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Armed Forces Mobilization Under 10 U.S.C. §12301(d) and Federal Employees: Why OPM Guidance Is Incorrect

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Armed Forces Mobilizations Under 10 U.S.C. § 12301(d) and Federal Employees: Why OPM Guidance is Incorrect

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ABSTRACT

The Office of Personnel Management ("OPM") provides unclear and incorrect guidance regarding benefits to reservist federal employees that mobilize under 10 U.S.C. § 12301(d), particularly regarding twenty-two days of military leave under 5 U.S.C. § 6323(b) and reservist differential pay under 5 U.S.C. § 5538. Because of this, many reservists are deprived of important benefits to which they are entitled.

This article is the first in-depth analysis of mobilizations under 10 U.S.C. § 12301(d) and the available benefits for federal employees. This article focuses on twenty-two days of military leave under 5 U.S.C. § 6323(b) and reservist differential pay under 5 U.S.C. § 5538, and also briefly addresses other benefits to which federal employees are entitled. OPM failed to consider recent jurisprudence from the Federal Circuit and administrative adjudicative bodies, leading to incorrect and unclear guidance for federal agencies, and causing agencies to improperly inform federal employees of their benefits.

This topic is important because more than 959,701 reservists have been involuntarily and voluntarily mobilized (including mobilization under 10 U.S.C. § 12301(d)) since 2001. Additionally, as of November 30, 2018, the total reported personnel strength by rank of the Ready Reserve was 798,402. This is a massive number of individuals that may be eligible for benefits of which they are unaware.

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INTRODUCTION

The United States Office of Personnel Management ("OPM") is the chief human resources agency for the federal government.[1] OPM provides a myriad of personnel guidance to federal agencies, including benefits guidance for reservist employees mobilized under 10 U.S.C. § 12301(d). Unfortunately, based upon court precedent, administrative adjudicative body decisions, and statutory construction, OPM's guidance for mobilized reservists is incorrect or ambiguous—particularly regarding military leave and reservist differential pay.

The problems with current OPM guidance concerning military leave and reservist differential pay are best illustrated through a hypothetical: Captain ("CPT") Smith is a federal employee of an executive agency in the United States government. He is also a member of the District of Columbia Army National Guard. While employed by his agency, CPT Smith volunteered for a one-year Active Duty Operational Support ("ADOS")[2] mobilization with the National Guard Bureau under 10 U.S.C. § 12301(d).[3] The mobilization began on November 1, 2018 and lasted a year. While mobilized, CPT Smith applied for the following benefits as an employee of a federal agency: (1) fifteen days of military leave; (2) an additional twenty-two days of emergency military leave; and, (3) federal reservist differential pay. CPT Smith's agency granted his request for fifteen days of military leave but, based upon OPM guidance, denied his requests for twenty-two

1. *Our Agency*, OFF. PERSONNEL MGMT., https://perma.cc/3XA2-LMCP.

2. Active Duty Operational Support mobilization orders allow reservists to assist a unit with a temporary mission. These orders typically last around a year. *See Ways to Serve: Active Duty Operational Support (ADOS)*, U.S. ARMY RES., https://perma.cc/DR9R-PF44.

3. This Article only addresses Active Duty Operational Support mobilizations under 10 U.S.C. § 12301(d), not Active Guard Reserve ("AGR") tours for Army Reserve Soldiers as found in Army Regulation 135–18. *See* U.S. DEP'T OF ARMY, REG. 135–18, THE ACTIVE GUARD RESERVE PROGRAM 26 (2017) [hereinafter AR 135–18] ("'Active Guard and Reserve' means a member of a [Reserve Component] ([Army National Guard of the United States] or [United States Army Reserve]) who is on active duty pursuant to 10 U.S.C. [§] 12301(d) or, if a member of the Army National Guard or Air National Guard, is on full-time National Guard duty pursuant to 32 U.S.C. [§] 502(f) and who is performing Active Guard and Reserve duty."). This distinction may be confusing as AGR tours are also authorized under 10 U.S.C. § 12301(d), but the benefits to which employees are entitled are different.

days of emergency military leave and differential pay. Upon researching his eligibility for these benefits, CPT Smith discovered the relevant laws and regulations were unclear and confusing. He was also unsure of the recourse he could take to remedy his situation. This Article outlines the benefits to which federal employees mobilized under 10 U.S.C. § 12301(d), like CPT Smith, are entitled.

More than an estimated 959,701[4] reservists have been involuntarily or voluntarily mobilized to active duty since 2001.[5] The actual number of mobilizations is much higher, as this estimate only counts the number of individuals mobilized—not the total number of mobilizations for each person. Additionally, as of November 30, 2018, the total reported personnel strength by rank of the Selected Reserve[6] was 798,402.[7] This is a massive number of individuals who may be eligible for benefits of which they are unaware. Due to the complicated nature of the law, and conflicting guidance provided by agencies, many reservists are potentially missing out on these benefits. This Article will help ensure that reservists are aware of these benefits. To effectuate this goal, this Article covers specific federal employment benefits available to all Army reservists mobilized under 10 U.S.C. § 12301(d).

This Article will first review the statutory authority under which CPT Smith was mobilized. Part I will also cover the various benefits to which CPT Smith may be entitled and the OPM guidance, or lack thereof, regarding these benefits. Part II will then discuss why the OPM Guidance is incorrect. Finally, Part III will discuss potential recourse for CPT Smith if the benefits are erroneously denied and ways for CPT Smith and other

4. As of September 4, 2018. This number includes mobilizations under 10 U.S.C. § 12301(d) (2012).

5. *See* LAWRENCE KAPP & BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RL30802, RESERVE COMPONENT PERSONNEL ISSUES: QUESTIONS AND ANSWERS 8 (2008). Prior to June 10, 2018, the Department of Defense only counted the number of involuntary mobilizations under 10 U.S.C. § 12302, not the total number of individuals mobilized. Since that date, the Department of Defense counts voluntary and involuntary mobilizations under 10 U.S.C. §§ 12301(d), 12302, 12304, and 688, and it bases its report on the number of individuals mobilized, not the number of mobilizations. *Id.* at n.32.

6. Members of the Selected Reserve are in an active status in the Ready Reserve, meaning they participate as members of units. See U.S ARMY HUMAN RES. COMMAND, INDIVIDUAL READY RESERVE: AN ORIENTATION HANDBOOK FOR IRR SOLDIERS 14 (2011), https://perma.cc/AZM2-KABH. These are typically traditional reservists and National Guard members that drill one weekend a month and participate in a two-week annual training every fiscal year. *Id.*

7. DEP'T OF DEF., SELECTED RESERVE PERSONNEL BY RESERVE COMPONENT AND RANK/GRADE (2018).

federal employees to become aware of these benefits, as well as steps that can be made to streamline the benefits system.

I. STATUTORY AUTHORITY AND OVERVIEW OF BENEFITS FOR ARMY RESERVISTS MOBILIZED UNDER 10 U.S.C. § 12301(d)

CPT Smith's mobilization was anchored in one main statutory authority and one main regulatory authority: 10 U.S.C. § 12301(d)[8] and Army Regulation 135–200.[9] Neither of these laws contain direct guidance on as to CPT Smith's federal employee benefits. However, there are three types of benefits for which CPT Smith might be eligible: military leave, emergency military leave, and reserve differential pay.

A. Statutory Authority for Army National Guard Mobilizations

The federal statute authorizing the voluntary mobilization of reservists like CPT Smith is 10 U.S.C. § 12301(d), while the implementing regulation for the Army is Army Regulation 135–200. Section 12301(d) lays a broad framework for these mobilizations.[10] The Army Regulation provides further guidance regarding the different categories of ADOS mobilizations.[11] Understanding the category of ADOS mobilization is important for determining which federal employment benefits apply.

1. 10 U.S.C. § 12301(d)

As an Army reservist, CPT Smith voluntarily mobilized for his one-year ADOS under 10 U.S.C. § 12301(d). While 10 U.S.C. § 12301(d) applies to other branches of the military, this Article only addresses the statute from an Army perspective.[12] Section 12301 is titled "Reserve components generally" and covers voluntary and involuntary mobilizations.[13] While it does not specifically mention ADOS mobilizations, this statute authorizes them.[14] Specifically, subsection (d) authorizes voluntary mobilizations:

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8. 10 U.S.C. § 12301(d) (2012).

