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August 2, 2017

Thomas J. Perona
Chair, Fort Pierce Retirement Board
City of Fort Pierce
100 North U.S. Highway One
Fort Pierce, FL 34950

RE: **Robert Creswell**

Dear Tom:

There is received an item of correspondence dated 6/22/17, attached, from counsel on behalf of Robert Creswell, retirant. It will be recalled that Mr. Creswell sought credit for several years of military service, to be included in his city pension. His claim was denied. He now retains new counsel and threatens suit.

Without agreeing with or conceding to assertion that he is in fact entitled to such credit, the Board does possess discretion under Rule 12(b) to reconsider the matter so as to reexamine the propriety of its decision. Current legal counsel does succeed, one thinks, in bringing the legal issues into somewhat sharper focus and there are thought to be grounds for believing that invitation to the parties for further briefing and argument may be helpful to the Board in determining either that the original decision was completely sound, or that there was error, justifying a different outcome. See ***Seltzer v. Office of Personnel Management***, 833 F.2d 975 (Fed. Cir 2987); ***Daily v. Pub. School Retirement System of Missouri***, 707 F.Supp 1087 (E.D. Mo. 1989); ***Cantwell, Jr. v. County of San Mateo***, 631 F.2d 631 (Ninth Cir 1980); ***Wrigglesworth v. Brumbaugh***, 121 F.Supp.2d 1126 (W.D. MI 2000); ***Almeida v. Retirement Board of Rhode Island Employees Retirement System***, 116 F.Supp2d 269 (RI D. 2000). As a fiduciary body, the Board sets it's bar to reconsideration low, so as to maintain confidence in a scrupulous adherence to the letter of the law.

With this in mind, it is recommended that the Board agree to undertake a reconsideration of the Petition of Robert Creswell, as previously denied at the Board's hearing of 3/16/17, that reconsideration be set for approximately 60 days thereafter, at the Board's meeting of 10/19/17, that counsel for the Petitioner and City be given due notice of the Board's intent to submit the matter to reconsideration and, further, that counsel be directed to supply legal memoranda upon the following schedule: Mr. Creswell, within 20 days; response by the City within 20 days thereafter; and reply by Creswell within 10 days following. With these memoranda in hand, and giving both sides opportunity to reargue and to present any further evidence that either might think proper, the Board would then make a final decision to either affirm, modify or recede from its earlier decision. Thanking you for your attention, I am and continue to remain, as always,

Most Cordially and Respectfully Yours,

JAMES T. WALKER, ESQUIRE
JTW/la

Attachment

ROONEY & ROONEY, P.A.

Personal Injury | Business & Contracts | Divorce & Paternity | International Law

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June 22, 2017

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Re: Robert Creswell
Retirement Credit for Intervening Military Service

Dear Mr. Walker:

Our office has the pleasure of representing Robert B. Creswell regarding his dispute with the City of Fort Pierce over his retirement pay. As discussed during our telephone conversation, this letter will set forth our client's position, and it is our hope that it will convince you and your client that Mr. Creswell is entitled to receive credit under the Fort Pierce Retirement and Benefit System for his time spent on active duty for the United States Army.

BACKGROUND

The City of Fort Pierce (the "City") employed Mr. Creswell from November 1, 1994, until May 1, 2004, and again from May 1, 2016, until June 1, 2016. He retired from his employment with the City on June 1, 2016. Our client also served as a United States Army reservist from 1978 until 1982, and again from 1988 until 2006, when he retired from the Army Reserve. As of 2006, Mr. Creswell was and is a retired United States Army reservist. While working for the City in 2008, Mr. Creswell received military orders from the United States Army dated September 4, 2008, commanding him to report for active duty on September 14, 2008, as a Retiree Recall. While on active duty, Plaintiff made all contributions towards his Fort Pierce Retirement.

