



THE SUNRISE CITY
FORT PIERCE
RETIREMENT BOARD
Florida

sent via email: kevindotylaw@aol.com

February 23, 2017

Kevin Doty, Esq.
411 Holly Road
Vero Beach, FL 32963

RE: Appeal Request of Robert Creswell

Dear Mr. Doty:

The issue of Mr. Creswell's credit for military time in his civilian pension has been ongoing and due to scheduling conflicts the rehearing has been postponed since his retirement was approved on August 18, 2016. This letter attempts to resolve Mr. Creswell's issues and determine if a rehearing is indeed needed.

I have conferred with the Assistant City Attorney, who in the attached memo has addressed your expressed opinion in your letter dated November 9, 2016, as to Mr. Creswell's entitlement to credited service time. The memo outlines the Retirement Board's previous stated position and further provides compliance of the Code.

For the reasons stated in the attached, Mr. Creswell is not entitled to civilian retirement credit if he is receiving military credit for the same time, unless he purchases it. In the event he has waived the credit from his military retirement he still has to make his contributory amount before it is credited in his civilian retirement. To not further engage you and your client, as well as the board with this issue, I am asking that Mr. Creswell provide proof that he has complied with the military requirement and waived his military retired pay in order to have the service time added to his civilian service for computation. Until proof of the waiver is provided there is no need to move forward with the rehearing request unless Mr. Creswell wants to purchase the time.

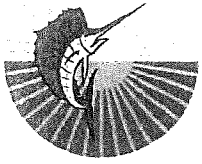
If you feel a hearing on this matter is still required please let me know no later than March 1, 2017.

Sincerely,



Johnna S. Morris
Secretary/Treasurer

cc: Robert Creswell
Iola Mosely, Asst. City Attorney
Jim Walker, Board Attorney
Tom Perona, Board Chairman
Christine Paz, Retirement Clerk
Attchmnts.



THE SUNRISE CITY
FORT PIERCE
CITY ATTORNEY'S OFFICE *Florida*

TO: JOHNNA MORRIS, DIRECTOR OF FINANCE

THROUGH: James Messer, Esq., City Attorney

FROM: Iola T Mosley, Esq., Sr. Assistant City Attorney *ITM*

RE: Analysis of Retirement Benefits for Returning Military Personnel

DATE: February 23, 2017

Attached is a legal analysis of the Creswell matter regarding pension benefits provisions relating to returning service personnel based on USERRA. This analysis should clarify the issues concerning city code provisions relating to recapture of pension benefits following employee's return to civilian employment following a call to active duty. If you have any questions you may contact Attorney Iola Mosley at ext. 3044

The Uniformed Services Employment and Reemployment Rights Act

[USERRA]

Congress enacted USERRA in 1994 in order to provide “prompt reemployment to those who engage in non-career service in the uniformed services” 38 USC §4301 (a) (1), (2). USERRA’s goals include minimizing disruption to the lives of persons who are serving in the military and to prevent discrimination against those choosing to serve their country. The act essentially prohibits employers from denying or discontinuing employment or from demoting or reducing employees benefits based on the employees military service. USERRA does not create additional privileges but acts to protect the employment status and the rights of armed service personnel to be free of discrimination based on his/her status as active military personnel called to duty.¹

38 USC §4318(b)(2)² requires that employees, who are reemployed (under USERRA) who have a pension plan that requires individual contribution, re-pay those employee contributions before the employer is required to provide pension payment for the years during which the employee was serving on active duty. In other words, in a pension system in which employees are required to contribute to their individual retirement, USERRA mandates that service personnel are to be regarded in the same way as all others and must “pay their fair share” prior to receiving inclusion of the years. The employee obligation to contribute the missed payments is triggered on the day of his return to civilian employment and follows for up to 5 years from the date of initial re-employment.

Further, pursuant to the implementing regulations for USERRA under 20 CFR §1002.262(b) an employee enrolled in a contributory plan who desires to recapture pension pay, is allowed to but not required to make up his/her contributions. The time period for repayment of the employee contribution begins on the date of re-employment and runs to a period of time up to 5 years following.

The City’s pension program is based on a contributory system³. The Fort Pierce, Florida Municipal Code (“FPMC”) Chapter 13 Article II §§13-27 and 13-28 provides that the returning employee buy back his pension share if he intends to recapture it. This provision is consistent with the provisions of USERRA and its implementing regulations.

