Laborers International Union of North America
National Guard District Council

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Explaining the 8th Circuit United States Court of Appeals' Decision on the Windfall Elimination Provision (WEP) and how it applies to those who served as Dual-Status Technicians of the Army or Air National Guard

Earlier this year we were made aware of a decision by the 8th Circuit Court of Appeals that a person who retires as Dual-Status Technicians of the Army and Air National Guard is excepted from the Windfall Elimination Provision (WEP). The case is *Petersen v. Astrue, Case No. 4:08CV3178.* Several members and outside organizations, such as NGAUS and EANGUS asked us to weigh in on the meaning of the decision and the potential impact it would have on retired Dual-Status Technicians. The Court ruled that due to the "unique" requirements of the National Guard Dual-Status Technician program, persons employed in said program perform work *"as a member of"* the uniformed services, and are thus not subject to WEP.

On the Web: *http://www.ca8.uscourts.gov/opndir/11/02/092374P.pdf*

What Does This Mean?

That individuals who retire as Dual-Status Technicians should not have their Social Security benefits reduced under the WEP.

Case Summary

- David Petersen was a National Guard Dual-Status Technician who retired in October 2000. In April 2006, Petersen filed for old-age and disability benefits, and the Social Security Administration (SSA) subsequently reduced those benefits under the WEP.

- Petersen challenged the SSA's initial determination and an Administrative Law Judge (ALJ) subsequently reversed the SSA's decision "holding that a prior decision from the United States District Court for the Western District of Missouri held that National Guard Technicians were on full-time military duty when performing their jobs. The ALJ found, therefore, that the pension Petersen received for his National Guard Technician work was excepted from the WEP." However, the SSA Appeals Council reversed the decision of ALJ and held that the exception to the WEP did not apply to Petersen.

- Petersen sought review by Federal district court, which judged in Petersen's favor and "held that Petersen's pension was payment based on "service as a member of a uniformed service" and thus subject to the WEP exception."

- The SSA appealed the district court's ruling to the 8th Circuit Court of Appeals.

- The 8th Circuit Court affirmed the district court's judgment and found against the SSA.

For more information regarding this issue and any other subject related to the National Guard Technician Program please visit our web-site at:

www.liuna-ngdc.org

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Background

The WEP was enacted in 1983 to eliminate the unintended benefits windfall that occurs when a worker splits their career between covered employment (required to pay Social Security taxes) and non-covered employment (exempt from Social Security taxes). This non-covered employment is often Federal employment that, prior to 1984, was exempt from Social Security taxes because Federal employees contributed to the Federal civil service pension (i.e., the Civil Service Retirement System, or CSRS) which was "designed to take the place both of social security and a private pension plan for workers who remain in [federal] employment throughout their careers." In 1994, the WEP language was modified to exclude payments received "as a member" of a uniformed service in the calculation. This 1994 language modification is the key to the entire 8th Circuit Court decision.

Detailed Explanation

Prior to the passage of the WEP, in calculating a beneficiary's primary insurance amount from the beneficiary's average monthly earnings, the SSA did not consider whether the earnings came from covered or non-covered employment. As a result, beneficiaries that had a split career received both full Social Security benefits and whatever pension benefits were provided by the non-covered employment. That changed under WEP, which requires a calculation of the Social Security benefit under a modified formula to account for the non-covered civil service pension benefits.

A more detailed explanation is contained in a January 29, 2010, Congressional Research Service (CRS) report, *Social Security: The Windfall Elimination Provision (WEP)*, by Alison M. Shelton:

> A worker is eligible for Social Security after he or she works in Social Security-covered employment for 10 or more years (40 or more quarters). In general, a worker's monthly Social Security benefit is based on his or her 35 highest-paid years of earnings in Social Security covered employment. The worker's earnings are indexed to wage growth to bring earlier years of his or her earnings up to a comparable, current basis. Average annual indexed earnings are found by totaling the highest 35 years of indexed wages and then dividing by 35. Next, a monthly average, known as Average Indexed Monthly Earnings (AIME), is found by dividing the annual average by 12.
>
> The Social Security benefit formula is designed so that workers with low average lifetime earnings, as represented by AIME, receive a benefit that is a larger proportion of their earnings than do workers with high average lifetime earnings. The benefit formula applies three progressive factors—90%, 32%, and 15%—to three different levels, or brackets, of AIME.[1] The result is known as the "primary insurance amount" (PIA) and is rounded down to the nearest 10 cents. For persons who reach age 62, die, or become disabled in 2009, the PIA is determined in
> Table 1 as follows:

Table 1. Social Security Benefit Formula in 2010

Factor	Average Indexed Monthly Earnings
90%	of the first $761, plus
32%	of earnings over $761 and through $4,586 plus
15%	of earnings over $4,586

> Years of zero covered earnings are entered as zeros into the formula that averages the worker's wage history over 35 years. Some workers have short careers in Social Security-covered employment—for example workers who have spent the majority of their careers in non-covered federal[2], state, or local government employment, or workers who have left the paid workforce for other reasons. These workers did not pay FICA taxes during their years of non-covered employment.