9. U.S. DEP'T OF ARMY, REG. 135–200, ACTIVE DUTY FOR MISSIONS, PROJECTS, AND TRAINING FOR RESERVE COMPONENT SOLDIERS DUTY POLICY, PROCEDURES, AND INVESTIGATIONS (Sept. 26, 2017) [hereinafter AR 135–200].

10. 10 U.S.C. § 12301(d).

11. AR 135-200, *supra* note 9.

12. 10 U.S.C. § 12301(d).

13. 10 U.S.C. § 12301 (2012).

14. *See* 10 U.S.C. § 12301(d).

> At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State concerned.[15]

Notably, mobilization under this subsection only occurs "with the consent of that member."[16] This is important to note because, as discussed below, OPM provides additional benefits to service members mobilized involuntarily.[17] While the statute generally authorizes voluntary mobilizations, the Army's implementing regulation provides further guidance regarding specific types and requirements for these mobilizations. According to Army Regulation ("AR") 135–200, operational support "is a category of voluntary duty that includes ADOS (with several subcategories)."[18]

2. Army Regulation 135–200

AR 135–200 prescribes the regulations governing mobilizations. According to AR 135–200, "ADOS is an authorized voluntary tour of [active duty] performed pursuant to 10 U.S.C. [§] 12301(d)," with the purpose of "provid[ing] the necessary skilled manpower assets to support existing or emerging requirements."[19] The regulation lists various categories of ADOS, including ADOS–Reserve Components ("ADOS–RC"), ADOS–Active Component ("ADOS–AC"), and contingency operations–ADOS ("CO–ADOS").[20] Because mobilization orders are often unclear regarding under which category of ADOS an Army reservist is mobilized, for the purpose of this Article, CPT Smith was also unsure of his status. OPM confers different benefits to the different categories of ADOS—namely providing the most benefits to CO–ADOS and the least to ADOS–RC.[21]

15. *Id.*
16. *Id.*
17. *See infra* Part I.C.1.
18. AR 135-200, *supra* note 9, at para. 6-1a.
19. *Id.* at para. 6-1b–c.
20. *Id.* at para. 1-1.
21. *See infra* Part I.C.

i. Active Duty for Operational Support—Reserve Component

"ADOS in support of the Reserve Components [("RC")] is known as ADOS–RC."[22] ADOS–RC "is authorized for RC Soldiers supporting RC operational missions above and beyond an RC unit's normal mission (such as exercises, projects, conferences, and so forth)."[23] According to the regulation, "these are limited to non-contingency missions."[24] Mobilization "[o]rders must state 10 U.S.C. [§] 12301(d) as the [mobilization] authority."[25]

ii. Active Duty for Operational Support—Active Component

"ADOS in support of the Active force is known as ADOS–AC."[26] Furthermore, there are three variations of ADOS–AC: administrative ADOS (ADMIN–ADOS), operational ADOS (OP–ADOS), and contingency operations ADOS (CO–ADOS).[27] ADMIN–ADOS is voluntary active duty and is performed by Army National Guard ("ARNGUS") and Army Reserve ("USAR") "[s]oldiers who possess special expertise needed for short-term support or completion of an essential active force mission."[28] "OP–ADOS is voluntary [active duty] performed by ARNGUS and USAR [s]oldiers supporting operational missions above and beyond the AC unit's normal mission."[29] OP–ADOS "is limited to non-overseas contingency missions."[30]

iii. Contingency Operations—Active Duty for Operational Support

"CO–ADOS is voluntary [active duty] performed by ARNGUS and USAR [s]oldiers supporting overseas contingency missions."[31] AR 135–200 defines contingency operations as

> an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an

22. AR 135–200, *supra* note 9, at para. 6-1c(1).
23. *Id.* at para. 6-26a.
24. *Id.*
25. *Id.* at para. 6-32b.
26. *Id.* at para. 6-1c(2).
27. *Id.*
28. *Id.* at para. 6-1c(2)(a).
29. *Id.* at para. 6-1c(2)(b).
30. *Id.*
31. *Id.* at para. 6-1c(2)(c).

> enemy of the U.S. or against an opposing military force; or 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 10 USC, Chapter 15 of 10 USC, or any other provision of law during a war or during a national emergency declared by the President or Congress.[32]

Regarding contingency operations, the regulation further states that

> [i]nstructions in this section will be implemented when the Secretary of Defense declares that a situation exists as outlined above, which requires the services of individual ARNGUS, USAR, or Retired Reserve members in support of contingency operations without the involuntary call-up of RC forces or military operations under the Presidential Reserve Call-up authority.[33]

Does mobilization under 10 U.S.C. § 12301(d) entitle CPT Smith to any federal employment benefits? The above statute and regulation provide no guidance regarding eligibility to federal employment benefits. CPT Smith must therefore turn to his agency and OPM guidance to determine whether he is eligible for any benefits on the basis of his ADOS status.

B. History of Fifteen Days of Military Leave: Redefining 'Days'

The general military leave to which federal employees are entitled was not always clear. The federal government first authorized federal employees to take paid leave for up to fifteen days per year for military training in 1917.[34] Prior to 2000, when calculating how much military leave employees were charged, federal agencies included days when employees were not scheduled to work (*e.g.*, weekends and holidays).[35] For example, an employee with a Monday to Friday workweek would be charged for eight days of military leave when attending reserve training from one Friday through the next, even though the employee was absent for only six actual workdays. Agencies measured the grant of military leave by the number of calendar days employees were absent from reserve training, rather than by the number of workdays they were absent from work.[36] This practice often required

32. *Id.* at para. 6-19a.

33. *Id.* at para. 6-19b.

34. *See* Butterbaugh, 91 M.S.P.R. 490, 498 (2002), *rev'd*, 336 F.3d 1332 (Fed. Cir. 2003).

35. Philip D. Donohoe, *The* Butterbaugh *Fallacy*, 61 A.F. L. REV. 149, 153 (2008).

36. *Id.*

employees to dip into their annual leave or required them to take leave without pay in order to serve the full period of their required reserve training.[37]

In 2000, Congress amended 5 U.S.C. § 6323 to add subsection (a)(3).[38] As amended, it states, "'[t]he minimum charge for leave under this subsection is one hour, and additional charges are in multiples thereof.'"[39] While this amendment does not mention or address the "15 days" in subsection (a)(1), OPM determined that section 6323(a)(1) "could no longer be interpreted to charge non-workdays against federal employees' military leave."[40] In a January 25, 2001 memorandum, OPM opined that Congress recognized an "8-hour civilian workday as the basis for accruing 1 day of military leave and that there [was] no intent to charge an employee military leave for the hours that he or she would not otherwise work."[41] Therefore, OPM deferred to Congress's interpretation and no longer provides guidance requiring reservists be charged military leave for non-duty days.

1. Butterbaugh v. Department of Justice

In 2003, an important moment in the field of federal employment benefits for reservists occurred when the Federal Circuit invalidated OPM's pre-2000 interpretation of charging service members military leave on days when they were not scheduled to perform duty at their civilian jobs.[42] In *Butterbaugh v. Department of Justice*,[43] on appeal from the Merit System Protection Board ("MSPB"),[44] the United States Court of Appeals for the

37. *See Butterbaugh*, 91 M.S.P.R. at 493. This distinction is especially important in the post 9/11 world as Reservists are expected to serve more time in uniform than before. Annual training ("AT") may be longer than two weeks; units now often combine AT with drill. Units also force members to drill mandatory unit training assembly ("MUTA") 8's which are four-day drills. *See* Charlsy Panzino, *Some Soldiers May Not Be Able to Handle New Pace of Training, Guard Chief Says*, ARMY TIMES (Mar. 13, 2018), https://perma.cc/2VUD-QVEB. Current projections for the sustainable readiness model for some National Guard units is "39 days in the first year, 48 days in the second year, 60 days in the third year and 51 days in the fourth year." *Id.*

38. Consolidated Appropriations Act, sec. 642, § 6232(a)(3), 114 Stat. 2763, 2763A-169 (2000).

39. Butterbaugh v. Dep't of Justice, 336 F.3d 1332, 1334 (Fed. Cir. 2003) (quoting 5 U.S.C § 6323(a)(3) (2000)).

40. *Id.*

41. *Id.* (citation omitted).

