APPENDIX

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APPENDIX A

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CHARLES FLYNN,
Petitioner

v.

DEPARTMENT OF STATE,
Respondent

2022-1220

Petition for review of the Merit Systems Protection Board in No. DC-4324-21-0367-I-1.

Decided: May 15, 2023

BRIAN J. LAWLER, Pilot Law, PC, San Diego, CA, argued for petitioner.

MARGARET JANTZEN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also represented by CLAUDIA BURKE, PATRICIA M. MCCARTHY.

Before LOURIE, HUGHES, and STARK, *Circuit Judges*.

HUGHES, *Circuit Judge*.

Charles Flynn appeals the final decision of the Merit Systems Protection Board denying his request for differential pay for his military service in the Army Reserve. Because our holdings in *Adams v. Department of Homeland Security*, 3 F.4th 1375 (Fed. Cir. 2021) and *Nordby v. Social Security Administration*, No. 21-2280 (Fed. Cir. May 11, 2023) dictate that the entitlement to differential pay under 5 U.S.C. § 5538(a) and 10 U.S.C. § 101(a)(13)(B) requires the employee to serve in a contingency operation, we affirm.

I

The facts and procedural history of this appeal largely mirror those laid out in *Nordby*. In *Nordby*, the federal employee was activated under 10 U.S.C. § 12301(d) to serve in the military. Upon conclusion of his service, he requested differential pay to make up the difference between the military and civilian compensation. The agency denied the request, determining that military service under 10 U.S.C. § 12301(d) does not qualify for differential pay under 5 U.S.C. § 5538. The Board affirmed.

Similarly, Mr. Flynn was employed by the United States Department of State as a Special Agent in the Bureau of Diplomatic Security. He also served as Lieutenant Colonel in the United States Army Reserve. From March 2020 to March 2022, he performed active duty under 10 U.S.C. § 12301 (d) at the Office of Military Commissions at the Pentagon, providing support on a variety of legal issues. For this duty period, he requested differential pay from the agency. The agency denied his request, determining that those called to voluntary active duty pursuant to 10 U.S.C. § 12301(d) are not entitled to differential pay under 5 U.S.C. § 5538(a). He appealed the decision to the Merit Systems Protection Board. The

Board affirmed, holding that he was not entitled to differential pay as a matter of law because his activation orders under 10 U.S.C. § 12301(d) did not qualify as a contingency operation, for which differential pay could be awarded under 5 U.S.C §5538.

Mr. Flynn now appeals.

II

We set aside the Board's decision only if it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Legal conclusions by the Board are reviewed de novo. *Wrocklage v. Dep't of Homeland Sec.*, 769 F.3d 1363, 1366 (Fed. Cir. 2014).

III

Mr. Flynn concedes that our holding in *Adams* affects the outcome of this case. Pet. Br. vi, 4–5. He dedicates all of his argument to challenging *Adams* and does not purport to show how his activation under 10 U.S.C. § 12301(d) warrants a different outcome from that of *Adams*. He also concedes that the petitioners in *Nordby* raise the same question: whether federal employees activated under 10 U.S.C. § 12301(d) are entitled to differential pay under 5 U.S.C. § 5538(a). Pet. Br. vi, 5.

The factual and procedural similarities between *Nordby* and this case compel us to reach the same outcome here. To receive differential pay, an employee "must have served pursuant to a call to active duty that meets the statutory definition of contingency operation." *Adams*, 3 F.4th at 1378; *Nordby*, No. 21-2280. slip op. at 4. And for voluntary activation under 10 U.S.C. § 12301(d)

to qualify as a contingency operation, "there must be a connection between the voluntary military service and the declared national emergency." *Nordby*, No. 21-2280. slip op. at 5. But Mr. Flynn has not alleged any connection between his service and an ongoing national emergency, and thus failed to demonstrate that his voluntary, active service under 10 U.S.C. § 12301(d) met the statutory definition of a contingency operation. Accordingly, we hold that the Board properly denied differential pay and affirm the decision of the Board.

AFFIRMED

COSTS

No costs.

APPENDIX B

[FILED: AUGUST 2, 2022]

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

CHARLES FLYNN,
Appellant,

v.