[1] Both the annual earnings amounts over the worker's lifetime, and the bracket amounts, are indexed to national wage growth so that the Social Security benefit replaces the same proportion of wages for each generation.

[2] Generally, employees of the federal government hired before 1984 are covered by the Civil Service Retirement System (CSRS) and are not covered by Social Security. Most federal workers first hired into federal service on or after January, 1984, participate in the Federal Employees' Retirement System (FERS), which includes Social Security coverage.

The averaging provision in the benefit formula tends to cause workers with short careers in covered employment to have low AIMEs, similar to persons who worked for low wages in covered employment throughout their careers. A worker's AIME will be lowered by any zero wage amounts that are entered into the 35-year averaging period, whether due to years of non-covered employment or years out of the workforce. Consequently, for a worker with a low AIME, whether as a result of low career earnings or a short career in covered employment, the benefit formula replaces more of covered earnings at the 90% rate than if this worker had spent his or her full 35-year career in covered employment at the same wage level. The higher replacement rate[3] for workers who have split their careers between Social Security-covered and non-covered jobs is sometimes referred to as a "windfall."[4]

A different Social Security benefit formula, referred to as the "windfall elimination provision" (WEP), applies to many workers who also are entitled to a pension from work not covered by Social Security (e.g., individuals who work for certain state and local governments, or under the Federal Civil Service Retirement System).[5] Under these rules, the 90% factor in the first bracket of the formula is replaced by a factor of 40%. The effect is to lower the proportion of earnings in the first bracket that are converted to benefits. Table 2 illustrates how the regular and WEP provisions work in 2010.

Table 2. Monthly PIA for a Worker With Average Indexed Monthly Earnings of $1,500 and Retiring in 2010

Regular Formula		**Windfall Elimination Formula**	
90% of first $761	$684.90	40% of first $761	$304.40
32% of earnings over $761 and through $4,586	$236.48	32% of earnings over $761 and through $4,586	$236.48
15% over $4,586	0.00	15% over $4,586	0.00
Total	**$921.38**	**Total**	**$540.88**

Thus, under the windfall elimination formula the benefit for the worker is $380.50 **less** ($921.38 – $540.88) per month than under the regular formula. Note that the WEP reduction is limited to the first bracket in the AIME formula (90% vs. 40%), so that for AIME amounts that exceed the first threshold of $761 the amount of the WEP reduction remains a flat $380.50 per month. This is because the 32% and 15% factors for the second and third levels are the same as in the regular formula. For example, if the worker had $2,000 of average indexed monthly earnings instead of $1,500, the windfall reduction would again be $380.50 per month.

A worker's WEP reduction cannot exceed more than one half of the pension based on the worker's non-covered work: this "guarantee" is designed to help protect workers with low pensions. Therefore, the WEP can never eliminate a person's Social Security benefit. The WEP also exempts workers who have 30 or more years of "substantial" employment covered under Social Security, with lesser reductions for workers with 21 through 29 years of substantial covered employment.

[3] A worker's replacement rate is the ratio of his or her Social Security benefit to pre-retirement income.

[4] The WEP is sometimes confused with the Government Pension Offset (GPO), which reduces Social Security spousal benefits of a worker who also has a government pension based on work that was not covered by Social Security. For more information on the GPO, please refer to CRS Report RL32453, *Social Security: The Government Pension Offset (GPO)*, by Alison M. Shelton.

[5] Social Security Act §215(a)(7). Federal service where Social Security taxes are withheld (Federal Employees' Retirement System or CSRS Offset) is not affected by the WEP. Social Security: The Windfall Elimination Provision (WEP).

How does the 8th Circuit's WEP decision affect National Guard Dual-Status Technicians?