Mr. Creswell's active duty status was terminated on September 13, 2011, and he began working for the City again on September 27, 2011. It was not until September 3, 2013, that the City informed Plaintiff that the contributions he made towards his Fort Pierce Retirement while on active duty were being reimbursed to him in accordance with Section 13-27 of the Fort Pierce Code of Ordinances (the "Code"). Section 13-27 of the Code does not permit Mr. Creswell to receive credit for time served on active duty under both the Fort Pierce Retirement and military retirement. The City, however, did not actually "reimburse" our client until May of 2015 when it added the contribution amount to Mr. Creswell's paycheck. Our client immediately returned the contribution amount to the City with a letter stating that the City should place the funds in the appropriate retirement account. The City rejected our client's payment and informed him that he has the right to request a hearing before the Fort Pierce Retirement Board, which our client did. After a hearing, the Fort Pierce Retirement Board determined that our client could not receive credit under the Fort Pierce Retirement System for his three-year tour of duty because: (a) he did not make an application within one year as required by Section 13-27(1) of the Code; and (b) our client is not permitted to receive credit for time served on active duty under both the Fort Pierce Retirement and military retirement as set forth in Section 13-27(4) of the Code.

MR. CRESWELL'S USERRA CLAIM

The City's and the Fort Pierce Retirement Board's position are in direct contravention of the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§4301-4333 ("USERRA"). USERRA supersedes any "State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided" under USERRA, "including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit." 38 U.S.C. § 4302. One such right or benefit provided under USERRA is an employee, upon being reemployed after military service, "shall ...be deemed to constitute service with the employer or employers maintaining the [pension] plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan." 38 U.S.C. § 4318(a)(2)(B). Any person reemployed under USERAA "shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services." 38 U.S.C. § 4318(a)(2)(A).

Here, the City is refusing to constitute Mr. Creswell's time spent on active duty as "service with" the City for the purpose of determining the accrual of benefits under the Fort Pierce Retirement plan. This is a clear violation of USERRA. The Code cannot serve as a basis to deny Mr. Creswell rights or benefits afforded under USERRA because the Code has been superseded/preempted by USERRA. 38 U.S.C. § 4302; *see also Wriggelsworth v. Brumbaugh,* 129

F. Supp. 2d 1106 (W.D. Mich. 2001). 5 U.S.C. § 8332(c)(2), which codifies a rule prohibiting "double-dipping," also cannot support the City's position because 5 U.S.C. § 8332(c)(2) only applies to the United States Civil Service Retirement System, not the Fort Pierce Retirement System.

Further, since these issues will likely be litigated if this matter goes to court, the failure to appeal the Retirement Board's decision cannot serve as a basis to deny our client's claim. First, there is no requirement that our client exhaust his administrative remedies before filing a claim in Federal Court under USERRA. *See, e.g., Carter v. JPMorgan Chase Bank, N.A.*, Case No. 15 C 2256 (N.D. Ill. Aug. 20, 2015); *Tartt v. Northwest Community Hospital*, No. 00-C-7960, 2004 WL 2254041, *5 (N.D. Ill. Oct. 5, 2004); 38 U.S.C. § 4323(a)(3(A) ("A person may commence an action for relief with respect to a complaint against . . . a private employer if the person has chosen not to apply to the Secretary [of Labor] for assistance."); 38 U.S.C. § 4323(b)(3) ("In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action."). Second, the Retirement Board had no jurisdiction to determine any rights under USERRA, which bars any potential defenses for failure to exhaust administrative remedies or res judicata. *See* 38 U.S.C. § 4323(b)(3); *see also, Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995).

Please let me know if in light of this information, the City will reconsider its decision and credit our client's military service from 2008 until 2011 towards his City retirement. The failure to do so will result in us filing the enclosed complaint in the United States District Court, Southern District of Florida. Please reply by **July 5, 2017**, with the City's position; otherwise, we will file the enclosed complaint no later than 5:00 pm that same day.

I invite you to contact me with any questions or concerns.

Sincerely,

D. Johnathan Rhodeback
DJR/jl

Encl.: See above

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ROBERT B. CRESWELL, CASE NO.

Plaintiff,

v.

CITY OF FORT PIERCE, FLORIDA,

Defendant.
_____/

PLAINTIFF'S COMPLAINT AND JURY DEMAND

Plaintiff, ROBERT B. CRESWELL (the "Plaintiff"), by and through his undersigned attorneys, hereby files this Complaint against the Defendant, CITY OF FORT PIERCE, FLORIDA (the "Defendant").