¹ See, 38 U.S.C. §§ 4312, 4313; *Alabama Power v Davis* 431 U.S. 581, 583 (1977) (“We do not think that Congress could have intended that employees would be able to waive their rights before entering military service. The purpose of the act...is ‘to minimize the disruption in individual lives resulting from the national need for military personnel’” Quoting *Leonard v United Airlines Inc.*, 972 F. 2d 155 (7th Cir 1992); *McGuire v. United Parcel Serv.*, 152 F. 3d 673, 676-77 (7th Cir. 1998)

² Section 4318(b) (2) provides “A person reemployed under this chapter *shall* be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of or derived from employee contribution or elective deferrals...*only to the extent the person makes payment to the plan* with respect to such contribution or deferrals....”

³ Fort Pierce, Florida Municipal Code Chapter 13 Article II §13-19

In this case the Petitioner did **not** provide payment of his pro-rata share of the employee pension benefit upon his return from military service as required, and is thus **ineligible** to claim the benefit.

Election of Pension Coverage

5 USCS §8332 is the provision of the United States Code that applies to Civil Service Retirement Pensions it defines years of service and governs when and how disbursements of pension funds are to be made for those who are employed in the Civil Service.

Title 5 USCS §8332 (c)(2) states "If an employee or Member is awarded retirement pay based on any period of Military service, the service of the employee or member may not include credit for such period of military service...." This provision regarding labor should be given great weight in consideration of application of military benefits.⁴

The provisions of the FPMC Chapter 13 Art II §13-27(4) providing the employee election, is in legal conformity with the provisions of 5 USC §8332 (c) (2). To date the Petitioner has **not** provided the City with evidence that he has complied with this provision.

Timely compliance

FPMC Chapter 13 Art II §13-27 (1) requires that the petitioner notify the financial officer within 1 year of his return to service that he elects to receive his pension benefit during the time he collected a military pension benefit.

The petitioner did not do so. Instead he notified the Human Resources department of his return. That department however does not operate under the direction of the Finance Director who heads the department that oversees retirement benefit calculations; the Human Resources department has an independent director who oversees other benefits and hiring.

Notification to one department does not constitute notice to the other department for the purposes of calculation of the retirement benefit in this matter, as the two departments are separate; they are created, governed, and have distinct responsibilities, separate and apart from each other⁵.

The petitioner in this matter returned to work in October of 2011; however he did **not** notify the finance department of his desire to recapture his retirement benefit until March 2013. This time period lies outside of the period allowed for such reporting under

⁴ *Davis v Alabama Power Company*, supra

⁵ see *McGuire v. United Parcel Service*, 152 F. 3d 673 (8th Cir. 1998)

FPMC 13-27 and as such was untimely. Petitioner failed to comply with this provision therefore he does not meet the requirements for payment of additional pension benefit.

Applicability of Florida Law

§115 Florida Statutes (2015)

Under Fla. Stat. §115.01 to 115.14 employees who are called to active duty in the military service are accorded the right to a leave of absence, and the right to return to employment upon the completion of their military tenure. Fla Stat. §115.14 specifically applies to public employees. Pursuant to the provisions of Fla. Stat. §115.14 the employing authority is required to continue to provide all "health insurance and other existing benefits... as required by the Uniformed Services Employment and Reemployment Rights Act" (emphasis added).

The language concerning strict adherence to the USERRA contained in Fla. Stat. §115.15 Fla. Stat. makes it apparent that the intent of the legislature was to provide concordance with the Federal Provisions. The language as such designates a preemption of state law by the federal law on this subject matter.⁶

Fort Pierce City Ordinance Provisions

FPMC Chapter 13 Article II §13-27 outlines the procedures for recouping pension benefits which must be followed by employees upon returning from military service. The returning Employee must;

- a) Make an application for his retirement benefits within one year of release of honorable military service (emphasis added);
- b) Make an application under the personnel rules and regulations;
- c) Pay into his share of retirement system co-payments (payments are suspended while the employee is on active duty);
- d) Notify the military that he is electing to receive his retirement benefit under the employers existing Civil Service program thus waiving acceptance of military pension benefits for the elected years of service.

In this matter the Employee is urging the Board to grant him pension benefits for the 3 years of his active military service, from 2008 to 2011.

