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Pension Credit for Military Service—Continued

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Q: I am a deputy sheriff in Virginia. My retirement program is under the Virginia Retirement System (VRS), which covers state and local government employees in Virginia. I was recalled to active duty for more than a year and deployed to Iraq. I have been released from active duty and have returned to work as a deputy sheriff.

As I understand the Uniformed Services Employment and Reemployment Rights Act (USERRA), I am entitled to be treated as if I had been continuously employed, for pension and seniority purposes. VRS has a retirement system for state and local government employees generally and a more generous system for "hazardous duty" employees such as law enforcement officers and firefighters. The city personnel office has told me that I am entitled to VRS pension credit for my military service time in the general system but not in the more generous "hazardous duty" system. The city personnel office cited a VRS rule to the effect that an employee is entitled to "hazardous duty" pension credit only for a period of time when the employee was performing "hazardous duty" for a state or local government in Virginia. I was guarding convoys in Iraq. Is that not "hazardous" enough for them? What gives?

A: The pertinent USERRA language is as follows: "For purposes of computing an employer's liability under paragraph (1) [38 U.S.C. 4318(b)(1)] or the employee's contributions under paragraph (2) [38 U.S.C. 4318(b)(2)], the employee's compensation during the period of [uniformed] service described in subsection (a)(2)(B) [38 U.S.C. 4318(a)(2)(B)] shall be computed—at the rate the employee would have received but for the period of service described in subsection (a)(2)(B)."¹ [38 U.S.C. 4318(b)(3) (emphasis supplied).]

You were employed as a deputy sheriff before you were recalled to active duty and after you returned from active duty. There is every reason to believe that, but for the call to service, you would have been continuously employed as a deputy sheriff. USERRA explicitly supersedes state laws that purport to limit USERRA rights. [See 38 U.S.C. 4302(b).] Under Article VI, clause 2 of the United States Constitution, commonly called the "Supremacy Clause," federal law trumps state law. A great war was fought about the supremacy of federal authority over state authority, and Virginia's team lost that one.

At my request, the city personnel officer called VRS, and VRS has agreed that you are entitled to be treated, for pension purposes, as if you had been continuously employed as a deputy sheriff, including for the purpose of VRS "hazardous duty" pension credit. I am pleased that VRS now seems to understand and accept the Supremacy Clause. I also invite your attention to Law Reviews 21 and 119.

*Military title used for purposes of identification only. The views expressed herein are the personal views of the authors and should not be attributed to the U.S. Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. government. The best way to reach Captain Wright is by e-mail, at samwright50@yahoo.com.