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Retirement Benefits For Government Employees Who Are Reservists

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I have heard from CAPT James Davitt, Jr., USNR (Ret.), an ROA member and retired teacher in New Jersey. His situation may be of interest to other ROA members, especially those who are employed by state or local governments.

New Jersey permits teachers and other employees of the state and its political subdivisions to purchase state retirement credit for wartime active duty. The time periods are 9/16/40 to 9/2/45 (World War II); 6/23/50 to 7/27/53 (Korean War), and 12/31/60 to 8/1/74 (Vietnam War). Captain Davitt served on active duty for three years during the Korean War and stayed in the Naval Reserve until he retired as a captain. He qualified for and started receiving at age 60 retirement benefits based on a combination of his active duty and his Naval Reserve service.

New Jersey law provides that "anyone receiving or eligible to receive a military pension … cannot purchase any part of his military service for credit in the TPAF (Teachers' Pension and Annuity Fund)." This "no double-dipping" clause directly contradicts 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 non-regular 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 creditable under it.

This "anti-anti-double dipping" clause has been in the law since 1948, when Congress first provided for Reserve component (age 60) retirement. In Cantwell v. County of San Mateo, 631 F.2d 631 (9th Cir.), cert. denied, 450 U.S. 998 (1980) the United States Court of Appeals for the 9th Circuit struck down California's "no double-dipping" clause as violative of 10 U.S.C. 12736 (then section 1336).

In 1990, as he was nearing retirement from his teaching career, Jim Davitt applied to purchase state retirement credit for his 1950–53 active duty period, and his application was accepted, at least initially. For about a year, deductions were taken from his teaching salary, for this purchase. Then, the retirement system apparently discovered his Naval Reserve status and reversed itself. The retirement system refunded the payments that Captain Davitt had made and discontinued the payroll deductions.

As a result of reading some of my Law Review columns, Captain Davitt

became aware of Cantwell and the argument that New Jersey's "no double-dipping" clause might be invalid under the Supremacy Clause of the United States Constitution. He supplied copies of my articles to New Jersey's attorney general and retirement system. Finally, last summer, New Jersey recognized that its "no double-dipping" clause is invalid, as applied to a person (like Captain Davitt) who is eligible to receive a Reserve (not regular) pension.

Unfortunately, New Jersey is applying its new lawful policy prospectively only, starting in July 2001. Jim Davitt, the man responsible for getting the state to correct its error, has received no personal benefit from the correction. He has pointed out that by the delay in correcting its unjust and unlawful policy New Jersey has managed to deprive all affected World War II and Korean War veterans of this valuable benefit, since virtually all of them retired prior to July 2001.

New Jersey's "no double-dipping" policy has been unlawful since 1948, when Congress enacted the "anti-anti-double-dipping" provision. Certainly, New Jersey should have recognized the error of its ways in 1980, when the 9th Circuit struck down the analogous California law. New Jersey's refusal to apply the new lawful policy to Jim Davitt and others similarly situated is unconscionable and clearly unlawful.

Here at ROA, we have the pen used by President Truman to sign Public Law 80-810, which established the Reserve retirement system. The purpose of that system, then and now, was and is to encourage persons who have served on active duty to remain in the National Guard or Reserve, so that they will be available for call-up in case of emergency. See Cantwell, 631 F.2d at 635, citing Alexander v. Fioto, 430 U.S. 634, 639 (1977). The ability to earn a pension at age 60, based on a combination of active duty and Reserve service, was one of the necessary pre-conditions to the establishment and effective implementation of the Total Force Policy. Today, our nation is more dependent than ever before on the National Guard and Reserve for essential national defense readiness. The Reserve component call-ups since 11 September further reinforce this essential truth.

An "anti-double-dipping" clause like New Jersey's has the inevitable effect of mitigating (if not altogether eliminating) the incentive that Congress has spent billions of federal dollars to create and maintain (Reserve retirement benefits). Because he chose to affiliate with and remain in the Naval Reserve after he left active duty in 1953, Jim Davitt has been deprived of a valuable benefit (the right to purchase state retirement credit for his 1950-53 active duty). If he had not affiliated with the Naval Reserve, he would have that benefit without problem. What he has been deprived of may be worth almost as much as what he earned by staying in the Naval Reserve. Thus, he received little or no net benefit for making himself available for further call-up all those years, plus his participation in weekend drills, annual training, etc.

It appears that a lawsuit may be necessary to get New Jersey to do right by Captain Davitt, and I have taken steps in that direction. I am interested in hearing from others similarly situated, in New Jersey and elsewhere.

Note: This issue has been resolved. See Captain Davitt's letter in "Reader Feedback," page 6 in the July/August issue.

Captain Wright was employed as an attorney for DoL for ten years. He was largely responsible for drafting USERRA, along with one other DoL attorney. He also helped to write the successful appellate briefs for the veterans in both the Imel and the Akers cases. Most recently, he was on active duty for 71 days (May–July 2001), including 40 days in Bahrain. Please see his July 2001 "Law Review" article.

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