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Yes You Can Double-Dip!

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1.3.2.3—Pension Credit for Military Service Time

1.8—Relationship between USERRA and other Laws/Policies

3.0—Reserve Retirement and Civilian Employment

Q: I am a life member of ROA and a retired Army Reserve Colonel. I graduated from college in 1969 and was commissioned a Second Lieutenant. I served on active duty for four years, including a year in Vietnam, and then I participated in the Army Reserve for another 26 years, retiring in 1999. I turned 60 in 2007 and started drawing my Army Reserve retired pay. The 1,460 points that I earned for my four active duty years (1969-73) figure prominently in the computation of my retired pay.

In 1974, about a year after I left active duty, I joined the federal civil service. At the time I was hired, I purchased civil service retirement credit for the four active duty years. Now, I am completing my civil service career and retiring. When I submitted my retirement paperwork, the personnel officer told me that “double dipping” is not permitted. She told me that I cannot get civil service retirement credit for the four active duty years because I am also using those same years of active duty in the computation of my military retirement.

This is not fair! If I cannot get retirement credit for the four active duty years, what was the point of purchasing the credit in 1974? Is the personnel officer correct?

A: No, the personnel officer is wrong. She is confusing *regular* military retirement with the *Reserve Component* retirement that you and I are receiving. You are entitled to use the four active duty years in the computation of your military reserve (age 60) retirement and also your federal civil service retirement because section 12736 of title 10 of the United States Code expressly so provides: “No period of [military] service included wholly or partly in determining a person’s right to, or the amount of, retired pay *under this chapter* 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.” 10 U.S.C. 12736 (emphasis supplied).

There are three ways to earn a military retirement, and three separate chapters of title 10 governing these forms of retirement. The first and traditional form of military retirement, under legislation that goes back to the Civil War, is based on full-time active military service for at least 20 years—a full active duty career. The second form of military retirement is based on having incurred a serious disability in the course of one’s military service. The third form of military retirement (under legislation that dates from 1948) is based on having earned at least 20 “good years” based on some combination of active duty and National Guard or Reserve part-time service. It is this third form of retirement and the title 10 chapter that governs it that are relevant to your situation.

Here at ROA headquarters (the treasured Minuteman Memorial Building), we have the pen that President Harry S. Truman used on June 29, 1948 to sign Public Law 80-810. Title III of that Public Law established the Reserve Component retirement system. The section that is now section 12736 has been part of this law ever since 1948.

Along with several other members of the ROA staff and tens of thousands of ROA members, I am a beneficiary of that 1948 law—one of ROA’s historic legislative accomplishments.

More than 15 million men and women served in the United States armed forces during World War II. After the war, Congress decided that we as a nation needed a way to keep those men and women available for emergency service, and we needed incentives to encourage them to maintain their military readiness through periodic training. Two years later almost to the day (June 25, 1950), the wisdom of this congressional enactment was vindicated when North Korea invaded South Korea and President Truman deployed United States troops to defend South Korea, and the Korean War began.

The point of the Reserve Component retirement system is to give young men and women an incentive to join the Reserve Components and to participate for 20 years or more. If an employer (federal, state, local, or private sector) could deprive employees of a valuable benefit *because of their service in the National Guard or Reserve* after leaving active duty, people like you would have little or no incentive to remain in the National Guard or Reserve after leaving active duty, and the whole point of the Reserve Component retirement system would be undermined.

To understand this point, let's talk about your good friend Joe Smith, your classmate in college and in Army ROTC in the late 1960s. Like you, Joe graduated from college and was commissioned a Second Lieutenant in 1969. Like you, Joe served on active duty for four years, including a year in Vietnam and left active duty in 1973. Like you, Joe took a federal civilian job in 1974 and remained for an entire career. Like you, Joe purchased federal civil service retirement credit for his four active duty years.

The difference is that Joe did not affiliate with the Army National Guard or Army Reserve after he left active duty in 1973. Joe is not receiving military retirement, because he had no further military service after the initial four active duty years.

Under the policy that your agency's personnel officer apparently favors, Joe Smith gets to use his four active duty years in computing his civilian pension, but you are denied that privilege. This policy devalues your 26 years of Army Reserve service, after you left active duty in 1973. This policy would likely lead you to advise your daughter and others of her generation that it makes no sense to affiliate with a Reserve Component after leaving active duty. What you gain in one area is at least partially offset by what you lose in another area.

Section 12736 means exactly what it says—you get to use the four active duty years for *both* your civil service retirement and your Reserve Component retirement. Section 12736 is binding on state and local governments as well as the Federal Government. A state law that precludes state and local government employees from “double dipping” in this way conflicts with section 12736 and is invalid under Article VI, Clause 2 of the United States Constitution (the Supremacy Clause). *See Cantwell v. County of San Mateo*, 631 F.2d 631 (9th Cir.), *cert. denied*, 450 U.S. 998 (1980). I discuss this issue in detail in Law Review 13 (June 2000).[\[1\]](#)

Under USERRA and the pre-1994 reemployment statute, your civilian employer (federal, state, local, or private sector) must give you civilian pension credit for a period of military service that interrupts your civilian job, provided you meet the eligibility criteria under USERRA or the prior law. Section 12736 means that it is unlawful to deny you the retirement credit on the grounds that you are “double dipping.”

As the Director of the Service Members Law Center (SMLC), I am here at ROA headquarters every business day, and sometimes on weekends as well, answering calls and e-mails about military-legal topics—sometimes more than 800 inquiries per month. I am here during regular business hours and until 10 pm Eastern Time on Mondays and Thursdays. The point of the evening availability is to make it possible for National Guard and Reserve personnel to call me from the privacy of their own homes, outside their civilian work hours.[\[2\]](#) No other organization offers this after-hours service.

Please send me e-mails at SWright@roa.org and please call me at 800-809-9448, extension 730. If I do not pick up your call, it is probably because I am on the telephone with another service member. Please leave messages for me in box 730, not ROA's “general mailbox” where messages have been known to be lost or delayed due to technical glitches.

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 800 articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.

[2] Please see Law Review 1165 concerning the folly of using your employer's telephone, computer, e-mail system, or time to complain about your employer and to seek advice or assistance in dealing with the employer.