INTRODUCTION

1. Plaintiff brings this action alleging violations of the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§4301-4333 ("USERRA"). Plaintiff, a retired Army reservist, was employed by Defendant when he was recalled to active duty on a Retiree Recall tour for three years. While Plaintiff was on his three-(3)-year tour of duty, he made all pension contributions under the Defendant's retirement plan.

2. Plaintiff returned to work for Defendant after finishing his tour of duty. Approximately four years later, Defendant returned Plaintiff's pension contribution payments and refused to credit Plaintiff's military service towards Defendant's retirement in violation of USERRA.

JURISDICTION AND VENUE

3. This complaint arises under USERRA. The jurisdiction of this Court is founded on federal question jurisdiction, 28 U.S.C. § 1331, as conferred by 38 U.S.C. § 4323(b)(3).

4. Venue is proper in this District under 28 U.S.C. § 1391, as Defendant maintains its principal place of business in this District and the events giving rise to this Complaint occurred in this District.

PARTIES

5. Plaintiff, ROBERT B. CRESWELL, is a natural person, is a resident of the State of Florida, and at all times material hereto, resided in St. Lucie County, Florida.

6. Defendant, CITY OF FORT PIERCE, FLORIDA, is a Florida municipal corporation located in St. Lucie County, Florida.

FACTUAL ALLEGATIONS

7. Plaintiff joined the United States Army in 1975, and served three (3) years and four (4) months of active duty.

8. Plaintiff thereafter served as a United States Army reservist from 1978 until 1982, and again from 1988 until 2006, when he retired from the Army Reserve.

9. As of 2006, Plaintiff was and is a retired United States Army reservist.

10. Plaintiff was employed by Defendant from November 1, 1994, until May 1, 2004, and again from May 1, 2006, until June 1, 2016, when he retired.

11. From 2012 until he retired in 2016, Plaintiff served as a Solid Waste Manager for Defendant.

12. While employed by Defendant, Plaintiff contributed to the City of Fort Pierce Retirement and Benefit System established under Article II, Chapter 13 of the Code of Ordinances for the City of Fort Pierce (the "Fort Pierce Pension Plan").

13. The Fort Pierce Pension Plan is a defined benefit plan covering all of Defendant's employees.

14. Benefits vest after five (5) years of service for employees hired by Defendant prior to October 1, 2012, and ten (10) years for those hired on or after October 1, 2012.

15. Plaintiff was hired by Defendant prior to October 1, 2012, and provided more than five (5) years of service; therefore, Plaintiff's benefits have vested under the Fort Pierce Pension Plan.

16. Upon retirement, payout to members under the Fort Pierce Pension Plan is calculated by multiplying the individual member's total service by a certain percentage of the member's salary.

17. Consequently, Plaintiff's retirement pay under the Fort Pierce Pension Plan is largely dependent upon Plaintiff's creditable service.

18. Plaintiff received Military Orders from the Army dated September 4, 2008, commanding him to report for Active Duty on September 14, 2008, as a Retiree Recall.

19. At about the same time, Defendant informed Plaintiff that he was being laid off because there were no funds available for his position.

20. Plaintiff contested Defendant's decision through the Civil Service Appeals Board.

21. During the appeal process, Defendant retracted its position in a letter dated December 3, 2008, wherein the City Manager stated that Plaintiff was permitted to return to employment with Defendant upon termination from active military status, and Defendant would

reinstate Plaintiff in a position with a similar salary and duties as the position he previously held when he left for military duty.

22. Plaintiff was on Active Duty until September 13, 2011, serving a total of three (3) years.

23. While Plaintiff was on his three-(3)-year tour of duty, he made all pension contributions towards the Fort Pierce Pension Plan.

24. Upon termination from active military status, Plaintiff attempted to immediately return to work with Defendant.

25. Since every employee of Defendant was mandated to use 72 hours of furlough as a budget reduction strategy for the year 2011, Plaintiff was on furlough from September 14, 2011, through September 26, 2011.

26. Plaintiff physically returned to work with Defendant on September 27, 2011.

27. On September 3, 2013, Defendant informed Plaintiff via memorandum that the contributions he made towards the Fort Pierce Pension Plan were being reimbursed to him as he could not receive retirement credit with Defendant and the military for the same respective time period under Section 13-27 of the Code.