DEPARTMENT OF STATE,
Agency.

DOCKET NUMBER
AT-4324-21-0367-I-1

DATE: September 17, 2021

BRIAN LAWLER, San Diego, California, for the appellant.

CLARE DUNCAN, Washington, D.C., for the agency.

BEFORE

MELISSA MEHRING
Administrative Judge

INITIAL DECISION

On April 23, 2021, the appellant filed an appeal in which he alleged that the agency violated the Uniformed Services Employment and Reemployment Rights Act of

1994 (USERRA) (codified as amended at 38 U.S.C. §§ 4301-4333). Appeal File (AF), Tab 1. Specifically, the appellant claimed the agency denied him his entitled differential pay pursuant to 5 U.S.C. § 5538(a). The Board has jurisdiction over this appeal pursuant to 38 U.S.C. § 4324(b). The appellant withdrew his request for a hearing, and therefore this case was decided on the written record. AF, Tab 9 at 3. For the reasons set forth below, the appellant's request for corrective action is DENIED.

BACKGROUND

The appellant is employed by the United States Department of State as a Special Agent in the Bureau of Diplomatic Security. AF, Tab 5 at 83. He is also a Lieutenant Colonel in the United States Army Reserve (USAR). AF, Tab 13 at 200. On January 27, 2020, the appellant received orders to active duty for operational support under 10 U.S.C. § 12301(d) from March 4, 2020 through March 3, 2021 with the USAR. *Id.* The orders stated the purpose of his activation as "Contingency Operation for Active Duty Operational Support (CO-ADOS) in support of OEF-CSB."[1] *Id.* (capitalization altered). Subsequently, the appellant received orders extending his active duty pursuant to 10 U.S.C. § 12301(d) with the USAR on January 4, 2021, with an additional active duty period from March 4, 2021 until March 3, 2022. *Id.* at 201.

On February 10, 2021, the appellant emailed the agency and requested reservist differential pay pursuant to 5 U.S.C. § 5538 for his term of active duty from "March 4, 2020 to the end of 2020." AF, Tab 5 at 70-71. The agency

[1] Neither the appellant nor the agency explained the acronym OEF-CSB anywhere in their submissions. A Google search suggested that OEF stands for Operation Enduring Freedom and CSB stands for Contracting Support Brigade.

advised the appellant that it would need to determine whether he was eligible for differential pay and that it was consulting with the Office of Personnel Management (OPM) on the issue. *Id.* at 69-70. On April 14, 2021, the agency responded to the appellant and provided him with a copy of the guidance received from OPM. *Id.* at 64-67. In the email provided, OPM determined that the appellant was not eligible for the requested reservist differential pay because "[m]ilitary service under 10 U.S.C. 12301(d) does not qualify for the reservist differential under 5 U.S.C. 5538." *Id.* at 65.

The appellant filed a Board appeal claiming an entitlement to reservist differential pay from March 4, 2020 through March 3, 2022 pursuant to 5 U.S.C. § 5538(a). *See* AF, Tab 1 at 9-10. The appellant further alleged that the agency knowingly and willfully violated 38 U.S.C. § 4311 by denying him benefits of employment through discriminatory practices including, but not limited to, denying him differential pay for his period of military leave. *Id.* at 11.

In the agency's response to the appellant's appeal, it asserted that the appellant was not entitled to reservist differential pay because of the type of service he was called to perform. *See* AF, Tab 5 at 9. The agency noted that 10 U.S.C. § 12301(d), the authority cited for the appellant's orders, is not a provision of law enumerated in 10 U.S.C. § 101(a)(13)(B), which defines what qualifies as a contingency operation. *Id.* at 12. The agency recognized the catch-all provision in section 101(a)(13)(B) that includes "any other provision of law during a war or national emergency declared by the President or Congress" but nevertheless found that 5 U.S.C. § 5538(a) only applied to involuntary orders and that the appellant's

duty was voluntary.[2] *Id.* at 15-16 (quoting 10 U.S.C. § 101(a)(13)(B)).