Petitioner argues that FPCO §13-27 and §13-28 as applied are preempted by Fla. Stat. §§115.14 and 115.12 and that pursuant to these statutory provisions he is entitled to receive the requested pension benefits without any conditions. As stated above this argument is without merit because Fla. Stat. §115 is specifically preempted

⁶ Op. Att'y Gen. Fla. 04-02 (2004)

by USERRA. To the extent that FPCO §13-27 and 13-28 Are consistent with USERRA as outlined above the Petitioner's argument fails.

The Petitioner has not complied with the requirements of the city ordinance regarding timely notification, benefit election, or buy-back of benefits provisions. Based on the forgoing points of law and argument it is recommended that the Petitioner's request be denied.



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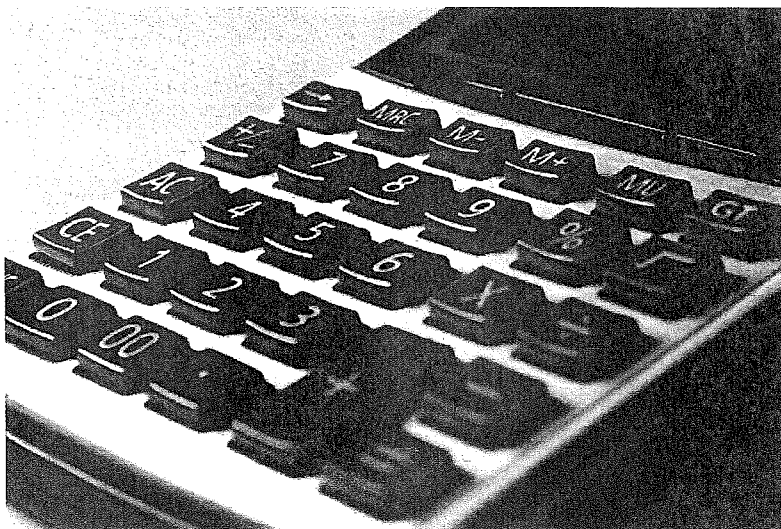
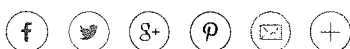


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Waive Your Military Retirement to Receive Civil Service Retirement Pay



Military.com

You cannot receive credit for any military service in your CSRS or FERS retirement computation if you are receiving military retired pay, unless you were awarded the retired pay:

- For a service-connected disability either incurred in combat with an enemy of the United States or caused by an instrumentality of war and incurred in the line of duty during a period of war, or
- Under the provisions of Chapter 1223, Title 10, U.S.C. (pertaining to retirement from a reserve component of the Armed Forces).

However, you can elect to waive the retired pay and have the military service added to your civilian service in computing your Civil Service annuity.


How to Waive Your Military Retired Pay

If you want to waive your military retired pay to receive credit for military service in the computation of your FERS or CSRS benefit, you should write the Retired Pay Operations Center at least 60 days before your planned retirement. Send your waiver to:

MILITARY PAY TOPICS

- Military Pay
- Military Pay Charts
- Basic Allowance for Housing (BAH)
- Allowances
- Basic Pay
- Military Bonuses
- Reserve and Guard Pay
- Retirement Pay
- Special Pay
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Proposed Military Pay: Charts [Help & Feedback](#)

Defense Finance and Accounting Service
U.S. Military Retirement Pay
 P.O. Box 7130
 London, KY 40742-7130
 You can "fax" your request to 1 (800) 469-6559.

Suggested wording for your request is as follows:

"I (Full Name and Military Serial Number) hereby waive my military retired pay for Civil Service Retirement or Federal Employees Retirement System purposes effective (The day before your annuity begins). I hereby authorize the U.S. Office of Personnel management to withhold from my (CSRS or FERS) annuity any amount of military retired pay granted beyond the effective date of this waiver due to any delay in receiving or processing this request."



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FEATURED VA LOAN ARTICLES

VA Loan Closing Costs: An Added Benefit

Besides the advantage of requiring no down payment for qualified VA borrowers, there is also a distinct advantage for the borrower.



IRRRL Facts for Veterans

IRRRL stands for Interest Rate Reduction Refinancing Loan, also known as a "Streamline" or a "VA to VA" loan.

VA Loan Limits for High-Cost Counties: Updated for 2017

The VA loan limit for 2017 is \$424,100. But it could actually be substantially more if you buy a home in a high-cost county. See...