28. Defendant eventually "reimbursed" Plaintiff in May of 2015, by adding the reimbursement amount to Plaintiff's paycheck.

29. Plaintiff then issued a check for the reimbursement amount and sent it to Defendant with a letter stating that the amount should be applied to the Fort Pierce Pension Plan.

30. In a response letter dated June 1, 2015, Defendant reiterated that Plaintiff was not permitted to receive credit for time served on Active Duty under both the Fort Pierce Pension Plan and the military retirement plan in accordance with Section 13-27 of the Code.

31. Plaintiff subsequently requested a hearing with the Fort Pierce Retirement Board.

32. The Fort Pierce Retirement Board concluded, after a hearing, that Plaintiff was not entitled to receive credit for his military service under the Fort Pierce Pension Plan because: (a) Plaintiff failed to apply within one year following his release from Active Duty (Section 13-27(1)); and (b) the same period of service had already been used to obtain or increase benefits through his military retirement program (Section 13-27(4)).

33. Plaintiff has retained the services of the undersigned attorneys and has agreed to pay a reasonable rate for legal services.

COUNT I
VIOLATIONS OF USERRA

34. Plaintiff hereby repeats and re-alleges paragraphs 1 through 33 above as if fully set forth herein.

35. USERRA was enacted to: (a) encourage noncareer service in the military by "eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;" and (b) to prohibit discrimination against persons because of their service in the military. 38 U.S.C. § 4301(a)(1) and (3).

36. It supersedes any "State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided" under USERRA, "including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit." 38 U.S.C. § 4302.

37. At all relevant times, Plaintiff was an "employee" as defined under USERRA. 38 U.S.C. § 4303(3).

38. At all relevant times, Defendant was an "employer" as defined under USERRA. 38 U.S.C. § 4303(4).

39. A person who is reemployed under USERRA "is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed." 38 U.S.C. § 4316(a).

40. The term "benefit", "benefit of employment", or "rights and benefits" means "the terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice ***and includes rights and benefits under a pension plan***, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment." [Emphasis added]. 38 U.S.C. § 4303(2).

41. 38 U.S.C. § 4318 governs Plaintiff's right to pension benefits. *See* 38 U.S.C. § 4318(a)(1)(A).

42. Any person reemployed under USERAA "shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services." 38 U.S.C. § 4318(a)(2)(A).

43. Such military service "shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of

determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan." 38 U.S.C. § 4318(a)(2)(B).

44. An employer is liable to an employee pension benefit plan for such military service for funding any obligation of the plan and "shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service." 38 U.S.C. § 4318(b)(1).

45. Defendant has violated USERRA by refusing to credit Plaintiff's military service for the purpose of determining the accrual of benefits under the Fort Pierce Pension Plan.

46. Instead, Defendant cites local ordinances (Sections 13-27) in support of its position to deny Plaintiff the accrual of benefits under the Fort Pierce Pension Plan.

47. USERRA, however, supersedes said ordinances and therefore, they cannot serve as a basis to deny Plaintiff rights under USERRA. 38 U.S.C. § 4302.

48. Defendant's failure to comply with USERRA was willful.

49. Plaintiff has been damaged by Defendant's conduct.

50. Plaintiff is not obligated to pay any fees or court costs. 38 U.S.C. § 4323(h)(1).

51. The Court has discretion to award Plaintiff reasonable attorney fees, expert witness fees, and other litigation expenses in connection with this lawsuit. 38 U.S.C. § 4323(h)(2).

WHEREFORE, Plaintiff respectfully requests that the Court issue a judgment:

a) Declaring that the acts and practices complained of herein are unlawful and are in violation of USERRA;

b) Requiring that Defendant fully comply with the provisions of USERRA by providing Plaintiff all employment benefits denied as a result of Defendant's unlawful acts and practices described herein;

c) Enjoining Defendant from taking any actions against Plaintiff that fail to comply with the provisions of USERRA;

d) Awarding Plaintiff fees and expenses, including attorneys' fees pursuant to 38 U.S.C. § 4323(h).

e) Awarding Plaintiff prejudgment interest on the amount of lost wages or employment benefits due;

f) Ordering that Defendant pay liquidated damages in an amount equal to the amount of lost wages, lost compensation and other lost benefits due to Defendant's willful violations of USERRA; and

g) Granting such other and further relief as may be just and proper and which Plaintiff may be entitled to under all applicable laws.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all issues so triable as a matter of law.

