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Pension Credit with State-Local Governments for Pre-1974 Military Service

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1.1.1.7—USERRA applies to state and local governments
1.3.2.3—Pension credit for service time
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***Von Allmen v. State of Connecticut Teachers Board,* 613 F.2d 356 (2nd Cir. 1979).[1]**

As I explained in Law Review 104[2] and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940.[3] The reemployment statute has applied to the Federal Government and private employers since 1940. It did not apply to state and local governments, as employers, until 1974.

On December 4, 1974, Congress enacted and President Gerald Ford signed into law the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), Public Law 93-508, 88 Stat. 1578. VEVRAA renumbered the VRRA and moved it from title 50 of the United States Code (War and National Defense) to title 38 (Veterans' Benefits). VEVRAA also made several substantive amendments to the VRRA. The most important amendment was to expand the applicability of the law to include state and local governments for the first time.[4]

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[1] This is a decision of the United States Court of Appeals for the 2nd Circuit, the federal appellate court that sits in New York City and hears appeals from district courts in Connecticut, New York, and Vermont. There is no subsequent appellate history of this case—the State of Connecticut did not apply to the Supreme Court for *certiorari* (discretionary review).

[2] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 835 articles about laws that are especially pertinent to those who serve our country in uniform, along with 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. We added 122 new articles in 2012 and another 113 so far in 2013.

[3] Please see Law Review 1122 (March 2011), concerning the most recent Supreme Court decision on the reemployment statute, *Staub v. Proctor Hospital,* 562 U.S. ____ (2011). In footnote 5 of Law Review 1122, you will find a link to the *amicus curiae* (friend of the court) brief that ROA filed in the *Staub* case. In that brief, we discuss in great detail the legislative history of the reemployment statute, back to 1940.

[4] Prior to 1974, the VRRA *recommended* but did not require the states and their political subdivisions to reemploy persons who left state/local government employment for military service and who sought reemployment after honorable service.

According to the Bureau of Labor Statistics (BLS, part of the United States Department of Labor), the total U.S. workforce (those persons holding or seeking civilian employment) is 136,038,000, and 3.7% of them (5,025,000) work for state governments and another 10.4% (14,081,000) work for local governments.[5] Expanding the reemployment statute to make it applicable to state and local governments was a most important improvement.

William K. Von Allmen was employed by the West Haven Board of Education, as a full-time teacher, from September 1955 until August 1956 (the 1955-56 academic year). In August 1956, he was inducted into the Army. He served honorably for almost two years and was released from active duty in June 1958. He returned to work for the school district in September 1958, at the start of the 1958-59 school year.

Upon returning to work, Von Allmen sought to purchase state retirement credit for the 1956-57 and 1957-58 academic years, the two years that he missed because he was drafted. At the time, Connecticut law made a distinction between "wartime" military service and "peacetime" service. A public employee like Von Allmen was permitted to purchase state retirement credit for wartime but not peacetime service. Based on the state law in effect at the time, Von Allmen was permitted to purchase state retirement credit for the 1956-57 school year but not for the 1957-58 school year.[6]

In January 1978, after the enactment of VEVRAA in 1974, Von Allmen renewed his attempt to get the Connecticut Teachers Retirement Board (CTRB) to give him state retirement credit for the 1957-58 school year. After the CTRB again refused him the credit, he initiated this lawsuit on March 1, 1978, in the United States District Court for the District of Connecticut.

Attorney Robert F. McWeeny of Hartford, Connecticut represented Von Allmen in both the District Court and the Court of Appeals, and represented him very well. Mr. McWeeny was later appointed a Superior Court Judge in Hartford and has had a distinguished judicial career. He took senior status in 2013 but still hears cases.

Section 4323(h)(2) of USERRA (enacted in 1994) provides for fee shifting. If the USERRA claimant is represented by private counsel and prevails, the court is authorized to order the defendant-employer to pay the successful plaintiff's attorneys fees. Under the reemployment statute in effect at the time that *Von Allmen* was decided, there was no fee shifting. In that time period, most VRRA cases were brought by the United States Department of Justice (DOJ), after referral from the Department of Labor (DOL), but *Von Allmen* is an exception.

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[5] *See* http://www.bls.gov/new.release/pdf/empsit.pdf.

[6] Fighting in the Korean War ended with an armistice signed on July 27, 1953. The "official end" of the Korean War, at least for Connecticut purposes, apparently occurred between the end of the 1956-57 school year and the start of the 1957-58 school year.

The District Court granted the defendants'[7] motion for summary judgment, holding that the 1974 VEVRAA amendment (expanding applicability to state and local governments) was not retroactive. Judge Ellen B. Burns held that Von Allmen was not entitled to civilian pension credit for the 1957-58 school year because he completed his military service and returned to work in 1958, more than 16 years before Congress enacted VEVRAA in 1974.

Von Allmen appealed to the 2nd Circuit, and the case was assigned to a three-judge panel consisting of Judge William Hughes Mulligan,[8] Judge William Homer Timbers,[9] and Judge Ellsworth Alfred Van Graafeiland.[10] In a unanimous decision written by Judge Timbers, the panel reversed the District Court and held that the 1974 amendment applied retroactively. Judge Timbers' opinion includes the following:

"To construe such legislation, however, as prospective only, we find unpersuasive for several reasons. First, it is most likely that Congress did not see any particular need to impose such a requirement on the states prior to the 1974 amendments. It was not until a large number of Vietnam veterans began returning from the service and were unable to get jobs that Congress realized that its earlier hortatory statement that the states "should" grant the same rights to returning veterans, § 9(b)(C) of the Military Selective Service Act, Supra, had been ineffective. Congress clearly was concerned that, since legislation providing reemployment rights to returning veterans varied from state to state in terms of coverage and enforcement mechanisms, veterans who had been employed in state and local governments would not be receiving the same rights as those who had previously been employed in the private sector. Indeed, the Senate Report stated:
'This year it is expected that an estimated half million Vietnam veterans will be separated from military service. More than half of these young men were employed prior to their entering service. Under the Military Selective Service Act of 1967, those who held jobs with the Federal Government or private industry are assured that their job rights are protected. This is not the case with those veterans who previously held jobs as school teachers, policemen, firemen, and other State, county, and city employees.' S.Rep.No.907, 93rd Cong., 1st Sess. 110 (1974).
It is clear from the legislative history that Congress intended the amendments to produce uniformity from state to state and to ensure that veterans returning from Vietnam would be rehired and given all the benefits to which they would be entitled had they not entered the service. If the amendments were to apply only prospectively from the date of their enactment, large numbers of veterans who returned from Vietnam prior to the effective date of the amendments in December 1974 would be stripped of the benefit of the amendments. Such a result would be contrary to the expressed purpose of the amendments which was to insure uniformity among all returning Vietnam veterans. S.Rep.No.907, 93rd Cong., 1st Sess. 109-10 (1974)."

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[7] The two defendants were the CTRB and the West Haven Board of Education.
[8] Judge Mulligan was appointed by President Richard Nixon in 1971. He resigned in 1981 and died in 1996.
[9] Judge Timbers was appointed by President Nixon in 1971. He took senior status in 1981 and died in 1994.
[10] Judge Van Graafeiland was appointed by President Gerald Ford and 1974. He took senior status in 1985 and died in 2004.

Von Allmen, 613 F.2d at 359-60.

Although this case was decided 34 years ago, it is still relevant and important as Vietnam-era veterans are reaching retirement age.