

**Number 13, June 2000 (updated March 2003):  
Pension Credit for Pre-Employment Military Service**

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Q: I served on active duty for four years in the 1960s, including a year in Vietnam. I have been employed by the Commonwealth of Virginia since 1974. I also served in the Army Reserve after leaving active duty, retiring as a colonel. I have heard that Virginia employees with 25 years of state service are permitted to purchase state retirement credit for up to four years of active duty. When I met the 25-year threshold last year, I sought to purchase credit for my four active-duty years. I did the math and found that I would only have to live 18 months after retiring to recoup (in extra benefits) what purchasing the credit would cost. The Virginia Retirement System (VRS) administrative office told me that I am ineligible to purchase the state credit because I am using those same four active-duty years to contribute to the Reserve retirement that I will begin receiving when I attain my 60th birthday. I think that it is unfair that I am being denied a valuable benefit because I chose to participate in the Army Reserve after I left active duty. Is denying me that benefit lawful? (name withheld)

A: It is clear that denying you the benefit is unlawful because Virginia law conflicts with Federal law. Under Article VI, Clause 2 of the United States Constitution (commonly called the "Supremacy Clause"), a valid federal statute prevails over a state statute or state constitution.

Code of Virginia Section 51.1-142(B) applies to a person (like you) with 25 years of creditable service in the VRS. Such a person is indeed permitted to purchase up to four years of VRS credit for active military service predating employment with the Commonwealth of Virginia. The problem is that Section 51.1-142(B) also provides as follows, "Such prior service credit shall not be otherwise creditable as prior service in the calculation of any retirement benefit under this or another retirement system."

The proviso in Section 51.1-142(B) clearly violates Title 10, United States Code, Section 12736 (10 U.S.C. 12736), which provides as follows:

· No period of service included wholly or partly in determining a person's right to or the amount of retired pay under this chapter [Chapter 1223 deals with "retired pay for nonregular service."] may be excluded in determining his eligibility for any annuity, pension, or old-age benefit, under any other law, on account of civilian employment by the United States or otherwise, or in determining the amount payable under that law, if that service is otherwise properly credited under it.

The United States Court of Appeals for the Ninth Circuit has struck down a California law that was similar to Virginia's Section 51.1-142(B). See *Cantwell v. County of San Mateo*, 631 F.2d 631 (9th Cir.), cert. denied, 450

U.S. 998 (1980). I think that it is just as clear that Virginia's limitation runs afoul of federal law and is invalid.

Q: I have heard that during our recently concluded legislative session an effort was made to resolve this issue. Is that correct?

A: Yes. During the 2000 legislative session, State Senator John H. Chichester of Fredericksburg introduced Senate Bill No. 44. If enacted, his bill would have added the following language to Section 51.1-142(B): "Except as otherwise required by Chapter 1223 of Title 10 of the United States Code." Senate Bill No. 44 was considered by the Senate Committee on Finance, which "continued" the bill to the 2001 legislative session. It is possible that the Senate and House of Delegates will act favorably on this legislation next year, but there is no guarantee of favorable action.

Amending state law to make it conform to federal law is one way to solve this problem, but it is by no means the only way. As I have explained, federal law prevails over conflicting state law. Whether or not Virginia's legislature chooses to solve this problem, Section 51.1-142(B) cannot stand as written. I hope that Virginia's attorney general will recognize that the state law is constitutionally indefensible so that this problem can be solved without expensive and protracted litigation.

Q: I have already been employed by the Commonwealth of Virginia for more than 25 years, and I am anxious to retire. I don't think that I should have to wait for our legislature or the courts to solve this problem. If I choose to retire this year, what do I need to do to protect my legal rights?

A: Before you retire, you should send a certified letter to the VRS administrative office, along with a check (to purchase the credit). A telephonic inquiry may not be sufficient. See *Cantwell*, 631 F.2d at 638. You should make a clear record that you have done what you needed to do before retiring. It is likely that the VRS will reject your application and return your check, but at least you will have made a clear record.

Q: Are other states violating 10 U.S.C. 12736 in this way?

A: Yes. I have found ten other states whose state laws are inconsistent with ten U.S.C. 12736: Alabama, Alaska, Arizona, California, Connecticut, Louisiana, Massachusetts, Oklahoma, Pennsylvania, and Tennessee. The Tennessee Valley Authority (TVA) is also violating ten U.S.C. 12736 in the way that it treats military service for TVA retirement purposes. I am interested in hearing from affected employees of Virginia and these other 10 states, as well as the TVA. I am aware of another attorney (also a Naval Reserve judge advocate and ROA member) who is contemplating a concerted attack on violations of this important federal right.

Congress created the Reserve Component retirement system (Chapter 1223 of Title 10) to encourage people (like you) who have served on active duty to remain in the Reserve Components so that they will be available for recall if

needed. See *Cantwell*, 631 F.2d at 635, citing *Alexander v. Fioto*, 430 U.S. 634, 639 (1977). The 11 states and the TVA should not be permitted to undo or mitigate the incentive that Congress is spending our federal tax dollars to create.

Editor's Note: Capt. Samuel F. Wright, JAGC, USNR\*, recently joined the ROA staff as Acting Director of Naval Affairs. He can be reached at ROA headquarters at 1-800-809-9448, extension 713. His e-mail address is [swright@roa.org](mailto:swright@roa.org).

If you are having difficulties with your civilian employer concerning your military-related absences from work, do not use your employer's telephone or e-mail account to contact Captain Wright or anyone else for advice or assistance. The employer may be looking for an excuse to discipline or fire you, and the last thing you should do is give the employer such an excuse.

Captain Wright earned a B.A. from Northwestern University (1973), a J.D. from the University of Houston (1976), and an LL.M from Georgetown University (1980). He was employed for ten years (1982-92) by the United States Department of Labor, Office of the Solicitor, and was one of two principal draftsmen of the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4301-4333. He is the author of more than 40 published articles about the civilian job rights of veterans and Reserve Component members.

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