Respectfully submitted,

/s/ D. John Rhodeback
D. John Rhodeback
FBN: 87081
ROONEY & ROONEY, P.A.
1517 20th Street
Vero Beach, Florida 32960
Telephone: (772) 778-5400
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Attorneys@RooneyAndRooneyLaw.com
Attorney for the Plaintiff

Wriggelsworth v. Brumbaugh, 129 F. Supp. 2d 1106 (W.D. Mich. 2001)

U.S. District Court for the Western District of Michigan - 129 F. Supp. 2d 1106 (W.D. Mich. 2001)
February 1, 2001

129 F. Supp. 2d 1106 (2001)

Gene WRIGGELSWORTH, in his capacity as Ingham County Sheriff, and Ingham County, Plaintiffs/Counter-Defendants

v.

Ellis BRUMBAUGH, Defendant/Cross and Counter-Plaintiff and Capitol City Lodge No. 141 of the Fraternal Order of Police, a labor association, Defendant/Cross-Defendant.

No. 5:00-CV-15.

United States District Court, W.D. Michigan, Southern Division.

February 1, 2001.

*1107 John R. McGlinchey, Cohl, Stoker & Toskey, PC, Richard D. McNulty, Cohl, Stoker & Toskey, PC, Lansing, MI, for Gene Wriggelsworth, in his capacity as Ingham County Sheriff, Ingham, County of, a municipal corporation, plaintiffs.

Thomas A. Baird, White, Przybylowicz, Schneider & Baird, PC, Okemos, MI, R. David Wilson, Wilson, Lawler & Lett, Lansing, MI, for Ellis Brumbaugh, an individual, Capitol City Capitol City Lodge No. 141 of the Fraternal Order of Police, a labor association, defendants.

OPINION

ENSLEN, Chief Judge.

This matter is before the Court in light of its Opinion and Partial Judgment of November 30, 2000. Said Opinion and Partial Judgment granted summary judgment in favor of Defendant/Counter-Plaintiff Ellis Brumbaugh and determined that issues of damages would be determined after receipt of briefing from

interested parties. The Court has now received the scheduled briefing on the issue of damages and determines that summary judgment may be granted on the various issues of damages because there are no genuine issues of material fact respecting damages.

*1108 *Factual Background*

Upon review of the briefing, it is apparent that there is essential agreement as to the facts of this matter. The pertinent facts respecting damages are as follows: Ellis Brumbaugh made application for reemployment under the Uniformed Services Employment and Re-employment Rights Act of 1994 (hereafter "USERRA"), codified at 38 U.S.C. §§ 4301-33, for his former employment as a police detective to begin on October 1, 1999. At the time of his initial application for re-employment, Sheriff Gene Wriggelsworth was of the belief that Brumbaugh was entitled to reemployment under USERRA. However, after discussions with the affected labor union (Capital City Lodge No. 141 of the Fraternal Order of Police) (hereafter "the Union"), Wriggelsworth learned that the Union opposed the re-hiring and would file a grievance as to the re-hiring because of its effects on other Union members. As illustrated in the previous briefing, the Union's legal position was supported by some case law and policy arguments. Faced with this situation, the Sheriff and the County chose to resolve the dispute by filing the instant declaratory action in January 2000 and by hiring Brumbaugh as an entry-level officer, beginning on February 24, 2000, pending resolution of the declaratory action.

Detective pay, at Brumbaugh's seniority, for the year 1999 totals $44,639. For the period of October 1, 1999 to December 31, 1999, the pay totals $11,159.75.

Detective pay, at Brumbaugh's seniority, for the year 2000 totals $45,978.00. During this year, Brumbaugh earned $23,416.00 at his entry-level deputy position. Given these figures, his net loss for the year 2000 equals $22,562.00.

Detective pay, at Brumbaugh's seniority, for the year 2001 equals $47,357.00. Entry-level deputy pay for 2001 equals $28,037. This amounts to a difference of $19,320 per year or $1,610 per month.