Get the FAQs on VA Home Loans

We've answered 75 of the most frequently asked VA Loan Benefit questions. View them now to get a quick understanding of your benefits.

Top 3 VA Home Loan Tips

There are numerous advantages to having a VA mortgage. A VA mortgage loan can be guaranteed with no money down. In some cases...



Coast Guard Sea Pay Undergoing Major Changes



The Military Retirement System



Military Retired Pay Overview

WHAT'S HOT IN THE MILITARY REPORT

- Arrests Made in TRICARE Rx Kickback Scheme
- TRICARE to Expand Coverage
- Free Online Course Expanded to Veteran Spouses
- Army Debuts New Combat Tourniquet
- California Guardsmen Ordered to Pay Back Bonuses: Report

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THE MILITARY ADVANTAGE

- Thornberry: Politics Hid Depth of Readiness Crisis Until Now
- Study: Blended Retirement System Won't Harm Retirees or Force
- Risky Business: Commissary Savings Redefined to 20% Stateside
- Suze Orman Has Some Thoughts on New Blended Retirement Plan
- Proposed Bill Could Ease Tax Burden on Military Spouses

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LAW OFFICES OF
KEVIN S. DOTY, P.A.

Attorney at Law

FLORIDA SUPREME COURT CERTIFIED
COUNTY, CIRCUIT AND APPELLATE COURT MEDIATOR
QUALIFIED ARBITRATOR

PLEASE REPLY TO VERO BEACH

KEVIN S. DOTY, ESQ.
411 Holly Road
VERO BEACH, FL 32963
TELEPHONE: 772-234-9990
FACSIMILE: 772-234-9992
EMAIL: Kevindoty@law@aol.com

2300 6th Avenue North
St. Petersburg, FL 33713

November 9, 2016

Ms. Johnna S. Morris
Director of Finance/Secretary-Treasurer
City of Fort Pierce Retirement and Benefit System
City of Fort Pierce
Post Office Box 1480
Fort Pierce, Florida 34954

Re: Robert Creswell

Dear Ms. Morris:

As you will recall, Mr. Creswell's retirement was approved during the August 18, 2016 meeting of the Board of Trustees of the City of Fort Pierce Retirement and Benefit System. Mr. Creswell timely requested a rehearing via letter dated August 30, 2016. That request remains pending. The Board's attorney, James Walker, Esq, suggested that I send this letter in advance of the requested hearing. This letter should not be construed as a waiver of Mr. Creswell's right to a hearing if this letter does not result in the satisfactory resolution of Mr. Creswell's issues.

For at least three very good reasons, my client should prevail in this matter. As mentioned in my August 30, 2016 letter to you, Mr. Creswell is entitled to credit for additional years of service for retirement purposes under Florida law based on his involuntary call to active duty with the United States Army. Mr. Creswell is entitled to credit for the years he spent on active duty and, thus, his retirement benefit needs to be recalculated. The board's reliance on a City of Fort Pierce ordinance to deny Mr. Creswell's credit for the time spent on active duty is misplaced for several reasons. Not only is the City of Fort Pierce Ordinance #13-27 contrary to Florida Statutes, it does not apply to Mr. Creswell or similarly situated employees. And, perhaps, unique to Mr. Creswell, his 2009 appeal to the Civil Service Appeals Board and the 2009

Ms. Johnna S. Morris
November 9, 2016
Page Two

settlement with the City, mandate my client's increased retirement benefits.

Municipal ordinances may not impose restrictions on matters set forth in state statutes. Attorney Walker will confirm that statement. Chapter 115, Florida Statutes, is applicable in this case. Section 115.12, Florida Statutes provides that "...the period of active military services **shall**, for purposes of computation to determine whether such person may be entitled to retirement under the laws of the states be deemed continuous..." (emphasis added). Section 115.14, Florida statutes, makes the above referenced statute applicable to employees such as Mr. Creswell. By its clear reading, Section 115.12 renders the City's Ordinances (13-27) unapplicable and/or unenforceable to my client. That is particularly true of 13-27(4). Simply stated, Section 115.12, Florida Statutes, overrides 13-27.