42. *See generally id.*

43. *Id.*

44. The MSPB plays an outsized role in employment law litigation. "The Merit Systems Protection Board is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems." *About MSPB,* U.S. MERIT SYSTEMS PROTECTION

Federal Circuit held that the federal agency acted impermissibly in charging several employees military leave allowance for days on which they were not scheduled to work but during which they trained with the military reserves.[45]

The Federal Circuit stated it saw "no reason why federal employees need military leave for days on which they are not scheduled to work."[46] This is because "the 'days' that Section 6323(a)(1) refers to are *leave* days, not 'training days' or 'reserve duty days.'"[47] As a result of the *Butterbaugh* decision, hundreds, if not thousands, of reservists have filed "*Butterbaugh* claims" requesting that the government compensate them for mischarged military leave between 1980 and 2000.[48]

C. Current OPM Guidance on Paid Leave and Differential Pay

According to OPM guidance, reservists mobilized under 10 U.S.C. § 12301(d) are eligible for some military leave days. However, the current guidance is sparse and incorrect regarding reservists' emergency military leave days and entitlement to differential pay.

1. Fifteen Days of Military Leave Under 5 U.S.C. § 6323(a)

According to OPM, any full-time federal civilian employee whose appointment is not limited to one year[49] is entitled to military leave.[50] Under 5 U.S.C. § 6323(a), the government provides fifteen days of paid military leave per fiscal year for active duty, active duty training, and inactive duty training.[51] The employee will not be charged for leave on non-duty days

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BOARD, https://perma.cc/66GM-FSGP. "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." *Id.* Appeals from the MSPB are heard by the United States Court of Appeals for the Federal Circuit. *See generally Butterbaugh*, 336 F.3d at 1332 (describing the appeals process from the MSPB to the Federal Circuit).

45. *See* Scott Randall, Marchand v. GAO: *The Next* Butterbaugh?, 2014 ARMY LAW. 33, 33 (2014).

46. *Butterbaugh*, 336 F.3d at 1337.

47. *Id.*

48. Donohoe, *supra* note 35, at 154.

49. Part-time employees receive a percentage of the fifteen days of military leave. *See* 5 U.S.C. § 6323(a)(2) (2012); *Fact Sheet: Military Leave*, OFF. PERSONNEL MGMT., https://perma.cc/FT42-QBTM.

50. *See Fact Sheet: Military Leave*, *supra* note 49.

51. *See id.*

(normally weekends or holidays).[52] The military leave is paid, so employees will collect both military and civilian pay for this time period.[53]

Section 6323(a) places several restrictions on how Army reservists may utilize this benefit. First, the leave can only be charged on days that the employee would be scheduled to work at the civilian employment.[54] Thus, "[a]n employee is entitled to pay for a holiday (as a separate payment under the normal holiday pay provisions) only if the employee is in civilian pay status on the workday before or after the holiday."[55]

Additionally, an employee can carry over a maximum of fifteen days of military leave into the next fiscal year,[56] so the employee is not required to use all of his or her leave in one fiscal year. Fortunately for CPT Smith, the statute authorizing him fifteen days of military leave is construed more liberally than it was in the past.

CPT Smith is entitled to fifteen days of military leave per fiscal year because he is serving on active duty; thus, OPM guidance is correct regarding this provision of law.[57] Since his ADOS tour crosses fiscal years,[58] CPT Smith can use this leave in each fiscal year. If he volunteers for several consecutive one-year ADOS tours, he can use the leave in each fiscal year. He is not required to use the leave in any specific fiscal year and can carry over fifteen days. Additionally, if CPT Smith decides to take his military leave during a pay period containing a holiday, he will be paid normal holiday pay for that day and not be charged military leave for it, so long as one of his military leave days abuts the holiday. Finally, if CPT Smith had served on any other ADOS tours between 1980 and 2000, and his agency improperly charged him military leave for days he did not work, he may be eligible for compensation from his agency based on *Butterbaugh*.[59]

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52. *See id.*

53. *Id.*

54. *See* Butterbaugh v. Dep't of Justice, 336 F.3d 1332, 1334 (Fed. Cir. 2003). The court stated that "federal employees need take military leave only for those days on which they are required to work." *Id.* at 1333.

55. OFFICE OF PERS. MGMT., OPM POLICY GUIDANCE REGARDING RESERVIST DIFFERENTIAL UNDER 5 U.S.C. 5538 6 (2015), https://perma.cc/PPR9-PSKK [hereinafter RESERVIST DIFFERENTIAL].

56. 5 U.S.C. § 6323(a)(1) (2012).

57. *See Fact Sheet: Military Leave*, *supra* note 49.

58. The fiscal year begins October 1st and ends September 30th. *See* 31 U.S.C. § 1102 (2012).

59. *See generally Butterbaugh*, 336 F.3d at 1332.

2. Twenty-Two Days of Military Leave under 5 U.S.C. § 6323(b)

In addition to the fifteen days of military leave, CPT Smith may be eligible for twenty-two additional days of military leave under 5 U.S.C. § 6323(b). While employees may be eligible for full civilian pay under this provision, 5 U.S.C. § 5519 requires that it be offset by military pay.[60] As with the fifteen days of military leave, if any day of leave taken under subsection (b) abuts a holiday, the employee will receive full pay for that holiday.[61] Under this provision, employees "may choose not to take military leave and instead take annual leave, compensatory time off for travel, or sick leave, if appropriate, in order to retain both civilian and military pay."[62]

In order to be deemed eligible for twenty-two days of emergency military leave, the employee must be a member of a Reserve Component of the Armed Forces and be performing "full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in [10 U.S.C. § 101(a)(13)]."[63] Mobilization in support of a 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.[64]

Once an employee meets one of these conditions, the employee is entitled to (1) emergency military leave without loss of, or reduction in, pay; (2) leave to which he otherwise is entitled; (3) credit for time or service; or

60. 5 U.S.C. § 5519 (2012) ("An amount . . . received by an employee or individual for military service as a member of the Reserve or National Guard for a period for which he is granted military leave under section 6323(b) or (c) shall be credited against the pay payable to the employee or individual with respect to his civilian position for that period.").

61. *See generally* RESERVIST DIFFERENTIAL, *supra* note 55.

62. *Fact Sheet: Military Leave*, *supra* note 49.

63. 5 U.S.C. § 6323(b)(2)(B) (2012). This leave may be granted under other circumstances. However, for the purposes of this Article, only situations involving reservists mobilized under 10 U.S.C. § 12301(d) are discussed.

64. 10 U.S.C. § 101(a)(13) (2012).

(4) performance or efficiency rating.[65] The leave allowance under this provision is twenty-two days per calendar year.[66]

OPM's guidance on this category of leave is sparse.[67] OPM merely reiterates the language as found in the statute without explanation.[68] This is where confusion may begin for an agency and employee mobilized under 10 U.S.C. § 12301(d)—including CPT Smith.

3. Army Reservist Differential Pay under 5 U.S.C. § 5538

In addition to the emergency military leave, CPT Smith may be eligible for reservist differential pay under 5 U.S.C. § 5538.[69] Reservist differential pay is a payment that an agency makes which is "equal to the amount by which an employee's projected civilian 'basic pay' for a covered pay period exceeds the employee's actual military 'pay and allowances' allocable to that pay period."[70] Basically, if an employee would make more money in his/her federal civilian job during a pay period than he/she makes in the military, the agency will pay the difference.

Under 5 U.S.C. § 5538, an absent federal civilian employee is eligible for differential pay if (1) he is performing "active duty under a provision of law referred to in 10 U.S.C. [§] 101(a)(13)(B)"; (2) he is "entitled to reemployment rights under [USERRA]"; and (3) he is not otherwise receiving pay from his civilian position.[71] According to 5 U.S.C. § 5538, "[t]he Office of Personnel Management shall, in consultation with the Secretary

65. *See* 5 U.S.C. § 6323.

66. 5 U.S.C. § 6323(b)(2)(B). Employees may also take annual leave or the absence can be charged to the "compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave." *Id.*

67. *See Pay & Leave, Frequently Asked Questions: When are Employees Eligible for an Additional 22 Days of Military Leave?* OFF. PERSONNEL MGMT., https://perma.cc/ETJ4-QS2J [hereinafter *When are Employees Eligible*].

68. *Id.*

69. This authority "is codified in 5 U.S.C. [§] 5538, which was added by section 751 of the Omnibus Appropriations Act, 2009 (Public Law 111-8, March 11, 2009), as amended by section 745 of the Consolidated Appropriations Act, 2010 (Public Law 111-117, December 16, 2009). Section 5538 became effective on . . . March 15, 2009, for [] employees on the standard biweekly payroll cycle[]." RESERVIST DIFFERENTIAL, *supra* note 55, at 2.

