B), the President must not only formally declare a national emergency (as he has done) but must also specify a particular statutory authority for the member’s tour. For example, the “Declaration of National Emergency by Reason of Certain Terrorist Attacks,” was declared on September 14, 2001, and in that declaration, the President designated the following title 10 provisions of law to be used during the current national emergency: §§ 123, 123a, 527, 2201(c), 12006 and 12302. Service under any provision of law not listed in the declaration falls outside the “national emergency provision” in § 101(a)(13)(B) and therefore would not qualify for credit under § 12731.

In response to a congressional inquiry in 2012, AF/JAA and SAF/GCM examined the issue of whether members of the Retired Reserve under the age of 60 years, who are called to active duty under § 688a⁴, may count such service under § 12731 to reduce their Reserve retirement pay age. Based on the rationale discussed above, we agreed with HQ ARPC/JA that active duty service under § 688a cannot be used to reduce Reserve retirement pay age under § 12731.⁵

Often, orders to active duty do not simply cite a single provision of law. For example, orders may state that a member has been “ordered to extended active duty per 10 U.S.C. § 12301(d) for duty in accordance with 10 U.S.C. § 10211.” Others, meanwhile, state a member has been ordered to active duty “per 10 U.S.C. § 12301(d) for duty in accordance with 10 U.S.C. § 10211 and 10 U.S.C. § 12310.” Based on a plain reading of § 12731, active duty pursuant to orders under § 12301(d) always qualifies for the reduced retirement age, so long as the active duty is not also ordered under § 12310. Thus, orders under § 12301(d) and § 10211 would qualify for the credit, while ones citing § 12310 would not, regardless of what other provisions of law are included on the orders.⁶ A reference to § 12310 renders the service non-qualifying for the reduced retirement age credit.

³ In 1973, a Senate special committee studying emergency powers published a compilation identifying some 470 provisions of federal law delegating to the executive extraordinary authority in time of national emergency. (U.S. Congress, Senate Special Committee on the Termination of the National Emergency, *Emergency Powers Statutes*, 93rd Cong., 1st sess., S.Rept. 93-549 (Washington: GPO, 1973).

⁴ § 688a. Retired members: temporary authority to order to active duty in high-demand, low-density assignments. Note that § 688 is specifically referenced as qualifying active duty service for reduced retirement pay age.

⁵ Notably, retired members recalled under 10 U.S.C. § 688 *are* entitled to the credit, since § 688 is specifically listed in 10 U.S.C. § 101(a)(13)(B).

⁶ Whether a member may lawfully perform duty simultaneously under both § 10211 and § 12310 or should perform such duty as a matter of policy, are questions outside the scope of this opinion. Nevertheless, we recommend those issues receive further analysis.

This opinion replaces OpJAGAF 2012/10.

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