In the appellant's closing brief, he argued that the catch-all provision in 10 U.S.C. § 101(a)(13)(B) applied to his case. AF, Tab 13 at 5-6. The appellant expounded that since September 11, 2011, there has been a national emergency declared by the president that has consistently been renewed. *Id.* at 5. He further elaborated that his military duty as the Chief of Contract and Fiscal Law at the Office of Military Commissions has been a part of contingency operations and thus falls under 10 U.S.C. § 101(a)(13)(B). *Id.* at 5-6. Moreover, the appellant argued

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[2] The agency also argued that OPM's guidance regarding differential pay is entitled to *Chevron* deference, or at minimum *Skidmore* deference. *See* AF, Tab 5 at 16-19. The United States Court of Appeals for the Federal Circuit recently had the opportunity to address the appropriate level of deference for OPM's guidance on the subject and declined to do so. *See Adams v. Department of Homeland Security*, 3 F.4th 1375 (2021). The question has not, to my knowledge, been resolved definitively by the Board. *See Marquiz v. Department of Defense*, 123 M.S.P.R. 479 (2016) (two Board members split on whether the catch-all provision in 10 U.S.C. § 101(a)(13)(B) entitled reservists activated through 10 U.S.C. § 12301(d) to differential pay under 5 U.S.C. § 5538(a)) (non-precedential decision, cited for clarifying value, see 5 C.F.R. §1201.117(c)). Member Robbins found that OPM's guidance was entitled to *Skidmore* deference and agreed with its rational, while Chairwoman Grundmann did not address the level of deference due and disagreed with OPM's guidance. *Marquiz*, 123 M.S.P.R. at 484-88. I find no need to settle the issue for the purposes of this decision.

Similarly, I do not address whether the appellant would be entitled to pay differential as a matter of fact based on a difference in pay between his civilian and military service. The agency argued that the appellant has failed to make such a showing in this case. AF, Tab 5 at 9. Because I find the appellant is not entitled to relief as a matter of law, I do not reach the question of fact in this case.

that 5 U.S.C. § 5538(a) must be interpreted broadly.[3] *Id.* at 8-9.

APPLICABLE LAW

Under 38 U.S.C. § 4311(a), a person who is a member of a uniformed service shall not be denied any benefit of employment on the basis of that performance of service. *Adams v. Department of Homeland Security*, 3 F.4th 1375, 1377-78 (Fed. Cir. 2021). The appellant has the burden of proving by a preponderance of the evidence that the agency denied him a benefit of employment on the basis of his military service.[4] *See Sheehan v. Department of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001); *Haskins v. Department of the Navy*, 106 M.S.P.R. 616, ¶ 10 (2007), *appeal dismissed*, 267 F. App'x 934 (Fed. Cir. 2008). The U.S. Court of Appeals for the Federal Circuit has held: "when the benefit in question is only available to members of the military, claimants do not need to show that their military service was a substantial or motivating factor. *Adams*, 3 F.4th at 1377-78 (Fed. Cir. 2021) (citing *Butterbaugh v. Department of Justice*, 336 F.3d 1332, 1336 (Fed. Cir. 2003)). Because differential pay under 5 U.S.C. § 5538(a) is only available to members of the military, an appellant only must show that he was

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[3] In support of this assertion, the appellant referred to a previous case I adjudicated: *Santiago v. Department of Veterans Affairs*, No. DC-4324-20-0796-I-1, 2021 WL 1171023 (Mar. 22, 2021). In *Santiago*, I found that 5 U.S.C. § 5538(a) included employees called to any type of duty under the catch-all provision in 10 U.S.C. § 101(a)(13)(B). Id. This interpretation has since been overruled by *Adams v. Department of Homeland Security*, 3 F.4th 1375 (Fed. Cir. 2021). 1375

[4] Preponderant evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.4(q).

entitled to differential pay as a benefit of employment and was denied. *Adams*, 3 F.4th at 1378.