70. *See id.*

71. *Id.* at 3–4. "Paid time off means . . . military leave, annual leave, sick leave, other applicable paid leave, excused absence, holiday time off, time off as an award, compensatory time off, credit hours, or any other paid time off to the employee's credit." *Id.* at 18.

of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section."[72]

OPM characterizes reservist differential as a payment made when federal civilian employees are "called or ordered to active duty" for the Army Reserves or National Guard "under certain specified provisions of law."[73] "The payment is equal to the amount by which an employee's projected civilian 'basic pay' for a covered pay period exceeds the employee's actual military 'pay and allowances' allocable to that pay period."[74] While OPM has issued policy guidance regarding reservist differential, it has not promulgated any regulations.

Unlike military leave, receiving reservist differential pay does not place the employee in a "paid leave status."[75] Unless the employee takes some sort of paid leave while receiving reservist differential, OPM considers the employee as being on leave without pay.[76] While taking paid leave, the employee is ineligible for reservist differential.[77] Differential pay is a special type of pay a reservist receives while in an unpaid status that is based on a comparison of "projected civilian basic pay and military pay and allowances."[78] Also dissimilar from military leave, while receiving a reservist differential, an employee is not entitled to holiday pay because reservist does not place the employee in "civilian pay status."[79]

While on active duty and receiving reservist differential, an employee may still use paid time off, including military leave.[80] However, while using paid time off, the employee is ineligible to receive differential pay.[81] Paid time off and differential pay may not be used concurrently.[82]

In determining what counts as military pay, OPM uses the definition "military pay and allowances."[83] This definition includes military basic

72. 5 U.S.C. § 5538(d) (2012).

73. *Pay & Leave, Frequently Asked Questions: What is a Reservist Differential?* OFF. PERSONNEL MGMT., https://perma.cc/ETJ4-QS2J [hereinafter *Reservist Differential Definition*].

74. *Id.*

75. RESERVIST DIFFERENTIAL, *supra* note 55, at 5.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 6.

80. *Id.*

81. *Id.* at 5.

82. *Id.*

83. *Id.* at 23.

pay,[84] basic allowance for housing (BAH),[85] basic allowance for subsistence (BAS),[86] and all other monthly military pay and allowances, excluding travel, transportation, and per diem allowances (as expressly required by section 5519) and one-time annual payments such as clothing allowances or reenlistment bonuses.[87] Civilian basic pay is the "gross amount of the base rate of pay set by law or administrative action without additional pay of any kind."[88] Importantly, this includes locality pay.[89]

Once the agency calculates the civilian base pay and military pay, it will determine how much, if any, it owes the federal employee for each pay period. OPM provides detailed guidance regarding the calculation of reservist differential. A complicated formula is used, and it changes frequently; for example, it takes into account how many days there are in the month.[90]

II. OPM GUIDANCE IS AMBIGUOUS OR INCORRECT REGARDING ARMY NATIONAL GUARD RESERVIST FEDERAL EMPLOYEE BENEFITS

OPM guidance is ambiguous or incorrect regarding the federal employee benefits that Army National Guard Reservists are entitled to receive. First, OPM's ambiguity surrounding the "in support of a contingency operation" requirement in 5 U.S.C. § 6323(b)(2)(B) makes it unclear whether CPT Smith is eligible for the extra twenty-two days of paid leave.[91] OPM guidance should be changed to allow Army reservists these benefits, no

84. *Military Salary—Pay Overview*, MIL. ADVANTAGE, https://perma.cc./VV9X-A4HW. ("Basic Pay is the base salary for a military member on active duty and counts for part of total military income.").

85. *Basic Allowance for Housing (BAH)*, DEF. TRAVEL MGMT. OFF., https://perma.cc/J8X3-RUJ2. "The Basic Allowance for Housing (BAH) is a U.S. based allowance prescribed by geographic duty location, pay grade, and dependency status. It provides uniformed Service members equitable housing compensation based on housing costs in local civilian housing markets within the United States when government quarters are not provided." *Id.*

86. *Basic Allowance for Subsistence*, MIL. COMPENSATION, https://perma.cc/8YYV-V336. ("BAS is meant to offset costs for a member's meals.").

87. RESERVIST DIFFERENTIAL, *supra* note 55, at 24.

88. *Id.* at 20.

89. *Fact Sheet: Administering Locality Rates*, OFF. PERSONNEL MGMT., https://perma.cc/S85Z-9KJW. "To determine an employee's locality rate, increase the employee's 'scheduled annual rate of pay' by the locality pay percentage authorized by the President for the locality pay area in which the employee's official worksite is located." *Id.*

90. RESERVIST DIFFERENTIAL, *supra* note 55, at 10–12.

91. 5 U.S.C. § 6323(b)(2)(B) (2012).

matter how their ADOS is categorized in the service specific implementing regulations. Second, although OPM provides detailed guidance on how to calculate reservist differential pay, it wrongfully excludes soldiers on voluntary active duty under 10 U.S.C. § 12301(d) from the benefit.

A. OPM Should Permit Army Reservists Mobilized Under 10 U.S.C. § 12301(d) to Receive the Additional Paid Leave if They Provide Indirect Support for a Contingency Operation

It is unclear whether CPT Smith is entitled to an additional twenty-two days of emergency military leave when he is mobilized under 10 U.S.C. § 12301(d). OPM guidance on emergency military leave is sparse, and provides no specific guidance addressing mobilization under 10 U.S.C. § 12301(d).[92]

At first glance, the answer appears to be he is not entitled to receive an additional twenty-two days of military leave. CPT Smith was not mobilized under one of the specific authorities listed in 10 U.S.C. § 101(a)(13)(B).[93] However, CPT Smith's mobilization is a contingency operation under the language "any other provision of law during a war or during a national emergency declared by the President or Congress" as found in 10 U.S.C. § 101(a)(13)(B).[94] Additionally, every President since the terrorist attack on September 11, 2001 has declared a national emergency each year "with respect to certain terrorist attacks," with the most recent declared by President Donald Trump in September of 2018.[95]

Assuming CPT Smith's agency denied him this benefit, because 10 U.S.C. § 12301(d) is "any other provision of law" and CPT Smith was called to order during a national emergency declared by the President, he should argue that he was ordered to active duty in support of a contingency operation as required by 5 U.S.C. § 6323(b). The determinative question is whether his duty was "in support of" a contingency operation in order to obtain the twenty-two days of emergency military leave.

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92. *When are Employees Eligible*, *supra* note 67.

93. 10 U.S.C. § 101(a)(13)(B) (2012).

94. 10 U.S.C. § 101(a)(13)(B) (2012); *see* O'Farrell v. Dep't of Def., 882 F.3d 1080, 1086 (Fed. Cir. 2018). The Federal Circuit held that section 101(a)(13)(B) instructs that a service member may be called to active duty "in support of a contingency operation" pursuant to section 6323(b), even if the service member was ordered to active duty pursuant to a provision of law that is not explicitly listed in section 101(a)(13)(B). *Id.*

95. *See* Continuation of the National Emergency with Respect to Certain Terrorist Attacks, 83 Fed. Reg. 46,067 (Sept. 10, 2018), https://perma.cc/6C6R-H3C2.

1. O'Farrell v. Department of Defense

Despite routinely losing at the MSPB, agencies continue to deny military leave under 5 U.S.C. § 6323(b). The recent Federal Circuit case, *O'Farrell v. Department of Defense*,[96] lays out the legal framework for determining why Army reservists mobilized under 10 U.S.C. § 12301(d) are likely entitled to the additional twenty-two days of military leave.

Michael O'Farrell was ordered to duty under 10 U.S.C. § 12301(d) during a national emergency as declared by the President.[97] While mobilized, O'Farrell requested an additional twenty-two days of military leave from his employer, the Defense Logistics Agency, pursuant to 5 U.S.C. § 6323(b).[98] O'Farrell argued he was serving under "any other provision of law during a national emergency declared by the President or Congress" as defined by § 101(a)(13)(B), so he was entitled to twenty-two days of additional military leave pursuant to 5 U.S.C. § 6323(b).[99] The agency denied his request.[100]

After the agency's denial, O'Farrell brought a claim under the Uniformed Services Employment and Reemployment Rights Act of 1994[101] ("USERRA") before the MSPB.[102] There, an administrative judge found that 5 U.S.C. § 6323(b) requires "a specific contingency operation [to] be identified in military orders when an employee is activated under section 12301(d) in order for the employee to be entitled to [twenty-two] days of additional military leave under section 6323(b)."[103] The judge determined that because 10 U.S.C. § 12301(d) is not specifically listed in § 101(a)(13)(B), it was not a contingency operation as required by § 6323(b).[104] Upon review, the full MSPB issued an order stating "[t]he two [MSPB] members cannot agree on the disposition of the petition for review," such that the administrative judge's decision became binding.[105]

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96. *O'Farrell*, 882 F.3d at 1080.