According to the 8th Circuit's case narrative, the SSA has consistently held that:

> "…despite the various military requirements imposed upon National Guard Technicians, the fact that they are defined as "Federal civilian employee[s]" necessarily means that their work was "**by**" a member of the uniformed service and not "**as**" a member of the uniformed service. The SSA argues that, under the plain language of the statute, "service as a member of a uniformed service" is limited "to military duties performed while acting in one's capacity as a member of the National Guard." Such duties would include, according to the SSA, required military training such as weekend drills "and other kinds of military duty, whether on active duty or some other military duty status." Accordingly, under the SSA's argument, the fact that Petersen was in a "dual status" role, his work was civilian and thus was performed "by" a member of a uniformed service and not "as" a member of a uniformed service."

The 8th Circuit disagreed with the SSA and found that:

> "Under the WEP's exception, if Petersen is receiving a pension that is "based wholly on service as a member of a uniformed service (as defined in [42 U.S.C. § 410(m)])," 42 U.S.C. § 415(a)(7)(A), that person's social security benefit is not subject to WEP's modified formula. Section 415(a)(7)(A) only requires that the service be as a member of the uniformed service. Petersen's pension meets the limited requirements of the statute. Neither party disputes that the Nebraska Air National Guard is a "uniformed service" or that the pension Petersen is receiving is based entirely on his service as a National Guard Technician. Nor is it disputed that when he was working as a National Guard Technician, Petersen was required to maintain his membership in the National Guard and the military grade for his position, 32 U.S.C. § 709(f)(1)(A), and was required by statute to "wear the uniform appropriate for [his] grade and component of the armed forces" while on duty, 32 U.S.C. § 709(b)(4). Due to these unique National Guard Technician requirements imposed upon him, we agree with the district court that Petersen performed his work "as a member of" the Nebraska Air National Guard."

Our Opinion

The SSA's application of WEP to Dual-Status Technicians has meant a reduction of Social Security retirement benefits for a very long time. The 8th Circuit's decision is far-reaching, and the case will have a significant impact on the way Dual-Status Technician retirements are calculated from this point forward. The Appeals Court decision is unambiguous in that Dual-Status Technician employment is work performed "as" a member of a uniformed service, not "by" a member of a uniformed service. This very simple distinction is all that is statutorily required to be exempt from the WEP.

We hope that the information contained here sheds a little more light on this subject. We have received several questions regarding the impact and ramifications of this case, and we would like to address some of these in the Q&A section on the next page. We are also researching all options to determine the best way forward for all National Guard Technicians.

If you have any questions regarding this case, please send an email to wep_case@liuna-ngdc.org, subject: WEP Question. Thank you.

Questions & Answers

Q1: Who does the 8th Circuit Appeals Court decision apply to?

A1: The 8th Circuit's decision is binding only in those States under their jurisdiction. These are: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

If you're a retired Dual-Status Technician of the Army or Air National Guard, and you live in a State covered by the 8th Circuit's decision, we recommend that you immediately contact your respective Social Security office to find out how to claim your retirement benefits.

Q2: When does the decision become effective, and is it retroactive?

A2: The decision becomes effective immediately. In this case, the decision was rendered February 23, 2009. However, since the court did not address retroactivity, the SSA can apply the decision with discretion. In the absence of a retroactive order, it is unlikely the SSA would make such adjustments due to the magnitude of cost.

Q3: How is the SSA dealing with the courts decision?

A3: According to Roger Moore, the attorney that successfully argued the Petersen case, the SSA did not appeal the circuit court's decision. Moore writes that all cases which his firm is currently handling are in the "process of being approved." (National Organization of Social Security Claimants' Representatives [NOSSCR] Magazine, Volume 34, No.1, Pg. 23-24). Moore goes on to say that it is unclear whether "the SSA is approving all WEP cases on a nationwide basis or not."

Q4: How does the 8th Circuit ruling affect States outside of their jurisdiction and what should I do?

A4: Legally, the 8th Circuit's decision is not binding on the rest of the U.S. This means that the SSA can continue applying the WEP to Dual-Status Technicians outside of the 8th Circuit's territory. However, in the absence of any other contradictory Circuit Court case law, it is highly persuasive.

If you're a retired Dual-Status Technician of the Army or Air National Guard, and you live in a State not covered by the 8th Circuit's decision, we recommend that you initiate an appeal of any adjustment to your Social Security benefits under WEP. We also suggest that you make reference to the Petersen decision in conjunction with your appeal. This would be the first steps towards seeking remedy in those States not covered by the 8th Circuit.