5 U.S.C. § 5538(a)

Section 5538(a) of 5 U.S.C. provides an entitlement to differential pay — the difference between an employee's military and civilian pay — if the appellant was called to active duty under a provision of law referenced in 10 U.S.C. § 101(a)(13)(B),[5] he was entitled to reemployment rights under USERRA, and he was not otherwise receiving pay from his civilian position. 5 U.S.C. §§ 5538(a), (b). Section 101(a)(13)(B) includes employees called to duty under several enumerated statutes as well as "any other provision of law during a war or national emergency". *O'Farrell v. Department of Defense*, 882 F.3d 1080, 1084 (Fed. Cir. 2018) (quoting 10 U.S.C. § 101(a)(13)(B)). The U.S. Court of Appeals for the Federal Circuit recently found in *Adams* that "[section] 5538(a) does not entitle a claimant to benefits when they are activated 'in support' of a contingency operation, only when they are directly called to serve in a contingency operation." *Adams*, 3 F.4th at 1379 (quoting 5 U.S.C. § 6323(b) in contrast).

10 U.S.C. § 12301(d)

The appellant was called to service pursuant to 10 U.S.C. § 12301(d), which provides that "[a]t 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*." 10 U.S.C. § 12301(d) (emphasis added); AF, Tab 13 at 200. The *Adams* court

[5] 5 Section 5538(a) also cites as applicable 10 U.S.C. § 12304(b), which the appellant has not alleged is a basis for his request for pay differential.

found it implausible that "Congress intended for the phrase 'any other provision of law during a war or national emergency,' to necessarily include § 12301(d) voluntary duty that was unconnected to the emergency at hand." *Adams*, 3 F.4th at 1380 (quoting 10 U.S.C. § 101(a)(13)(B)). The court reasoned that this reading is consistent with OPM guidance on differential pay, which instructs that "qualifying active duty does not include voluntary active duty under 10 U.S.C. [§] 12301(d)." *See OPM Policy Guidance Regarding Reservist Differential Under 5 U.S.C. § 5538* at 18 (available at https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/reservist-differential/policyguidance.pdf).

ANALYSIS

I find that the appellant is not entitled to differential pay under 5 U.S.C. § 5538(a). The appellant's activation orders under 10 U.S.C. § 12301(d) do not qualify as a contingency operation listed in 10 U.S.C. § 101(a)(13)(B) as required by section 5538(a). *See Adams*, 3 F.4th at 1379-80. According to Army Regulation 135-200, Active Duty Operational Support (ADOS) is an authorized voluntary tour of active duty performed pursuant to section 12301(d) with the purpose of "provid[ing] the necessary skilled manpower assets to *support* existing or emerging requirements." AR 135-200 ch. 6-1(b)-(c) (emphasis added). More specifically, "ADOS in support of the Active Component (AC) (AD units or commands) is known as ADOS–AC." AR 135-200 ch. 6-1(c)(2). Contingency Operation for Active Duty Operational Support (CO-ADOS), a subcategory of ADOS-AC, is voluntary active duty performed by "[s]oldiers *supporting overseas contingency missions*." AR 135-200 ch. 6-1(c)(2)(c) (emphasis added). The appellant's orders specifically classify his activation as CO-ADOS; thus, his

service is voluntary and only provides support for contingency operations overseas.

The *Adams* court expressly stated that 5 U.S.C. § 5538(a) does not entitle a claimant to differential pay when they are activated in support of a contingency operation. *Adams*, 3 F.4th at 1379. I find the appellant's authorization for CO-ADOS is insufficient to meet the strict requirements established in *Adams* for differential pay under section 5538(a). *See id.* at 1377. Thus, I find that the appellant is not entitled to his requested differential pay.[6]

DECISION

The appellant's request for corrective action is DENIED

FOR THE BOARD: /s/
Melissa Mehring
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **October 22, 2021**, unless a petition for review is filed by that date. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30- day period begins to run upon either your receipt of the initial decision or its receipt by your

[6] I do not reach the question of whether voluntary service may ever qualify an individual for pay differential as it is unnecessary to the conclusion in this case as it was in *Adams*. *See Adams*, 3 F.4th 1375, 1380.

representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the "Notice of Appeal Rights" section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but

currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled "Notice of Appeal Rights," which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings

of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems*

Protection Board, 582 U.S. ____ , 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after this decision becomes final as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G

Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review "raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D)," then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days** of the date this decision becomes final under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals

for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

U.S. MERIT SYSTEMS PROTECTION BOARD
Office of the Clerk of the Board
1615 M Street, N.W.
Washington, D.C. 20419-0002

Phone: 202-653-7200; Fax: 202-653-7130; E-Mail: mspb@mspb.gov

2022-1220

ATTESTATION

I HEREBY ATTEST that the attached index represents a list of the documents comprising the administrative record of the Merit Systems Protection Board in the appeal of Charles Flynn v. Department of State, MSPB Docket No. DC-4324-21-0367-I-1, and that the administrative record is under my official custody and control on this date

on file in this Board

December 7, 2021
Date

Tawanda Williams for
Jennifer Everling
Acting Clerk of the Board

APPENDIX C

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CHARLES FLYNN,
Petitioner

v.

DEPARTMENT OF STATE,
Respondent

2022-1220

Petition for review of the Merit Systems Protection Board in No. DC-4324-21-0367-I-1.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.[1]

PER CURIAM

ORDER

Charles Flynn filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by the Department of State. The petition was first referred as a petition to the panel that heard the appeal,

[1] Circuit Judge Newman did not participate.

and there-after the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue November 8, 2023.

FOR THE COURT

/s/

November 1, 2023
Date

Jarrett B. Perlow
Clerk of Court

APPENDIX D

5 U.S.C. § 5538

Nonreduction in pay while serving in the uniformed services or National Guard

(a) An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under section 12304b of title 10 or a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which—

(1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)

(2) the amount of pay and allowances which (as determined under subsection (d))—

(A) is payable to such employee for that service; and

(B) is allocable to such pay period.

(b) Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee's civilian employment had not been interrupted)—

(1) during which such employee is entitled to re-employment rights under chapter 43 of title 38 with respect to the position from which such employee is absent (as referred to in subsection (a)); and

(2) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee is entitled by virtue of such employee's civilian employment with the Government.

(c) Any amount payable under this section to an employee shall be paid—

(1) by such employee's employing agency;

(2) from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and

(3) to the extent practicable, at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted.

(d) The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section.

(e)(1) The head of each agency referred to in section 2302(a)(2)(C)(ii) shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.

(2) The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.

(f) For purposes of this section—

(1) the terms "employee", "Federal Government", and "uniformed services" have the same respective meanings as given those terms in section 4303 of title 38;

(2) the term "employing agency", as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency referred to in section 2302(a)(2)(C)(ii)) with respect to which such employee has reemployment rights under chapter 43 of title 38; and

(3) the term "basic pay" includes any amount payable under section 5304.

APPENDIX E

10 U.S.C. § 101

§ 101. Definitions

(a) In general.—The following definitions apply in this title:

(1) The term "United States", in a geographic sense, means the States and the District of Columbia.

[(2) Repealed. Pub.L. 109-163, Div. A, Title X, § 1057(a)(1), Jan. 6, 2006, 119 Stat. 3440]

(3) The term "possessions" includes the Virgin Islands, Guam, American Samoa, and the Guano Islands, so long as they remain possessions, but does not include any Commonwealth.

(4) The term "armed forces" means the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard.

(5) The term "uniformed services" means—

(A) the armed forces;

(B) the commissioned corps of the National Oceanic and Atmospheric Administration; and

(C) the commissioned corps of the Public Health Service.

(6) The term "department", when used with respect to a military department, means the executive part of the department and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of the department. When used with respect to the Department of Defense, such term means the

executive part of the department, including the executive parts of the military departments, and all field headquarters, forces, reserve components, installations, activities, and functions under the control or supervision of the Secretary of Defense, including those of the military departments.

(7) The term "executive part of the department" means the executive part of the Department of Defense, Department of the Army, Department of the Navy, or Department of the Air Force, as the case may be, at the seat of government.

(8) The term "military departments" means the Department of the Army, the Department of the Navy, and the Department of the Air Force.