97. *Id.* at 1082.

98. *Id.* at 1083.

99. O'Farrell, No. DE-4324-14-0013-I-1, 2016 MSPB LEXIS 1401, at *5–6 (M.S.P.B.), *aff'd*, 123 M.S.P.R. 590 (Sept. 15, 2016).

100. *Id.* at *8. Before the MSPB, the agency argued O'Farrell was not supporting a contingency operation because his orders did not expressly specify a contingency operation. *Id.* at *5.

101. Codified as amended at 38 U.S.C. §§ 4301–4335 (2012).

102. *O'Farrell*, 2016 MSPB LEXIS at *1.

103. *Id.* at *7.

104. *Id.* at *5.

105. O'Farrell, 123 M.S.P.R. 590, 591 (Sept. 15, 2016), *rev'd*, 882 F.3d 1080 (Fed. Cir. 2018).

O'Farrell appealed to the Federal Circuit, which reversed the MSPB's decision and held the MSPB misinterpreted 5 U.S.C. § 6323(b) by requiring a federal employee to identify a specific contingency operation in their military orders when activated under 10 U.S.C. § 12301(d) to be entitled to the twenty-two days of additional military leave.[106] The Federal Circuit determined the MSPB failed to assess what qualified as "support" or as a "contingency operation" under the 5 U.S.C. § 6323(b).[107] Finally, the Federal Circuit concluded that the MSPB abused its discretion in determining O'Farrell was not entitled to additional leave under 5 U.S.C. § 6323(b) because it was "undisputed that the armed forces of the United States [were] engaged in military operations in Afghanistan in conjunction with a national emergency declared by the President that constitute[d] a contingency operation" and O'Farrell was called to active duty "in support of" that contingency operation.[108]

In its decision, the Federal Circuit interpreted the word "support," as found in 5 U.S.C. § 6323(b), in accordance with its ordinary meaning,[109] which "broadly encompasses an act of helping a person or thing to hold firm or not to give way" or a "provision of assistance or backing."[110] Applying this interpretation, the Federal Circuit held O'Farrell was called to active duty "in support of" a contingency operation because he replaced an "attorney who directly supported the contingency operation through his deployment to Afghanistan."[111] "Indeed, the Order calling Mr. O'Farrell to active duty pursuant to § 12301(d), which undoubtedly qualifies as a 'provision of law,' states that he will provide 'operational *support*' for this mission."[112]

The Federal Circuit decided that 5 U.S.C. § 6323(b) imposed no requirement that the service member provide direct, as opposed to indirect, support to the contingency operation.[113] The Federal Circuit further held

106. O'Farrell v. Dep't of Def., 882 F.3d 1080, 1083–84 (Fed. Cir. 2018).

107. *Id.*

108. *Id.* at 1087.

109. *See generally* Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 876 (2014) (discussing ordinary, common meaning of "support"); *see also O'Farrell*, 882 F.3d at 1084 (quoting *Support*, OXFORD ENG. DICTIONARY, https://perma.cc/3ARB-PMRK ("'[S]upport' broadly encompasses 'an act of helping a person or thing to hold firm or not to give way; provision of *assistance* or backing[.]'")); *Support*, THE NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005) ("[G]ive assistance to, esp. financially; enable to function or act[.]"); *Support*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) ("To aid the cause, policy, or interests of[.]").

110. *O'Farrell*, 882 F.3d at 1084 (emphasis omitted) (quotation marks omitted).

111. *Id.* at 1087.

112. *Id.*

113. *See id.*

O'Farrell's orders did not have to indicate the Navy considered his service to be in support of a contingency operation.[114] Finally, the Federal Circuit concluded indirect support for contingency operations is sufficient to qualify for leave under 5 U.S.C. § 6323(b).[115]

2. Analyzing CPT Smith's Claim under 5 U.S.C. § 6323(b)

Going back to CPT Smith—is his mobilization "in support of" a contingency operation? Because 10 U.S.C.§ 12301(d) does not distinguish between types of ADOS, arguably all service under 10 U.S.C.§ 12301(d) is in support of a contingency operation, whether directly or indirectly.

The category of ADOS under which CPT Smith was mobilized may also factor into whether he is entitled to the twenty-two days of additional military leave.[116] For example, O'Farrell was serving under ADOS–AC orders,[117] and the Federal Circuit held he was serving in support of a contingency operation.[118] Additionally, AR 135–200 states that ADOS–AC and CO–ADOS are mobilizations in support of contingency operations.[119]

If CPT Smith was mobilized under ADOS–AC orders (including ADMIN–ADOS, OP–ADOS, and CO–ADOS), it is likely his mobilization would be determined to be "in support of" a contingency operation and he would be entitled to the additional twenty-two days of military leave. It is hard to argue that an employee is not supporting a contingency operation when CO–ADOS is the acronym for *contingency operations* active duty operational support, especially when there is no authority indicating that it means something different in this context.

The legal analysis is murkier if CPT Smith was mobilized under ADOS–RC. According to AR 135–200, this type of ADOS status is limited to non-contingency missions.[120] However, under the Federal Circuit's rationale in *O'Farrell*, CPT Smith can argue that his mobilization is providing indirect support to contingency operations and, if that is the case, arguably he would be eligible for twenty-two additional days of leave. By definition,

114. *Id.* at 1087–88.

115. *Id.* at 1088.

116. *See* AR 135–200, *supra* note 9. However, it must be noted that the Federal Circuit did not address service regulations in making its determination in *O'Farrell*. There is also no indication it would do so in future cases. *See O'Farrell*, 882 F.3d at 1080.

117. *See* O'Farrell, No. DE-4324-14-0013-I-1, 2016 MSPB LEXIS 1401 (M.S.P.B.), *aff'd*, 123 M.S.P.R. 590 (Sept. 15, 2016).

118. *See O'Farrell*, 882 F.3d at 1088.

119. *See* AR 135–200, *supra* note 9 at para. 6-1c(2).

120. *Id.* at para. 6-26a.

ADOS is "operational support" (whether directly or indirectly) because it is the acronym for Active Duty Operational *Support*. There is no legal authority indicating that it means anything other than this. Finally, in *O'Farrell*, the Federal Circuit did not even address the service regulation implementing 10 U.S.C. § 12301(d), so the argument may be made that ADOS-RC qualifies. Therefore, OPM guidance should be changed to allow Army reservists these benefits no matter how the ADOS is categorized in the service specific implementing regulations.

B. OPM Should Qualify Army Reservists Mobilized Under 10 U.S.C. § 12301(d) as Active Duty Employees Entitled to Differential Pay

Additionally, and confusingly for reservists mobilized under 10 U.S.C.§ 12301(d), OPM specifies that only employees serving on active duty under the specific provisions listed in 10 U.S.C. 101(a)(13)(B) are entitled to differential pay.[121] Notably, according to OPM, "qualifying active duty does not include voluntary active duty under 10 U.S.C. [§] 12301(d) or annual training duty under 10 U.S.C. [§] 10147 or [§] 12301(b)."[122] This guidance is incorrect based upon statutory construction and the decisions of administrative adjudicative bodies. Unfortunately, many federal agencies use OPM's interpretation and end up in litigation when they deny employees this benefit.[123] While there are no on point precedential decisions on this topic, *Marchand v. Government Accountability Office* and *Marquiz v. Department of Defense* illustrate how OPM's guidance is incorrect regarding reservist differential pay for soldiers mobilized under 10 U.S.C. § 12301(d).

1. Marchand v. Government Accountability Office

The case *Marchand v. Government Accountability Office*[124] provides an on-point legal analysis of eligibility for differential pay when a federal employee is mobilized under 10 U.S.C. § 12301(d). While the claim was

121. These specific provisions are 10 U.S.C. §§ 688, 12301(a), 12302, 12304, 12304a, 12305, and 12406 and chapter 15 (including §§ 331, 332, and 333). *See Pay & Leave, Frequently Asked Questions: What Types of Active Duty Service Qualifies for Reservist Differential?* OFF. PERSONNEL MGMT., https://perma.cc/FUG7-3A4P [hereinafter *Services that Qualify*].