Given Brumbaugh's long service, he would also be entitled to longevity bonuses as to his detective position in December 1999 and December 2000 under the applicable Collective Bargaining Agreements. (*See* Brumbaugh's Memorandum of Law, Attachments 1 and 2.) The December 1999 bonus is computed as follows: $18,000 (base salary figure for those making more than $18,000 per annum), multiplied by 9 percent (the applicable seniority rate) and then divided by four (to reflect a proration for only having worked one-quarter of the year). This results in a 1999 longevity bonus of $405. The 2000 bonus, computed in the same way but without the proration, is $1,620. The total bonuses equal $2,025. A longevity bonus for the year 2001 is not due until December 2001.

Given the above figures, Ellis Brumbaugh's net loss in salary and bonuses (less wages earned) for the period of October 1, 1999 until January 31, 2001 amounts to $37,356.75.

On September 24, 1999, just prior to the anticipated October 1, 1999 employment, Brumbaugh purchased dress clothing intended for use in the detective job from the Men's Wearhouse costing

$1,329.09. (Brumbaugh Response, Exhibits 5 and 6.) This was done in reliance on the Collective Bargaining Agreement clothing reimbursement policy, which at the time allowed detectives reimbursement for business clothing in an amount not to exceed $525 per year. (Brumbaugh Memorandum of Law, Attachment 1 at 44.)

In October 1999, Ingham County's attorney, Richard McNulty, sought an opinion from the Municipal Employees' Retirement System of Michigan regarding the effect of re-employment of Ellis Brumbaugh as to his pension rights as an County employee. The Director responded by giving an opinion that Brumbaugh would not be entitled to pension credit for his military service because, among other reasons, the MERS Plan, Section 9(4), and the pertinent state statutes explicitly provide that members of the military shall not receive credit for periods of military service for which the members are eligible for benefits from another retirement system. *1109 (Wriggelsworth Memorandum of Law, Exhibit D.)

Legal Analysis

To enforce the terms of USERRA, Congress has specifically provided the following remedies:

> (d) Remedies. (1) In any action under this section, the court may award relief as follows:
>
> (A) The court may require the employer to comply with the provisions of this chapter.
>
> (B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
>
> (C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.
>
> (2) (A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter. (2) (B) ....
>
> (3) A State shall be subject to the same remedies, including prejudgment interest, as may be

> imposed upon any private employer under this section.
>
> (e) Equity powers. The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.

38 U.S.C. § 4323(d)-(e). *See, e.g., Groom v. Department of Army,* 82 M.S.P.R. 221, 224 (M.S.P.B.1999) (holding that USERRA authorized remedies including reinstatement with like status and backpay).

Given the availability of such remedies and the Court's prior ruling concerning summary judgment (*Wrigglesworth v. Brumbaugh,* 121 F. Supp. 2d 1126 (W.D.Mich.2000)), the parties have expressed some agreements and disagreements about the appropriate remedies in this suit.

Reinstatement

Plaintiffs and Defendant agree that reinstatement is an appropriate equitable remedy. Brumbaugh has also requested that incident to reinstatement the employer be made to credit him sick leave time accrued prior to his military service, sick leave and vacation leave that would have accrued since October 1, 1999 had he been properly re-employed, and seniority of approximately 29.5 years. There are no objections to these requests, which are consistent with the statute and case law. Accordingly, Brumbaugh will be immediately reinstated with said rights and benefits of employment.

Backpay

Plaintiffs and Defendant also agree that backpay (lost compensation) is an appropriate remedy, although their computations of backpay differ slightly. The Court's analysis of backpay, taken from the documents filed by the parties, computes lost compensation at $37,356.75. Thus, an award of backpay for lost compensation between October 1, 1999 and January 31, 2001 will be order in that amount.