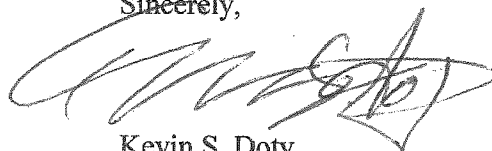
Even if Section 115.12, Florida Statutes did not render 13-27(4) unenforceable, it does not apply to my client. Mr. Creswell did not leave the employ of the City of Fort Pierce when he was on active duty. In fact, his pay was supplemented and he continued to receive insurance benefits and, he continued to pay taxes on his income. Additionally, Mr. Creswell continued to contribute money into the retirement system while he was on active duty. That was not a mistake as alleged. It was in keeping with the settlement recorded with City Manager, David Recor.

During 2008, the City of Fort Pierce threatened Mr. Creswell with a lay-off when he was on active duty. When it was brought to the attention of the City that any such termination of employment would be unlawful, the City relented and agreed to supplement Mr. Creswell and more importantly, reinstate him for retirement purposes. The pertinent documents should be found in Mr. Creswell's personnel file, but for your review, I enclose a copy of my letter to City Attorney, Steven McCain, Esq., dated May 14, 2009, City Manager, David Recor letter dated July 13, 2009, and a memo dated September 29, 2009 from Mazella Smith to David Recor. As a specific condition of dropping his appeal to the Civil Service Appeals Board (appeal of threatened termination). The City agreed to reinstate Mr. Creswell, supplement his pay and preserve/reinstate him for retirement purposes.

For the reasons stated, Mr. Creswell is entitled to retirement credit for the time he spent serving this Country as a soldier in the United States Army. Please re-calculate his retirement pay.

If a hearing on this matter is required, I ask that it be scheduled in January, 2017. Thank you for your attention to this request.

Sincerely,



Kevin S. Doty

KSD/lfh
Enclosures
Cc: James Walker, Esq. (w/enclosures)
Client (w/enclosures)

LAW OFFICES OF

KEVIN S. DOTY, P.A.

Kevin S. Doty, Esq.
Certified Circuit Court Mediator

947 20th Place
Vero Beach, FL 32960

Phone: (772) 299-6301
Facsimile: (772) 299-6310
Email: kevindotylaw@aol.com

May 14, 2009

Via: Facsimile Only: 1-772-466-5492

Steven R. McCain, Esquire
Office of the City Attorney
City Hall, 100 North U.S. 1
P.O. Box 1480
Fort Pierce, Florida 34954-1480

Re: Appeal of Robert B. Creswell to Civil Service Appeals Board

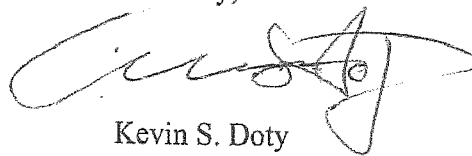
Dear Steven:

I am pleased to advise you that after discussing your most recent letter and the proposed letter from City Manager, Mr. Recor, we have an agreement. My client will dismiss the pending appeal upon completion or fulfillment of the anticipated requirements and upon receipt of his check. This acceptance is conditioned expressly upon our understanding that in addition to the matters contained in the letter from Mr. Recor, the reinstatement of Mr. Creswell upon his return from active duty will result in no break in his employment with the City for purposes of his retirement, advancement and etc.

I am not sure what you want in the way of documentation. I will be pleased to allow you to prepare whatever documentation you would ask Mr. Creswell to sign.

Thank you for your continued cooperation and professional courtesies. I am very glad we were able to resolve this amicably. Thank you for your attention to these matters.

Sincerely,

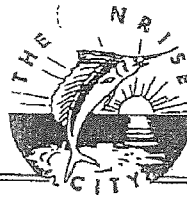


Kevin S. Doty

KSD/lfh

cc: Mr. Robert B. Creswell (via: email only)

CITY OF FORT PIERCE *Florida*



OFFICE OF THE CITY COMMISSION
CITY HALL, 100 NORTH U.S. 1
P.O. BOX 1480
FORT PIERCE, FLORIDA 34954-1480

TEL (772) 460-2200
FAX (772) 489-4142
www.cityoffortpierce.com

July 13, 2009

JUL 17 2009

Mr. Robert Creswell
1402 Nebraska Avenue, Unit 3-B
Fort Pierce, FL 34950

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Re: Reinstatement from Military Service

Dear Mr. Creswell:

This letter serves to confirm the terms of the arrangement between you and the City of Fort Pierce that resolves all issues in your presently pending appeal before the Civil Service Appeals Board.