122. *See* RESERVIST DIFFERENTIAL, *supra* note 55 at 18.

123. *See* Marquiz, No. SF-4324-15-0099-I-1, 2015 MSPB LEXIS 2138, at *7 (M.S.P.B. Mar. 12, 2015), *aff'd*, 123 M.S.P.R. 479 (2016); Marchand v. Gov't Accountability Office, 12-GA-05 VT, Order Granting Complainant's Motion for Summary Judgment (Dec. 27, 2012), https://perma.cc/9JZA-V38S.

124. *See Marchand,* 12-GA-05 VT.

before the Office of Compliance[125] and is not a precedential decision, the legal reasoning is notably persuasive.

On November 30, 2010, Major Gregory Marchand was ordered "to active duty for operational support under [the] provision of [10 U.S.C. § 12301(d)]."[126] The purpose of his orders was a "contingency operation for active duty operational support pursuant to the national emergency declared under Presidential Proclamation 7463."[127] Marchand served a one-year active duty tour from January 2011 through January 2012.[128] He requested reservist differential pay, but his employer, the Government Accountability Office, denied the request because he was mobilized under 10 U.S.C. § 12301(d).[129]

Marchand filed an action with the Office of Compliance, the legislative branch's version of the Merit System Protection Board, seeking to challenge OPM's interpretation of 5 U.S.C. § 5538(a).[130] Before the Office of Compliance, the government argued that "the phrase 'a provision of law referred to in section 101(a)(13)(B) of title 10' in 5 U.S.C. § 5538 only refers to the provisions of law explicitly enumerated in § 101(a)(13)(B), and not the catch-all provision, 'or any other provision of law during a war or during a national emergency declared by the President or Congress.'"[131] Relying on OPM guidance, Marchand's agency determined he was not entitled to the benefit because he was mobilized under 10 U.S.C. § 12301(d), which is not a specific provision of law enumerated in 10 U.S.C. § 101(a)(13)(B).[132] Marchand argued 5 U.S.C. § 5538 incorporated the catch-all provision, which includes 10 U.S.C. § 12301(d) and, therefore, he was entitled to differential pay.[133]

125. *See About the OCWR,* OFF. CONG. WORKPLACE RTS., https://perma.cc/3E76-YV7G ("The Congressional Accountability Act of 1995 (CAA) protects over 30,000 employees of the legislative branch nationwide and establishes the Office of Congressional Workplace Rights (formerly Office of Compliance [(OOC)]) to administer and ensure the integrity of the Act through its programs of dispute resolution, education, and enforcement. The [OOC] assists members of Congress, employing offices and employees, and visiting public in understanding their rights and responsibilities under the workplace and accessibility laws.").

126. *Marchand*, 12-GA-05 VT at 2 (internal quotation marks omitted).

127. *Id.* (internal quotation marks omitted).

128. *Id.*

129. *Id.*

130. *Id.* at 2–3.

131. *Id.* at 3.

132. *See id.* at 4.

133. *Id.* at 3.

The Office of Compliance agreed with Marchand after looking at the statute as a whole.[134] It said that 5 U.S.C. § 5538(a) "was passed as part of a larger bill, the Consolidated Appropriations Act of 2010."[135] In that Act, Congress used phrases "enumerated in" and "listed in."[136] The Office of Compliance reasoned that "[i]f Congress intended to limit the applicability of § 5538 to only the enumerated statutes listed in § 101(a)(13)(B), it would have used the same narrow language used in the larger Act."[137] The Office of Compliance opined that adopting the government's interpretation of 10 U.S.C. § 101(a)(13)(B) would render the catch-all phrase "superfluous."[138]

The Office of Compliance also addressed OPM's guidance, upon which the agency relied in denying the claim, which "interpreted (and still interprets) the language found in § 5538(a) as requiring any call or order to active duty to be specifically referenced in § 101(a)(13)(B)."[139] The Office of Compliance determined that the OPM guidance did not deserve *Chevron*[140] deference because Congress's intent for 5 U.S.C. § 5538(a) to apply to "any other provision of law during a war or during a national emergency declared by the President or Congress" was clear.[141]

The Office of Compliance found Marchand qualified for differential pay during his mobilization because he was "mobilized under a call or order to active duty in support of a contingency operation, [] under 10 U.S.C. § 12301(d)."[142] This is "clearly within the meaning of 'any other provision of law during a war or national emergency declared by the President or Congress.'"[143] This decision is important and may be used as a guide for other reservists because it thoroughly discusses and ultimately invalidates various theories put forth by agencies to deny reservists this benefit.

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134. *Id.* at 5.

135. *Id.* at 3.

136. *Id.*; *see* Consolidated Appropriations Act § 745, 5 U.S.C. § 5538 (2009).

137. *Marchand*, 12-GA-05 VT at 3; *see* Delgado v. U.S. Attorney Gen., 487 F.3d 855, 862 (11th Cir. 2007) ("'[W]here Congress knows how to say something but chooses not to, its silence is controlling.'") (alteration in original) (quoting CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1226 (11th Cir. 2001)); United States v. Int'l Bus. Machs. Corp., 892 F.2d 1006, 1009 (Fed. Cir. 1989) ("Had Congress intended to make the exemption permanent, it knew how: it could and we believe would have used the words of futurity . . . .").

138. *Marchand*, 12-GA-05 VT at 3–4.

139. Randall, *supra* note 45.

140. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

141. *Marchand*, 12-GA-05 VT at 4 (quoting *Chevron*, 467 U.S. at 842–43) (internal quotation marks omitted).

142. *See* Randall, *supra* note 45, at 34.

143. *Id.* (quoting *Marchand*, 12-GA-05 VT at 2).

2. Marquiz v. Department of Defense

The first MSPB case addressing whether a federal employee is entitled to differential pay when mobilized under 10 U.S.C. § 12301(d) was *Marquiz v. Department of Defense*.[144] As with *Marchand*, in this nonprecedential,[145] persuasive, initial decision, the administrative judge invalidated OPM guidance regarding differential pay for employees mobilized under 10 U.S.C. § 12301(d).[146]

The facts mirror *Marchand*: Joshua Marquiz was ordered to active duty under 10 U.S.C. § 12301(d), and he requested differential pay.[147] His agency denied his request, contending military duty ordered under 10 U.S.C. § 12301(d) did not qualify for differential pay.[148] Marquiz argued "his orders [fell] within 10 U.S.C. § 101(a)(13)(B)'s catch-all provision."[149]

The administrative law judge determined that this was a question of first impression for MSPB—"whether an employee who volunteers for military service during a national emergency is entitled to the same differential pay afforded to those who are called up involuntarily."[150]

The agency argued that, with respect to the text of 5 U.S.C. § 5538, the phrase "referred to in section 101(a)(13)(B)" meant only the laws specifically mentioned by number in that section, not the catch-all provision.[151] According to the agency, "[h]ad Congress intended to sweep in the section's catch-all . . ., [the statute] would have explicitly said 'in' rather than 'referred to in.'"[152] The judge rejected this argument as the agency's "suggestion for how the statute could have been written—'a provision of law in section 101(a)(13)(B)'—would not cover the catch-all provision any more unambiguously than the current statutory language."[153] The judge found

144. *See* Marquiz, No. SF-4324-15-0099-I-1, 2015 MSPB LEXIS 2138, at *7 (M.S.P.B. Mar. 12, 2015), *aff'd*, 123 M.S.P.R. 479 (2016).

145. *See* 5 C.F.R. § 1201.117(c)(2) (2018) ("A nonprecedential Order is one that the Board has determined does not add significantly to the body of MSPB case law. . . . Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.").

146. *See Marquiz*, 2015 MSPB LEXIS at * 1. A note of caution, the full MSPB affirmed with an equally divided Board. Marquiz, 123 M.S.P.R. 479, 480 (M.S.P.B. July 12, 2016).

147. *See Marquiz*, 2015 MSPB LEXIS at *2–3.

148. *Id.* at *3.

149. *Id.*

150. *Id.* at *5–6.

151. *Id.* at *7 (internal quotation marks omitted).

