

## RESERVES

### Reduced Eligibility Age for Reserve Retirement Pay

You have asked whether active duty service under 10 U.S.C. § 10211 (extended active duty tours to participate in preparing and administering policies affecting Reserve components) may be used to reduce Reserve retirement age under 10 U.S.C. § 12731. We conclude it may not.

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 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 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).<sup>1</sup> 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 age reduction. § 12310 is the authority to order Reserve component members to active duty under § 12301(d) for “organizing, administering, recruiting, instructing, or training the Reserve components,” which is typically referred to “AGR duty.” Thus, § 12310 active duty service may not be used to reduce Reserve retirement age under § 12731.

---

<sup>1</sup> 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

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 Con. 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 Reserve retirement age, the measure ultimately adopted provided a more limited approach wherein only certain types of service qualified to reduce Reserve retirement 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 age for Reserve component members “according to time spent deployed.” P.L. 111-383, Sec. 635.

Thus it is evident that Congress did not intend for all types of active duty and active service to qualify for reduced age for Reserve retired pay. With this background, we turn to the specific question whether service pursuant to an order to active duty under § 10211 is not among those provisions specifically enumerated in § 12731. Therefore, a rule of statutory construction, *expression unius est exclusion alterius* (“the express mention of one thing excludes all others”) would preclude § 10211 service, unless the more general “national emergency provision” applies.

There are estimated to be over 450 dormant “national emergency provisions” within the U.S. Code.<sup>2</sup> However, these “national emergency provisions” are not self-executing whenever a national emergency is declared. Instead, to trigger a “national emergency provision” there must be compliance with the National Emergencies Act (50 U.S.C. §§ 1601-1651). To do so, the President must not only formally declare a national emergency but also specify the statutory

---

<sup>2</sup> 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*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., S.Rept. 93-549 (Washington: GPO, 1973).

authorities to be affected by the emergency. Thus for a § 10211 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 but must also specify § 10211 as one of the statutory authorities to be affected by the national emergency. For example, we are currently under a “Declaration of National Emergency by Reason of Certain Terrorist Attacks,” first declared on September 14, 2001 and presently continued through September 14, 2012. Pursuant to this declaration, the President has designated the following title 10 provisions of law to be used during the current national emergency: §§ 123, 123a, 527, 2201(c), 12006 and 12302. Accordingly, these are the only title 10 sections of law which have been specifically affected by the current national emergency. Since § 10211 is not one of them, the “national emergency provision” in § 101(a)(13)(B) cannot be used to qualify § 10211 service under § 12731.

In response to a congressional inquiry earlier this year, 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 § 688a<sup>3</sup>, may count such service under § 12731 to reduce their Reserve retirement 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 age under § 12731. Likewise, SAF/GCM joins us in concluding that active duty service under 10 U.S.C. § 10211 is not creditable towards early retirement under 10 U.S.C. § 12731.

OpJAGAF 2012/10 29 August 2012

---

<sup>3</sup> § 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 age.