

## **LAW REVIEW<sup>1</sup> 23043**

**August 2023**

### **Yes, You Can Double-Dip on your Civilian and Military Pensions, State Law to the Contrary Notwithstanding.**

**By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>**

#### **Subject Index Codes:**

**1.2—USERRA forbids discrimination.**

**1.3.2.3—Pension credit for service time**

**1.8—Relationship between USERRA and other laws/policies**

**3.0—Reserve retirement and civilian employment**

***Cantwell v. County of San Mateo*, 631 F.2d 631 (9<sup>th</sup> Cir. 1980), cert. denied, 450 U.S. 998 (1981).<sup>3</sup>**

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<sup>1</sup> Please see [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2,000 “Law Review” 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), the Uniformed Services Former Spouses’ Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997, and we add new articles each month. I am the author of more than 90% of the articles published so far, but we are always looking for “other than Sam” articles by other lawyers.

<sup>2</sup> BA 1973, Northwestern University; JD (law degree), 1976, University of Houston, LLM (advanced law degree), 1980, Georgetown University. I served on active duty and in the Navy Reserve as a judge advocate and retired in 2007. I am a life member of ROA, and I currently serve on the Executive Committee and as Chairman of the Membership Committee. I participated in the drafting of USERRA, to replace the 1940 reemployment statute, while employed as an attorney for the United States Department of Labor (DOL). I have also worked with USERRA and the predecessor reemployment statute as a Navy judge advocate, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), and as an attorney for the United States Office of Special Counsel (OSC). For six years (June 2009 through May 2015), I was a full-time employee of ROA, serving as the first Director of the Service Members Law Center (SMLC). Please see Law Review 15052 (June 2015) for a summary of the accomplishments of the SMLC. My paid ROA employment ended 5/31/2015, but I have continued many of the SMLC functions as a volunteer and ROA member. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

<sup>3</sup> This is a 1980 decision of the United States Court of Appeals for the 9<sup>th</sup> Circuit, the federal intermediate appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, the Commonwealth of the Northern Mariana Islands, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. The citation means that you can find this decision in Volume 631 of *Federal Reporter Second Series*, and the decision starts on page 631. The “cert. denied” means that the Supreme Court was asked to review this decision and declined the request.

***Almeida v. Retirement Board of Rhode Island Employees Retirement System*, 116 F. Supp. 2d 269 (D.R.I. 2000).**<sup>4</sup>

**Q: I am an Army Reserve Captain<sup>5</sup> and a life member of the Reserve Organization of America (ROA).<sup>6</sup> I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform.**

**I was born in 1997, and I graduated from college in 2019. While in college, I participated in the Army’s Reserve Officers Training Corps (ROTC), and when I graduated on May 15, 2019, I was commissioned a Second Lieutenant. I remained on full-time active duty for exactly four years, until May 2023, when I was released from active duty and affiliated with the Army Reserve. In August 2023, I will start my new career as a teacher for my local school district.**

**During my orientation as a new teacher, I was told that, under our State law, I can purchase teacher retirement credit for up to five years of full-time active duty that I performed before the start of my teaching career, and I signed up to purchase credit for my four years**

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<sup>4</sup> This is a 2000 decision of the United States District Court for the District of Rhode Island, not appealed. This court followed the *Cantwell* precedent and held that section 12736 of title 10 of the United States Code invalidates a state law that provides that a state or local government employee cannot receive state retirement credit for a period of active-duty military service if he or she is also receiving or will receive Reserve Retirement credit for the same period of service.

<sup>5</sup> The factual set-up for this article is hypothetical but realistic.

<sup>6</sup> In 2018, the members of the Reserve Officers Association amended the organization’s constitution and made all past and present uniformed services personnel (E-1 through O-10) eligible for full membership, including voting and running for office. The organization adopted the “doing business as” name “Reserve Organization of America” (ROA) to emphasize that the organization represents and admits to membership enlisted personnel as well as commissioned officers.

of active duty, from May 2019 until May 2023. The school district's personnel director told me that our state law does not permit me to "double dip." She said that if I receive military retirement credit for those four years of active duty, I cannot also receive state teacher retirement credit for that same period of active duty.

I enjoy my Army Reserve participation, and I want to be ready to answer the country's call if a new major military challenge arises. I plan to remain active in the Army Reserve at least until May 2039, to earn the Reserve Component retirement starting in 2057, when I turn 60, or maybe sooner if I am called to contingency service from the Army Reserve.