Initially, please be informed that, if you wish to return to employment with the City upon your termination from active military service, the City will make provisions to reinstate you in a position as nearly comparable as possible in duties to the position you previously held when you left for military duty and at the salary you would have received had you continuously remained employed by the City. Our records indicate that military leave will expire on September 13, 2009. Please provide the Administrative Services Director with written notice of your intent to return so that we can start the process of searching for such a position.

Additionally, the City will supplement your military pay for the difference, if any, between the salary you were receiving from the City and your military pay while you are on active duty, retroactive to the last payment you received from the City; provided, however, that depending upon the amount of such difference, such supplement may be subject to the approval of the City Commission. Accordingly, if you have not already done so, please provide us with verification of your military pay from the date you left for military duty.

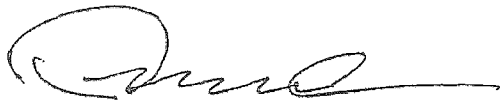
COPY

Lastly, since the arrangement summarized herein resolves the issues in your referenced presently pending appeal before the Civil Service Appeals Board, you will withdraw or dismiss such appeal by providing written notice thereof to the Civil Service Appeals Board through the Administrative Services Director with a copy of such notice being sent to the City Attorney.

Should you have any questions or concerns, please do not hesitate to contact my office at 772-460-2200 ext. 300.

Thank you for your commitment to our country and the City of Fort Pierce.

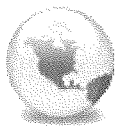
Sincerely,



David L. Recor, ICMA-CM
City Manager

DLR:jdr

c: Mazella D. Smith, Administrative Services Director
Harold Hopkins, Solid Waste Director
Robert V. Schwerer, City Attorney
Spencer Gilbert, Esquire
Steve DiPalma, CSAB Chairman
Kevin S. Doty, Esquire, Attorney for R. Creswell



Robert Creswell v. City Retirement System

Jim Walker

to:

'Kevin S. Doty'

09/12/2016 03:26 PM

Hide Details

From: "Jim Walker" <jimw@jimwalkerlaw.com>

To: "'Kevin S. Doty'" <kevindotylaw@aol.com>

Ken, you will recall filing a Petition for Rehearing, w/request that the matter be brought up for rehearing at the Board's November meeting.

That's fine. But it would be my preference that the Board not be confronted with your client's issues unless there is a bona fide dispute requiring it's involvement. Like you and me, the Board members honor our military veterans, respect their service, and would prefer not to be placed in the unpleasant position of denying benefit entitlement, given reasonable alternative. Staff, I might add, feels the same way. With that in mind, you are strongly encouraged to spell out your client's legal position in written form, if there is believed sound basis for making such argument. Please understand that reasonable doubts are often resolved in favor of the retirant, and staff would welcome an opportunity to revisit it's thinking on the legal basis for its position, should there be fair grounds to do so.

Your Petition is understood to involve entitlement to buy-back of military time during a period Mr. Creswell was temporarily recalled to active military duty. My own research causes me to understand that staff's position in denying your client's request to buy-back military credits pursuant to city code section 13-27 is sound. But I wouldn't mind loosing this argument. So if you have good reason to think otherwise, please let me know. My own legal duty is to the retirement system as a whole in assuring that it is administered in the manner required by law. Litigation for the sake of protecting a position that is unsound is not my job.

Under Section 13-27(4) the returning employee is permitted to claim extra credit for military service if "... *the same period of service has not been used to obtain or increase a benefit from another retirement program.*" Mr. Creswell is understood to admit that his service time was credited toward an increase in his military pension. If so, the City's application of the provision in question is backed up by the Uniformed Services and Reemployment Rights Act of 1994 (USERRA). See 5 USC sec. 8332(c)(2) (A). See also, generally 20 CFR 1002.259. I am not aware of any reported decisions to the contrary. But, again, if you have any contrary authority, whether statutory or judicial, which will mandate a different result, do not hesitate in acquainting me with it. Again, there is no desire to take a position adverse to our retirant for the mere sake of being adversarial. Thanking you for your attention, while looking forward to hearing from you, I am and shall ever continue to remain, as always, Most Cordially and Respectfully

Yours, James T. Walker, Esq. (772-461-2310)

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