(9) The term "Secretary concerned" means—

(A) the Secretary of the Army, with respect to matters concerning the Army;

(B) the Secretary of the Navy, with respect to matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Department of the Navy;

(C) the Secretary of the Air Force, with respect to matters concerning the Air Force and the Space Force; and

(D) the Secretary of Homeland Security, with respect to matters concerning the Coast Guard when it is not operating as a service in the Department of the Navy.

(10) The term "service acquisition executive" means the civilian official within a military department who is designated as the service acquisition executive for purposes of regulations and

procedures providing for a service acquisition executive for that military department.

(11) The term "Defense Agency" means an organizational entity of the Department of Defense—

(A) that is established by the Secretary of Defense under section 191 of this title (or under the second sentence of section 125(d) of this title (as in effect before October 1, 1986)) to perform a supply or service activity common to more than one military department (other than such an entity that is designated by the Secretary as a Department of Defense Field Activity); or

(B) that is designated by the Secretary of Defense as a Defense Agency.

(12) The term "Department of Defense Field Activity" means an organizational entity of the Department of Defense—

(A) that is established by the Secretary of Defense under section 191 of this title (or under the second sentence of section 125(d) of this title (as in effect before October 1, 1986)) to perform a supply or service activity common to more than one military department; and

(B) that is designated by the Secretary of Defense as a Department of Defense Field Activity.

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

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

an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 13 of this title, section 3713 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.

(14) The term "supplies" includes material, equipment, and stores of all kinds.

(15) The term "pay" includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

(16) The term "congressional defense committees" means—

(A) the Committee on Armed Services and the Committee on Appropriations of the Senate; and

(B) the Committee on Armed Services and the Committee on Appropriations of the House of Representatives.

(17) The term "base closure law" means the following:

(A) Section 2687 of this title.

(B) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

(C) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note).

(18) The term "acquisition workforce" means the persons serving in acquisition positions within the Department of Defense, as designated pursuant to section 1721(a) of this title.

(19) The term "climate resilience" means the capability to avoid, prepare for, minimize the effect of, adapt to, and recover from, extreme weather, or from anticipated or unanticipated changes in environmental conditions, that do (or have the potential to) adversely affect the national security of the United States or of allies and partners of the United States.

(20) The term "extreme weather" means recurrent flooding, drought, desertification, wildfires, thawing permafrost, sea level fluctuation, changes in mean high tides, or any other weather-related event, or anticipated change in environmental conditions, that present (or are projected to present) a recurring annual threat to the climate security of the United States or of allies and partners of the United States.

(b) Personnel generally.—The following definitions relating to military personnel apply in this title:

(1) The term "officer" means a commissioned or warrant officer.

(2) The term "commissioned officer" includes a commissioned warrant officer.

(3) The term "warrant officer" means a person who holds a commission or warrant in a warrant officer grade.

(4) The term "general officer" means an officer of the Army, Air Force, or Marine Corps serving in or having the grade of general, lieutenant general, major general, or brigadier general.

(5) The term "flag officer" means an officer of the Navy or Coast Guard serving in or having the grade of admiral, vice admiral, rear admiral, or rear admiral (lower half).

(6) The term "enlisted member" means a person in an enlisted grade.

(7) The term "grade" means a step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation.

(8) The term "rank" means the order of precedence among members of the armed forces.

(9) The term "rating" means the name (such as "boatswain's mate") prescribed for members of an armed force in an occupational field. The term "rate" means the name (such as "chief boatswain's mate") prescribed for members in the same rating or other category who are in the same grade (such as chief petty officer or seaman apprentice).

(10) The term "original", with respect to the appointment of a member of the armed forces in a regular or reserve component, refers to that member's most recent appointment in that component that is neither a promotion nor a demotion.

(11) The term "authorized strength" means the largest number of members authorized to be in an armed force, a component, a branch, a grade, or any other category of the armed forces.

(12) The term "regular", with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office in a regular component of an armed force.

(13) The term "active-duty list" means a single list for the Army, Navy, Air Force, Marine Corps, or Space Force (required to be maintained under section 620 of this title) which contains the names of all officers of that armed force, other than officers described in section 641 of this title, who are serving on active duty.

(14) The term "medical officer" means an officer of the Medical Corps of the Army, an officer of the Medical Corps of the Navy, or an officer in the Air Force designated as a medical officer.