If, as is likely, I stay in the Army Reserve long enough to qualify for the Reserve Component retirement, my four years of active duty will help me in two ways. First, these four years count toward the 20 "good years" that I must attain to qualify for Reserve Component retirement. Second, the 1,460 days that I spent on active duty will give me 1,460 points, helping determine the amount of my monthly retirement check when I retire from the Army Reserve.

I have done the math, and purchasing the four years of teacher retirement credit for my four active-duty years makes good financial sense, but not if state law means that I cannot use the four active-duty years to qualify for Reserve Component retirement and for state teacher retirement.

In your Law Review 22028 (May 2022), you wrote that federal law overrides and preempts the New Hampshire law that forbids "double

**dipping” of this kind. Do you stand by what you wrote in May 2022? Is my state’s law also invalidated by federal law?**

**Answer, bottom line up front**

Yes, I stand by what I wrote in Law Review 22028 and several earlier articles, and this application of federal law and the Supremacy Clause of the United States Constitution applies to all 50 states, not just New Hampshire.

**Explanation**

**The Reserve Retirement System**

Sixteen million Americans served in uniform during World War II, and the great majority of them were honorably discharged within a few months after victory was achieved. President Harry S. Truman, our organization, and many others realized that World War II was not “the war to end all wars” as some had claimed about World War I, and that our nation needed to maintain its military readiness. Accordingly, in 1948 Congress enacted legislation establishing the Reserve Retirement System.<sup>7</sup> Just two years later, in June 1950, North Korea invaded South Korea and the Korean War was on, and thousands of individuals who had served in World War II were recalled to active duty from the National Guard and Reserve.

As I have explained in Law Review 16086 (September 2016), a person who serves in the Reserve or National Guard and accumulates at least

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<sup>7</sup> At ROA headquarters, in the treasured Minuteman Memorial Building, we have on display the pen that President Truman used to sign this bill into law.

20 “good years” for Reserve Retirement purposes qualifies to receive monthly Reserve Retirement checks starting at age 60. As I have explained in Law Review 16090 (also September 2016), a Reserve Component service member who has performed contingency service after 1/28/2008 can qualify to start receiving the Reserve Retirement benefit before achieving his or her 60<sup>th</sup> birthday.

The Reserve Retirement System is an essential part of the package of incentives that Congress has established to encourage qualified young people to serve in the Reserve Components for a career, not just an initial period of six or eight years. Now more than ever, our country needs qualified young people who are already trained for military service and who are “ready to fight tonight.”

**State and local governments must not be permitted to undo the powerful incentive for Reserve Component service created by the Reserve Retirement System.**

If a state or local government or other employer were permitted to undo this incentive, by offering civilian pension credit for military service only if the person waived military pension credit for the same period of service, the military readiness benefit of the Reserve Retirement System would be at least partially undone. Accordingly, Congress enacted the following provision in 1948:

No period of 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 creditable under it.<sup>8</sup>

In *Cantwell* and *Almeida*, the two published court decisions cited at the top of this article, the United States Court of Appeals for the 9<sup>th</sup> Circuit and the United States District Court for the District of Rhode Island decided that section 12736 (quoted above) means exactly what it says. If a state chooses to offer state retirement credit for periods of active military service performed before the start of an employee's civilian career, the state cannot, consistent with federal law and the Supremacy Clause of the Constitution, deny that privilege to a person who has chosen to affiliate with the National Guard or Reserve after leaving active duty. These precedents are binding on all 50 states.<sup>9</sup>

**Q: What is the relationship between section 12736 of title 10 and the Uniformed Services Employment and Reemployment Rights Act (USERRA)?**

**A:** Under section 4318 of USERRA,<sup>10</sup> a person who leaves a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services, and who meets the five USERRA conditions, is entitled to be treated, for civilian pension purposes, as if he or she had remained continuously employed by the civilian employer during the time that the person was away from work for uniformed service.

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<sup>8</sup> 10 U.S.C. § 12736 (emphasis supplied).

<sup>9</sup> In Law Review 13 (June 2000), I argued that Virginia's "no double dipping" law was invalid, based on section 12736 and the *Cantwell* precedent. On 10/20/2000, I sent a letter to Virginia Attorney General Mark L. Earley, making that point. In December 2000, Attorney General Earley agreed with me and directed the Virginia Retirement System to amend its regulations to bring its practice into compliance with federal law, notwithstanding the invalid Virginia statute. See Law Review 21 (December 2000).

