

**Number 21, December 2000:
State Retirement Credit for Military Service; Virginia Agrees with
ROA's Position**

By CAPT Samuel F. Wright, JAGC, USNR*

In "Law Review" Number 13 (June 2000), I explained that Virginia law allows you (as a state or local government employee) to purchase up to four years of state retirement credit for active military service that you performed before you began your civilian career. I also explained that Virginia law contains a "no double-dipping" rule. Under Virginia law, you are not permitted to purchase state retirement credit for a period of military service if you are using that same period of active duty to help you qualify under any other retirement system, including military Reserve (age 60) retirement.

In my June article, I expressed the opinion that Virginia's "no double-dipping" rule violates Title 10, United States Code, section 12736 (10 USC 12736). That section provides that you cannot be denied credit under any other law on the grounds that you are receiving reserve retirement credit for the same period of service. Under the Supremacy Clause of the United States Constitution, federal law prevails over conflicting state law. See *Cantwell v. County of San Mateo*, 631 F.2d 631 (9th Cir.), cert. denied, 450 U.S. 998 (1980) (striking down a similar California law because it conflicted with 10 USC 12736).

Virginia Attorney General Mark L. Earley recently agreed with my argument. In a letter dated 20 October, addressed to the director of the Virginia Retirement System (VRS), Attorney General Earley cited *Cantwell* and stated that Virginia's "no double-dipping" rule "clearly would not withstand constitutional challenge by a member of the [VRS] who was similarly situated." Mr. Earley's letter also advised VRS that it has the authority to adopt regulations bringing its practice into compliance with federal law, notwithstanding the invalid state law.

The result is that if you are a state or local government employee in Virginia, you will now be permitted to purchase state retirement credit for a period of up to four years of pre-employment active duty. It will no longer matter whether you are or are not using the same period of active duty for reserve retirement purposes. This is a most important accomplishment.

The Reserve retirement system is an important underpinning of the modern Total Force Policy. ROA lobbied for the Reserve retirement law, and here at our headquarters we have the pen that President Truman used to sign that law in 1948. Without the incentive of the age-60 pension, it would probably be impossible to recruit individuals for the Reserve components and to retain them for 20 years or more.

There has been progress on this issue in other places as well. Just recently,

the United States District Court for the District of Rhode Island cited 10 USC 12736 and Cantwell in striking down that state's "no double-dipping" rule. See *Almeida v. Retirement Board of the Rhode Island Employees Retirement System*, 116 F. Supp. 2d 269 (D.R.I. 2000).

In Oklahoma, the legislature recently amended the state retirement law to remove an objectionable "no double-dipping" rule. California, Massachusetts and Pennsylvania have recognized that "no double-dipping" rules are invalid and are not enforcing them. There still may be a problem in Alabama, Alaska, Arizona, Connecticut, Louisiana and Tennessee. I look forward to hearing from ROA members who are public employees in those states.

There has also been progress at the Tennessee Valley Authority (TVA), which is part of the federal government, but it has a separate personnel and retirement system. Certain TVA employees are eligible, under the rules of the TVA Retirement System (TVARS), to purchase credit for pre-TVA military service. TVARS recently amended its rules to remove an objectionable "no double-dipping" rule. It appears that TVARS is now complying with 10 USC 12736.

Note: For reasons of space, not all "Law Review" articles will be published in *The Officer*, but all will be available on our Web site www.roa.org. "Law Reviews" 19 and 20—which will not run in *The Officer*—deal with important and favorable new provisions recently enacted as part of the FY01 National Defense Authorization Act. "Law Review" Number 19 deals with a new provision allowing you to be considered by a Reserve selection board (not an active-duty selection board) if you go on active duty under an order or call specifying a period of three years or less. "Law Review" Number 20 deals with new provisions expanding the opportunity for children of Reserve component members to obtain presidential appointments to the service academies.