(15) The term "dental officer" means an officer of the Dental Corps of the Army, an officer of the Dental Corps of the Navy, or an officer of the Air Force designated as a dental officer.

(16) The term "Active Guard and Reserve" means a member of a reserve component who is on active duty pursuant to section 12301(d) of this title or, if a member of the Army National Guard or Air National Guard, is on full-time National Guard duty pursuant to section 502(f) of title 32, and who is performing Active Guard and Reserve duty.

(c) Reserve components.—The following definitions relating to the reserve components apply in this title:

(1) The term "National Guard" means the Army National Guard and the Air National Guard.

(2) The term "Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that—

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(3) The term "Army National Guard of the United States" means the reserve component of the Army all of whose members are members of the Army National Guard.

(4) The term "Air National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that—

(A) is an air force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(5) The term "Air National Guard of the United States" means the reserve component of the Air

Force all of whose members are members of the Air National Guard.

(6) The term "reserve", with respect to an enlistment, appointment, grade, or office, means enlistment, appointment, grade, or office held as a Reserve of one of the armed forces.

(7) The term "reserve active-status list" means a single list for the Army, Navy, Air Force, or Marine Corps (required to be maintained under section 14002 of this title) that contains the names of all officers of that armed force except warrant officers (including commissioned warrant officers) who are in an active status in a reserve component of the Army, Navy, Air Force, or Marine Corps and are not on an active-duty list.

(d) Duty status.—The following definitions relating to duty status apply in this title:

(1) The term "active duty" means full-time duty in the active military service of the United States. Such term includes fulltime training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.

(2) The term "active duty for a period of more than 30 days" means active duty under a call or order that does not specify a period of 30 days or less.

(3) The term "active service" means service on active duty or full-time National Guard duty.

(4) The term "active status" means the status of a member of a reserve component who is not in the

inactive Army National Guard or inactive Air National Guard, on an inactive status list, or in the Retired Reserve.

(5) The term "full-time National Guard duty" means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

(6)(A) The term "active Guard and Reserve duty" means active duty performed by a member of a reserve component of the Army, Navy, Air Force, or Marine Corps, or full-time National Guard duty performed by a member of the National Guard pursuant to an order to full-time National Guard duty, for a period of 180 consecutive days or more for the purpose of organizing, administering, recruiting, instructing, or training the reserve components.

(B) Such term does not include the following:

(i) Duty performed as a member of the Reserve Forces Policy Board provided for under section 10301 of this title.

(ii) Duty performed as a property and fiscal officer under section 708 of title 32.

(iii) Duty performed for the purpose of interdiction and counter-drug activities for which funds have been provided under section 112 of title 32.

(iv) Duty performed as a general or flag officer.

(v) Service as a State director of the Selective Service System under section 10(b)(2) of the Military Selective Service Act (50 U.S.C. 3809(b)(2)).

(7) The term "inactive-duty training" means—

(A) duty prescribed for Reserves by the Secretary concerned under section 206 of title 37 or any other provision of law; and

(B) special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned. Such term includes those duties when performed by Reserves in their status as members of the National Guard.

(e) Facilities and operations.—The following definitions relating to facilities and operations apply in this title:

(1) Range.—The term "range", when used in a geographic sense, means a designated land or water area that is set aside, managed, and used for range activities of the Department of Defense. Such term includes the following:

(A) Firing lines and positions, maneuver areas, firing lanes, test pads, detonation pads, impact areas, electronic scoring sites, buffer zones with restricted access, and exclusionary areas.

(B) Airspace areas designated for military use in accordance with regulations and procedures prescribed by the Administrator of the Federal Aviation Administration.

(2) Range activities.—The term "range activities" means—

(A) research, development, testing, and evaluation of military munitions, other ordnance, and weapons systems; and

(B) the training of members of the armed forces in the use and handling of military munitions, other ordnance, and weapons systems.

(3) Operational range.—The term "operational range" means a range that is under the jurisdiction, custody, or control of the Secretary of a military department and—

(A) that is used for range activities, or

(B) although not currently being used for range activities, that is still considered by the Secretary to be a range and has not been put to a new use that is incompatible with range activities.