<sup>10</sup> 38 U.S.C. § 4318.

As I have explained in detail in Law Review 15116 (December 2015) and many other articles, you must meet five simple conditions to have the right to reemployment under USERRA:

- a. You must leave a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary service in the uniformed services.<sup>11</sup>
- b. You must have given the employer prior oral or written notice.<sup>12</sup>
- c. Your cumulative periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.<sup>13</sup>
- d. You must have been released from the period of service without having received a disqualifying bad discharge from the military.<sup>14</sup>
- e. After release from the period of service, you must have made a timely application for reemployment.<sup>15</sup>

Section 4318 does not apply to your 2019-23 period of service because you did not leave your school district job to perform uniformed service—you did not start your school district job until after you left active duty in May 2023. But the opportunity to purchase state retirement credit for your 2019-23 active-duty period is a “benefit of employment,” and denying you that benefit because you chose to affiliate with the Army Reserve after you left active duty violated section 4311(a) of USERRA. That subsection provides:

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<sup>11</sup> 38 U.S.C. § 4312(a).

<sup>12</sup> 38 U.S.C. § 4312(a)(1).

<sup>13</sup> 38 U.S.C. § 4312(c). *See generally* Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting your five-year limit.

<sup>14</sup> 38 U.S.C. § 4304. Disqualifying discharges include punitive discharges, awarded by court martial for serious offenses, and other-than-honorable administrative discharges.

<sup>15</sup> After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

A person who is a member, applies to be a member, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any *benefit of employment* by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.<sup>16</sup>

**Q: If, after I start my new job with the school district, I leave my job for a short or long period of time for uniformed service, and then return to work at the school district after release from that period of service, am I entitled to civilian pension credit for the time that I am away from work for service?**

**A:** Yes, if you meet the five USERRA conditions, as discussed above.<sup>17</sup>

**Q: What is the relationship between USERRA and state law?**

**A:** USERRA is a floor and not a ceiling on your rights. State law, school district policy, or the collective bargaining agreement between your union and the school district can give you greater or additional rights but cannot take away or reduce your USERRA rights or impose additional prerequisites upon your exercise of those rights.<sup>18</sup>

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<sup>16</sup> 38 U.S.C. § 4311(a) (emphasis supplied).

<sup>17</sup> 38 U.S.C. § 4318.

<sup>18</sup> 38 U.S.C. § 4302.



**Q: In our federal system of government, what is the relationship between a federal statute like USERRA and a state statute or constitution?**

**A:** The Supremacy Clause of the United States Constitution provides:

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.<sup>19</sup>

A Supreme Court decision almost two centuries ago established the seminal principle that a federal statute trumps a conflicting state statute.<sup>20</sup> USERRA overrides and supersedes a conflicting state statute, and so does section 12736 of title 10.

### **Please join or support ROA**

This article is one of 2,000-plus “Law Review” articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997, and we add new articles each month.

ROA is more than a century old—it was established on 10/2/1922 by a group of veterans of “The Great War,” as World War I was then known. General of the Armies John J. Pershing, the commander of our country’s

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<sup>19</sup> United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18<sup>th</sup> Century.

<sup>20</sup> See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

military forces in that war, invited reserve officers who had served under him to attend a meeting at Washington's historic Willard Hotel. General Pershing and the reserve officers who attended the meeting at his invitation recognized that calling the recently concluded war "the war to end all wars" was a dangerous conceit and that our nation needed to maintain military readiness.

One of the founders was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For more than a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's national defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to their membership status, or lack thereof, in our organization, but please understand that ROA members, through their dues and contributions, pay the cost of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any of our country's eight uniformed services,<sup>21</sup> you are eligible for membership in ROA, and a

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<sup>21</sup> Congress recently created the United States Space Force as the 8<sup>th</sup> uniformed service.

one-year membership only costs \$20 or \$450 for a life membership.<sup>22</sup> Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to persons who are serving or have served in the Active Component of the armed forces, as well as the National Guard and Reserve.

If you are eligible, please join. You can join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448. If you are not eligible, please contribute to help us continue our vital work. You can send us a contribution at:

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<sup>22</sup> If you are under the age of 35, you can become an associate member for free for five years or when you turn 35, whichever comes first.

<sup>23</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).