152. *Id.*

153. *Id.* at *7–8.

that Marquiz was entitled to differential pay because 10 U.S.C. § 12301(d) fell within the catch-all provision.[154]

Additionally, the judge compared the language of OPM's interpretation of 5 U.S.C. § 5538 to its interpretation of the Family and Medical Leave Act (FMLA) and determined that its interpretation of identical language was inconsistent.[155] The judge explained that Congress enacted 5 U.S.C. § 5538 the same year that it added a provision to FMLA related to taking leave for a relative's "covered active duty" in the military.[156] Congress defined "covered active duty" as a foreign deployment that is ordered "'under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code.'"[157] While implementing this section, OPM clearly indicated that it covered the laws listed in 10 U.S.C. § 101(a)(13)(B), as well as "any other provision of law during a declared war or national emergency."[158] The judge determined that the statutory language in 5 U.S.C. § 5538 could not be interpreted any other way.[159]

The agency took the position that other parts of the statute would be superfluous if the catch-all phrase was read to cover 10 U.S.C. § 12301(d).[160] It argued that "Congress twice added laws to the list in [10 U.S.C.] § 101(a)(13)(B), and . . . these amendments would have been superfluous if those statutes were already covered by the catch-all provision."[161] The agency reasoned that Congress did not intend to cover 10 U.S.C. § 12301(d) because it was not included in the list of enumerated laws found in the statute.[162] The judge determined that these arguments "miss[ed] the mark" because the catch-all provision of the statute only applies during a declared war or national emergency.[163] Additionally, the judge determined the agency's interpretation would "read[] the catch-all provision out of the statute," rendering it superfluous.[164] Finally, the judge declined to grant *Chevron*[165] deference because there was no statutory

154. *Id.* at *12–13.

155. *Id.* at *8.

156. *Id.* at *8–9.

157. *Id.* at *8 (quoting 5 U.S.C. § 6381(7)(B) (2012)).

158. *Id.* at *9.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at *9–10.

164. *Id.* at *10.

165. *Id.* at *10–13. *See also* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for

ambiguity for OPM to resolve.[166] Upon full MSPB review, an equally divided Board affirmed the judge's decision.[167]

Subsequent cases before the MSPB have followed the same legal reasoning in ordering agencies to grant differential pay.[168] However, one case runs contrary to the legal reasoning in *Marquiz*. In *Stockwell v. Department of Homeland Security.*,[169] the judge adopted the separate opinion in *Marquiz v. Department of Defense*[170] and determined that Stockwell was not entitled to differential pay, citing OPM guidance.[171] This is problematic because other administrative law judges may opt to deny differential pay claims on the basis of *Stockwell*. Without further guidance from the full MSPB, an Army reservist may receive a different outcome based upon which judge he or she receives at the MSPB. Fortunately, if the Army reservist appealed to the Federal Circuit, he or she would likely receive the benefit of reservist differential.

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the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

166. *Marquiz*, 2015 MSPB LEXIS at *10–13.

167. *See* Marquiz, 123 M.S.P.R. 479, 487 (M.S.P.B. July 12, 2016). Acting Chair Robbins disagreed and in a separate opinion opined that, regarding 10 U.S.C. § 12301 (d),

> [i]n his September 14, 2001 emergency declaration, President George W. Bush enumerated a number of statutory provisions that he intended to utilize. 66 Fed. Reg. 48,199 (Sept. 14, 2001). The statute at issue here is not among those enumerated statutes. Eight of the statutes have language reflecting that they apply in time of war or national emergency. Subsequently, President Bush informed Congress on December 17, 2003, that he was invoking another statutory provision, 10 U.S.C. § 603, which also states that it applies in time of war or national emergency. There would have been no need for the President to specifically identify the statutes that he was invoking if, by their terms, they applied in time of national emergency and he was declaring a national emergency. This suggests that because the statute here has not been invoked in an emergency declaration, the authority provided under the statute in the event of a national emergency does not apply.

Id. Chair Robbins also opined that OPM's interpretation should have been entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *Id.* at 488.

168. *See* Miller, No. CH-3330-16-0518-I-1, 2016 MSPB LEXIS 6318 (M.S.P.B. Oct. 24, 2016); Doe, No. NY-4324-15-0127-I-2, 2016 MSPB LEXIS 5987 (M.S.P.B. Oct. 6, 2016).

169. Stockwell, No. CH-4324-17-0314-I-2, 2018 MSPB LEXIS 1935 (M.S.P.B. May 31, 2018).

170. *Marquiz*, 123 M.S.P.R. at 486.

171. *Stockwell*, 2018 MSPB LEXIS at *11.

3. Analyzing CPT Smith's Army Reservist Differential Pay under 5 U.S.C. § 5538

According to OPM, CPT Smith is not eligible for reservist differential pay because OPM specifically excludes voluntary active duty under 10 U.S.C. § 12301(d).[172] Like the practices of other agencies,[173] CPT Smith's agency denied entitlement to this benefit based on OPM guidance. However, in the limited aforementioned MSPB cases, most judges have found individuals mobilized under 10 U.S.C. § 12301(d) are entitled to reservist differential pay.[174] This Author believes the legal reasoning in *Marquiz* and the cases that follow its lead are more legally sound than the rationale used by the judge in *Stockwell* due to statutory construction and jurisprudence at the Federal Circuit.

The legal reasoning in *Marquiz* aligns with the Federal Circuit's reasoning in *O'Farrell*, where the court clearly held that 10 U.S.C. § 101(a)(13)(B) includes 10 U.S.C. § 12301(d) in its catch-all provision.[175] Both entitlement to military leave under 5 U.S.C. § 6323(b) and entitlement to reservist differential pay under 5 U.S.C. § 5538(a) require determining whether an employee is eligible for the benefit under 10 U.S.C. § 101(a)(13)(B).[176] While these are two separate statutes, eligibility for both requires an interpretation of 10 U.S.C. § 101(a)(13)(B). Under both statutes, entitlement to the benefit is granted if the reservist is mobilized under "any other provision of law during a war or during a national emergency declared by the President or Congress."[177]

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172. *See* RESERVIST DIFFERENTIAL, *supra* note 55 at 18.

173. *See* Anderson, SF-4324-11-0003-I-1, 2011 MSPB LEXIS 394, at *1 (M.S.P.B. Jan. 21, 2011) (denying reservist differential pay; claim withdrawn).

174. *See Marquiz* 123 M.S.P.R. at 479; Miller, No. CH-3330-16-0518-I-1, 2016 MSPB LEXIS 6318 (M.S.P.B. Oct. 24, 2016); Doe, No. NY-4324-15-0127-I-2, 2016 MSPB LEXIS 5987 (M.S.P.B. Oct. 6, 2016).

175. O'Farrell v. Dep't of Def., 882 F.3d 1080, 1084–85 (Fed. Cir. 2018). "While § 101(a)(13)(B) lists specific statutory provisions under which a service member may be ordered to active duty, the subsection's use of the word 'any' indicates that this list of statutory provisions is non-exhaustive and that 'other provision[s] of law' should be interpreted broadly." *Id.* (citing Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 219, (2008)). *See Ali*, 552 U.S. at 219. (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)) ("[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). "Therefore, § 101(a)(13)(B) instructs that a service member may be called to active duty 'in support of a contingency operation' pursuant to § 6323(b), even if the service member were ordered to active duty pursuant to a provision of law that is not explicitly listed in § 101(a)(13)(B)." *O'Farrell*, 882 F.3d at 1084–1085.

176. *See O'Farrell*, 882 F.3d at 1084–85.

177. 10 U.S.C. § 101(a)(13)(B) (2012).

Since the Federal Circuit interpreted 10 U.S.C. § 101(a)(13)(B) to include 10 U.S.C. § 12301(d) in the military leave case of *O'Farrell*, this Author believes the Federal Circuit would similarly interpret 10 U.S.C. § 101(a)(13)(B) to include 10 U.S.C. § 12301(d) in reservist differential pay cases. The relevant question in both situations is whether the reservist is mobilized under "any other provision of law during a war or during a national emergency declared by the President or Congress" as defined by 10 U.S.C. § 101(a)(13)(B).[178]

III. UTILIZING THE FEDERAL EMPLOYMENT BENEFITS AND STREAMLINING THE PROCESS FOR ARMY RESERVISTS MOBILIZED UNDER 10 U.S.C. § 12301(d)

A. Utilizing the Benefits: An Illustration Through CPT Smith

CPT Smith should be deemed eligible for fifteen days of military leave, twenty-two days of additional emergency military leave, and reservist differential pay. When and how should he utilize these benefits?

