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Detroit Bankruptcy and USERRA

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1.3.2.3—Pension credit for military service time

On July 18, 2013, Michigan Governor Rick Snyder and Detroit's Emergency Manager Kevyn Orr filed a Chapter 9 bankruptcy petition in the United States District Court for the Eastern District of Michigan. Detroit is $18.5 billion in debt.

Detroit's population peaked at 1.8 million in the 1950 census, making it the fifth-largest United States city at the time. The 2010 Census showed a population of 700,000, or less than 39% of the peak. Entire neighborhoods have simply disappeared.

Detroit has huge obligations to retired police officers, firefighters, teachers, and other public employees, with defined benefit pension plans that are massively overpromised and underfunded. Such pension plans should be self-funding. Over the decades, money should have been reserved and invested, to pay the obligated pension and health care benefits for retired city employees, but not enough money was set aside. The problem was compounded when the investments underperformed.

Because these are defined benefit plans (rather than defined contribution plans), Detroit is obligated to make up these shortfalls, but the money just is not there. The public employee unions have objected to the bankruptcy proceeding, contending that according to the Michigan Constitution, vested benefits under public employee pension plans cannot be taken away from beneficiaries.

I believe that this objection has no legal merit. The Michigan Constitution is clearly superseded by the federal bankruptcy code. Under Article VI, Clause 2 of the United States Constitution (commonly called the "Supremacy Clause"), federal statutes trump conflicting state statutes and state constitutions.

I think that it is inevitable that Detroit's public employee retirees will take a "haircut" (perhaps 50 percent or more) in their pension and health care benefits. This looming haircut makes it all the more urgent that public employees and retirees who served in the Reserve Components and whose careers were interrupted by military service receive pension credit for their military service time, as required by the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the predecessor reemployment statute, the Veterans' Reemployment Rights Act (VRRA).

Let us take a hypothetical but realistic example. Joe Smith retired from the Detroit Police Department in 2008, after a 25-year career. Joe also served in the Marine Corps Reserve, and his civilian career was interrupted by several periods of military service, including 1990-91 service for *Operation Desert Storm* and 2003-04 service for *Operation Iraqi Freedom.* Under the reemployment statute (old and new), Joe is entitled to be treated as if he had been continuously employed by the City of Detroit during each of the periods when he was away from work for military service.

Joe has not been so credited, and he is unaware that his federal rights have been violated. Now that Joe is facing a 50 percent cut in his pension benefits, getting proper credit for these military service times could be the difference between hamburger dinners and dog food dinners.

Detroit is the leading edge of major municipal bankruptcies and underfunded pensions. Other major cities are not much better off. It is likely that Chicago will file for bankruptcy protection before President Barack Obama leaves office in 2017, in the unrealistic hope that the President will bail out the city where he started his career.

I have been dealing with this area of law for more than 31 years. I developed the interest and expertise in this law when I worked as a Department of Labor attorney from 1982 to 1992. Together with one other Department of Labor attorney, Susan M. Webman, I largely drafted the interagency task force work product that President George H.W. Bush presented to Congress as USERRA in early 1991 and that President Bill Clinton signed into law on Oct. 13, 1994. I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve, as an attorney for the U.S. Office of Special Counsel, and as an attorney in private practice. In 2009, I retired from private practice and joined ROA's full-time staff, as the first director of the Service Members Law Center.

Protecting the legal rights of service members has been the focus of my legal career, since I graduated from the University of Houston Law School and passed the Texas Bar Exam in 1976. I am continuing that focus as the director of ROA's Service Members Law Center.

If you know a public employee who is currently serving or recently retired from one of the seven Reserve Components and whose public employee career was interrupted by voluntary or involuntary service after 1990, please refer them to ROA's Service Members Law Center. We receive about 800 inquiries per month, half of which are dealing with USERRA. The service is free and open to the public, with extended hours until 10 p.m. Eastern time on Mondays and Thursdays.

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