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State Law Cannot Limit USERRA Pension Credit

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Q: I am a major in the Army Reserve, employed by the state of Rhode Island since 1992, when I left Active Duty the first time. I was on Active Duty for four years, from 1988 until 1992. I did not work for the state before that period of duty. I remained in the Army Reserve after I left Active Duty, and I recently returned from two years of Active Duty (2001–03).

Rhode Island permits newly hired state employees to purchase state retirement credit for up to four years of pre-employment military service, and I applied to purchase such credit for my 1988–92 Active Duty period. Initially, the state denied my request on the grounds that I will receive federal retirement credit for that period of Active Duty, because I have remained active in the Army Reserve. I would essentially be double-dipping into two retirement systems for the same years of service. After you published Law Review 21 (December 2000), outlining how the state's prohibition on double-dipping is superseded by federal law, the state reversed itself and permitted me to purchase state credit for the 1988–92 Active Duty.

I took a military leave from my state job in October 2001, when called to active duty. I gave the state prior notice, in writing, and I was released from active duty under honorable conditions on 15 October 2003. I applied for re-employment on 1 November and went back to work on 15 November. I applied for state retirement credit for the 2001–03 military leave period. The state retirement system turned me down, saying that under state law an individual employee is permitted to purchase up to four years of state retirement credit for active military service, and that I have already exhausted that limit when I purchased credit for the 1988–92 period. Is the state retirement system correct in denying me pension credit for my 2001–03 military leave period?

A: No. The Uniformed Services Employment and Reemployment Rights Act (USERRA) applies to your 2001–03 Active Duty, and USERRA (as a federal law) supersedes state laws that purport to limit your federal re-employment rights. [See 38 U.S.C. 4302(b).] Article VI, clause 2 of the U.S. Constitution provides as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Capitalized just this way, in the 18th century style).

This is commonly called the "Supremacy Clause." Under this clause, the federal re-employment statute trumps conflicting state laws. [See Peel v.

Florida Department of Transportation, 600 F.2d 1070, 1073-74 (5th Cir. 1979); Cronin v. Police Department of the City of New York, 675 F. Supp. 847, 853 (S.D.N.Y. 1987); Fitz v. Board of Education of the Port Huron Area Schools, 662 F. Supp. 1011, 1014-15 (E.D. Mich. 1985), affirmed, 802 F.2d 457 (6th Cir. 1986); Mazak v. Florida Department of Administration, 113 LRRM 3217 (N.D. Fla. 1983).]

Title 10, United States Code, section 12736 (part of the chapter that deals with Reserve Component age-60 retirement) provides that if a period of military service is otherwise properly creditable under any other law, including a state law, you cannot be denied credit for that period of service on the grounds that you are getting or will get retirement credit for that service for Reserve (age 60) retirement purposes. Rhode Island has a "no double-dipping" clause in its state retirement law: you cannot purchase credit for a period of military service if you are also claiming credit for that same period of service under any other law. Rhode Island's "no double-dipping" rule has been held to violate 10 U.S.C. 12736 and, thus, to be void under the Supremacy Clause of the Constitution. [See Almeida v. Retirement Board of Rhode Island Employees Retirement System, 116 F. Supp. 2d 169 (D.R.I. 2000), citing Cantwell v. County of San Mateo, 631 F.2d 631 (9th Cir.), cert. denied, 450 U.S. 998 (1980).]

Rhode Island is one of many states where the validity of "no double-dipping" rules has been questioned. I discuss the interplay between 10 U.S.C. 12736 and state retirement laws in Law Reviews 2, 13, 15, 21, 48 and 57.

As I explained in Law Review 89, USERRA was enacted in 1994, and it replaced the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. Neither the VRR law nor USERRA applies to your 1988–92 Active Duty, because you did not work for the state of Rhode Island before that period. USERRA does apply to your 2001–2003 Active Duty, because you left your state job to go on Active Duty in 2001.

Although federal law does not require Rhode Island to allow you to purchase credit for the 1988–92 period, 10 U.S.C. 12736 prevents your state from discriminating against you, regarding your state retirement, because you have chosen to remain in the Army Reserve after leaving Active Duty. On the other hand, USERRA clearly requires Rhode Island to give you pension credit for the 2001–03 period. You met the eligibility criteria under USERRA, so the employer is required for pension purposes to treat you as having been continuously employed.

Section 4318 of USERRA (38 U.S.C. 4318) governs pension entitlements. I discuss that section in detail in Law Reviews 4, 9, 40, 74, 75, 76, and 107. The fact that the employer also allowed you to purchase state retirement credit for the 1988–92 period of pre-employment military service is commendable but irrelevant. That fact does not excuse the state from its obligations under Section 4318 with regard to the 2001–03 period.

In short, a pension benefit granted to new employees recognizing previous military service does not excuse a state (or any other employer) from its obligations under Section 4318 of USERRA with regard to subsequent periods of uniformed service that interrupt your employment with that employer.

Q: When I purchased credit for the 1988–92 period, the amount of the payment was based on a percentage of what I earned from the Army during that period. Am I required to pay for credit for my 2001–03 Active Duty? How will the amount of the payment be computed?

A: If employees normally pay for all or a portion of their retirement credit, you will be required to pay what you would have paid if you had been continuously employed. This computation is based on your imputed civilian salary during the military period. What you earned from the Army (either higher or lower than your civilian pay) is irrelevant for the purpose of computing your employee contribution (if any) to the pension plan.

Q: While employed by the state, I normally pay $100 per month as the employee contribution to the pension plan. I was away from the job for service for 24 months, so I must pay $2,400. That is a lot of money. Am I required to pay it all at once?

A: No. "Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years." [38 U.S.C. 4318(b)(2).] You must pay the $2,400 by 15 November 2008 (five years after the date of your re-employment).

Q: While I am actively working, I pay the $100 per month out of pre-tax dollars, and that means I save money on the deal. (If I had to pay the $100 per month from income that had already been taxed, making these payments would be more difficult.) Am I entitled to use pre-tax dollars to pay the $2,400 make-up payment?

A: Yes. See Law Review 82.

*Military title used for purposes of identification only. The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Labor (DoL), or the U.S. government. Past Law Reviews can be found on the ROA Web site. The best way to reach Captain Wright is by e-mail at samwright50@yahoo.com.