First, CPT Smith receives fifteen days per fiscal year of military leave, and he can take these paid leave days at any point during his mobilization.[179] Because his mobilization crosses two fiscal years, he can take up to thirty days, or he can rollover up to fifteen days into an additional fiscal year. When and where he takes these days is up to him. CPT Smith may want to keep in mind that if one of his military leave days abuts a holiday, he will receive holiday pay for that day.

Similarly, CPT Smith can take his twenty-two days of additional military leave whenever he pleases.[180] However, he has to keep in mind that these days are per calendar year and unspent days do not roll over into the next year. Because emergency military leave is a pay status, he will accrue

178. *Id.*

179. *See Pay & Leave Frequently Asked Questions: Choosing Between Leave and Leave Without Pay*, OFF. PERSONNEL MGMT., https://perma.cc/UL5Z-AR3T [hereinafter *Choosing Between Leave and Leave Without Pay*] ("OPM's regulations at 5 CFR 353.208 implementing the Uniformed Services Employment and Reemployment Rights Act (USERRA) state that an employee performing service with the uniformed services must be permitted, upon request, to use any accrued annual leave, military leave, earned compensatory time off for travel, or accrued sick leave (consistent with the statutory and regulatory criteria for using sick leave), during such service. An employee is entitled to use annual leave, military leave, earned compensatory time off for travel, or sick leave intermittently with leave without pay while on active duty or active/inactive duty training.").

180. 5 C.F.R. § 353.208 (2018).

annual and sick leave while on this status and he will be paid for holidays that abut his leave days. While he may not accrue any additional base pay, CPT Smith will accumulate leave and paid holidays if they abut his leave days.

Lastly, CPT Smith should apply for differential pay if he makes less military pay than civilian pay at his federal agency. He should keep in mind the calculations when coming to this determination. If he makes more with the military, there is no incentive in filing for differential pay, as it is not considered a pay status. However, CPT Smith should keep in mind that he is eligible for step increases and other potential pay increases[181] from his civilian job while he is away, and these increases may change the differential pay calculation.

B. What Recourse Does a Federal Employee Have if Denied these Benefits?

In our scenario, CPT Smith's agency denied him the twenty-two days of emergency military leave and reservist differential pay. What can CPT Smith do to obtain these employment related benefits?

Initially, CPT Smith should ask the human resources department of his federal agency to reconsider its decision. To support his claims, he should send copies of the *O'Farrell* and *Marchand* decisions (or this Article) which accurately describe how OPM guidance is incorrect. If the agency continues to deny his claims, assuming he is working for the executive branch, he should take his claims to the MSPB for corrective action.

If CPT Smith's agency denied any of the above benefits, he should bring his action to the MSPB as a USERRA appeal.[182] In order to establish

181. *See* RESERVIST DIFFERENTIAL, *supra* note 55, at 7–8. "The following pay adjustments should be applied in computing an employee's projected current rate of civilian basic pay: . . . Within-grade increases (generally based on longevity and acceptable performance); Career ladder promotion increases (if promotion would have occurred with reasonable certainty)." *Id.* at 8.

182. What if CPT Smith's agency refuses to reemploy him after his mobilization? With a few exceptions, CPT Smith's agency is required to rehire him upon return from his mobilization under USERRA. Generally speaking, under USERRA "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits." 38 U.S.C. § 4312(a) (2012). In order to be protected under USERRA, the service member is required to give advance notice of such service to the employer and the service cannot exceed five years, with some exceptions. 38 U.S.C. § 4312(a)(1)–(3). Voluntary or involuntary performance of duty in a uniformed service triggers the protections of USERRA. *See* Michele A. Forte, *Reemployment Rights for the Guard and Reserve: Will Civilian Employers Pay the Price for National Defense?*, 59 A.F. L. REV. 287, 296 (2007). Therefore, CPT

MSPB jurisdiction over a USERRA[183] appeal, the appellant must show: "(1) performance of duty in a uniformed service of the United States; (2) an allegation of a loss of a benefit of employment; and (3) an allegation that the benefit was lost due to the performance of duty in the uniformed service."[184] The MSPB has held that an allegation that an employer took or failed to take certain actions based on an individual's military status or obligations in violation of USERRA constitutes a nonfrivolous allegation, entitling the appellant to Board consideration of his claim.[185]

Similar to a *Butterbaugh*[186] claim, the MSPB would have jurisdiction over CPT Smith's claims because claims stemming from denial of a benefit of employment due to military service are nonfrivolous allegations under USERRA.[187] Note that USERRA appeals have no time limit for filing.[188]

Once at MSPB, an administrative law judge would initially hear CPT Smith's claims. If CPT Smith is serving on CO–ADOS orders, his military leave claim under 5 U.S.C. § 6323(b) should be immediately granted under the precedent set in *O'Farrell*.[189] If serving on ADOS–RC orders, CPT Smith should argue he is providing indirect support to a contingency operation; and therefore, he should be granted the benefit. Regarding CPT Smith's claims for differential pay, there are no precedential decisions. Thus, CPT Smith should make the same arguments as those found in *Marchand*.

Smith, as well as all reservists, are covered by USERRA while mobilized under 10 U.S.C. § 12301(d).

183. USERRA provides that

> [a] person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. § 4311(a) (2012).

184. Muse, 82 M.S.P.R. 164, 169 (1999).

185. *See* Yates v. MSPB, 145 F.3d 1480, 1484–85 (Fed. Cir. 1998); Tindall, 84 M.S.P.R. 230, 234 (1999); Melvin, 79 M.S.P.R. 372, 375 (1998).

186. *See* Butterbaugh, 91 M.S.P.R. 490, 496 (2002), *rev'd*, 336 F.3d 1332 (Fed. Cir. 2003) (providing a thorough legal analysis regarding jurisdiction); *see also* Donohoe, *supra* note 35, at 55 (providing a thorough legal analysis on why the Federal Circuit should have found that the MSPB had no jurisdiction over the USERRA claim).

187. *See* Butterbaugh v. Dep't of Justice, 336 F.3d 1332, 1334 (Fed. Cir. 2003).

188. *See* 5 C.F.R. § 1208.12 (2018); Garcia, 101 M.S.P.R. 172, 176 (2006); Harper, 101 M.S.P.R. 166, 169–70 (2006).

189. *See* O'Farrell v. Dep't of Def., 882 F.3d 1080 (Fed. Cir. 2018).

If CPT Smith is denied any of these benefits in the initial decision, he can appeal to the full MSPB Board or directly to the Federal Circuit.[190] Based on the language in *O'Farrell*, this Author believes the Federal Circuit would make a similar ruling and grant eligibility for reservist differential pay.

C. Streamlining Federal Employee Benefits for Army National Guard Reservists Mobilized Under 10 U.S.C. § 12301(d)

While OPM guidance clearly and properly shows service members mobilized under 10 U.S.C. § 12301(d) are entitled to fifteen days of military leave, OPM guidance for twenty-two days of emergency military leave and reservist differential is unclear and, at times, incorrect. Fortunately, this is an easy problem for OPM to fix.

For the twenty-two days of additional military leave, OPM needs to update its guidance and specifically address mobilizations under 10 U.S.C. § 12301(d). OPM guidance should incorporate *O'Farrell* and leave no question that employees mobilized under 10 U.S.C. § 12301(d) are entitled to twenty-two days of additional military leave.

For reservist differential, OPM needs to update its guidance and change it to state employees mobilized under 10 U.S.C. § 12301(d) are eligible for reservist differential pay. OPM guidance should incorporate the rationale of *Marquiz* and *O'Farrell*,[191] and it should leave no question that employees mobilized under 10 U.S.C. § 12301(d) are eligible for reservist differential pay.

CONCLUSION

OPM needs to bring its guidance in line with federal court precedent and administrative adjudicative body decisions. Streamlining this guidance will lead to less confusion for Army reservists mobilized under 10 U.S.C. § 12301(d), allowing these soldiers to easily obtain the benefits to which they are entitled. Revising OPM guidance will also lead to less litigation before the MSPB, as these federal employees will receive the benefits they deserve.

190. *See About MSPB*, *supra*, note 44. At the time of the publishing of this article, the Board did not constitute a quorum, so it was not hearing petitions for review.

191. *See O'Farrell*, 882 F.3d at 1080; Marquiz, 123 M.S.P.R. 479 (M.S.P.B. July 12, 2016).