(4) Military munitions.—(A) The term "military munitions" means all ammunition products and components produced for or used by the armed forces for national defense and security, including ammunition products or components under the control of the Department of Defense, the Coast Guard, the Department of Energy, and the National Guard.

(B) Such term includes the following:

(i) Confined gaseous, liquid, and solid propellants.

(ii) Explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries, including bulk explosives and chemical warfare agents.

(iii) Chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, and demolition charges.

(iv) Devices and components of any item specified in clauses (i) through (iii).

(C) Such term does not include the following:

(i) Wholly inert items.

(ii) Improvised explosive devices.

(iii) Nuclear weapons, nuclear devices, and nuclear components, other than nonnuclear components of nuclear devices that are managed under the nuclear weapons program of the Department of Energy after all required sanitization operations under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) have been completed.

(5) Unexploded ordnance.—The term "unexploded ordnance" means military munitions that—

(A) have been primed, fused, armed, or otherwise prepared for action;

(B) have been fired, dropped, launched, projected, or placed in such a manner as to constitute a hazard to operations, installations, personnel, or material; and

(C) remain unexploded, whether by malfunction, design, or any other cause.

(6) Energy resilience.—The term "energy resilience" means the ability to avoid, prepare for, minimize, adapt to, and recover from anticipated and unanticipated energy disruptions in order to ensure energy availability and reliability sufficient to provide for mission assurance and readiness, including mission essential operations related to readiness, and to execute or rapidly reestablish mission essential requirements.

(7) Energy security.—The term "energy security" means having assured access to reliable supplies of energy and the ability to protect and deliver sufficient energy to meet mission essential requirements.

(8) Military installation resilience.—The term "military installation resilience" means the capability of a military installation to avoid, prepare for, minimize the effect of, adapt to, and recover from extreme weather events, or from anticipated or unanticipated changes in environmental conditions, that do, or have the potential to, adversely affect the military installation or essential transportation, logistical, or other necessary resources outside of the military installation that are necessary in order to maintain, improve, or rapidly reestablish installation mission assurance and mission-essential functions.

(f) Rules of construction.—In this title—

(1) "shall" is used in an imperative sense;

(2) "may" is used in a permissive sense;

(3) "no person may * * * " means that no person is required, authorized, or permitted to do the act prescribed;

(4) "includes" means "includes but is not limited to"; and

(5) "spouse" means husband or wife, as the case may be.

(g) Reference to Title 1 definitions.—For other definitions applicable to this title, see sections 1 through 5 of title 1.

APPENDIX F

18 U.S.C. § 209

Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or Whoever, whether an individual, partnership, association, corporation, or other organization pays, makes any contribution to, or in any way supplements, the salary of any such officer or employee under circumstances which would make its receipt a violation of this subsection—Shall be subject to the penalties set forth in section 216 of this title.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of chapter 41 of title 5.

(e) This section does not prohibit the payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency: *Provided*, That such program has been established by statute or Executive order of the President, offers appointments not to exceed three hundred and sixty-five days, and permits no extensions in excess of ninety additional days or, in the case of participants in overseas assignments, in excess of three hundred and sixty-five days.

(f) This section does not prohibit acceptance or receipt, by any officer or employee injured during the commission of an offense described in section 351 or 1751 of this title, of contributions or payments from an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and which is exempt from taxation under section 501(a) of such Code.

(g)(1) This section does not prohibit an employee of a private sector organization, while assigned to an agency under chapter 37 of title 5, from continuing to receive pay and benefits from such organization in accordance with such chapter.

(2) For purposes of this subsection, the term "agency" means an agency (as defined by section 3701 of title 5) and the Office of the Chief Technology Officer of the District of Columbia.

(h) This section does not prohibit a member of the reserve components of the armed forces on active duty pursuant to a call or order to active duty under a provision

of law referred to in section 101(a)(13) of title 10 from receiving from any person that employed such member before the call or order to active duty any payment of any part of the salary or wages that such person would have paid the member if the member's employment had not been interrupted by such call or order to active duty.