Costs and Attorney Fees

Brumbaugh has also requested an award of costs and reasonable attorney fees. Title 38 United States Code Section 4323 authorizes a prevailing veteran who has hired private counsel to obtain reasonable attorney fees and litigation expenses. Brumbaugh is also entitled to an award of costs pursuant to 28 U.S.C. § 1920. Brumbaugh claims $1,143.69 in costs and $32,736.50 in attorney fees and has filed documentation supporting these figures. The Plaintiffs have not objected to these figures. Upon review of the matter, the Court determines that the amounts requested are reasonable and that they were actually

and necessarily expended in this litigation. Accordingly, the Court will approve an award of costs and attorney fees *1110 in favor of Defendant Brumbaugh and against Plaintiffs in the total amount of $33,880.19.[1]

Clothing Allowance

Plaintiffs and Defendant Brumbaugh disagree as to his entitlement to a clothing allowance. Plaintiffs' argument is that since Brumbaugh has received deputy uniforms and a cleaning allowance he should not also receive a clothing allowance for detectives (which he did not actually need during that time given his assignment). Plaintiffs' argument frankly ignores the pertinent statutory language. Under USERRA, a returning veteran is entitled to not only pay, seniority and employee benefits, but also all of the "rights and benefits" of the employment. These terms are defined at 38 U.S.C. § 4303(2) as follows:

> (2) The term "benefit", "benefit of employment", or "rights and benefits" means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

38 U.S.C. § 4303(2).

Thus, it is clear from this language that the "rights and benefits" of employment are not limited to wages, health and pension benefits, but includes all other rights which the employer by contract provides for eligible employees. Under the case law interpreting this section, the benefits of employment are to be viewed expansively. *See Yates v. Merit Systems Protection Board,* 145 F.3d 1480, 1484 (Fed.Cir.1998) (holding that "benefits" were to be construed expansively and included employer training and evaluation); *Petersen v. Dept. of Interior,* 71 M.S.P.R. 227 (M.S.P.B.1996) (holding that law enforcement commission was a "benefit of employment"); *Fernandez v. Department of Army,* 84 M.S.P.R. 550, 553 (M.S.P.B. 1999) (commenting that it was likely that a living quarters allowance was a "benefit of employment"). Construing this language liberally, as the Court is required to do under the Supreme Court's decisions in *King v. St. Vincent's Hospital,* 502 U.S. 215, 221 n. 9, 112 S. Ct. 570, 116 L. Ed. 2d 578 (1991) and *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284, 66 S. Ct. 1105, 90 L. Ed. 1230 (1946), the Court determines that the clothing allowance of $525 is a "right and benefit" of employment and that Brumbaugh became entitled to receive this amount from the County beginning on October 1, 1999.

Liquidated Damages

Plaintiffs and Defendant Brumbaugh also disagree as to Brumbaugh's entitlement to liquidated damages equaling the amount of his actual damages. Brumbaugh argues that since the Plaintiff Wriggelsworth initially believed that he was required to rehire Brumbaugh as a detective the subsequent failure to do so warrants liquidated damages for a "willful" violation. Plaintiffs contend that this would be improper given that there was some legal support for the action taken, given that a declaratory action was promptly filed to obtain a judicial ruling, and given that Brumbaugh was hired at an entry-level position in the interim.

Neither the parties nor this Court have found any case precedent interpreting the liquidated damages clause of USERRA. Nevertheless, a few observations about that clause are in order. The clause employs the term "willful," which term became a term of art in the late 1980s and *1111 early 1990s due to three United States Supreme Court decisions which interpreted the term "willful" in other federal statutes imposing liquidated damages. In *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125-30 and n. 22, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985), the Supreme Court interpreted the term "willful" in the Age Discrimination in Employment Act as meaning that an employer engaged in conduct known to be prohibited or engaged in conduct with reckless disregard of its prohibition. The Supreme Court also made clear that where the employer's conduct was reasonable and in good faith that liquidated damages were not warranted. Similar holdings were made by the Supreme Court in *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133-135, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988) as to the Fair Labor Standards Act and in *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 616-17, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993) as to the Age Discrimination in Employment Act. These same standards have been utilized by the Sixth Circuit Court of Appeals as to federal statutes containing the term "willful." *See, e.g., Dole v. Elliott Travel & Tours, Inc.,* 942 F.2d 962, 967 (6th Cir. 1991).

Since USERRA was enacted in 1994, it was enacted at a time when Congress was aware of the Supreme Court's interpretation of the term "willful" in other federal statutes. The selection of the term in USERRA's liquidated damages clause without reference to a different standard for the award of liquidated damages shows an intent by Congress to impose a similar standard as to USERRA cases. In light of such standard, it is clear that Brumbaugh is not entitled to an award of liquidated damages. The Plaintiffs were, in this case, caught between divergent and reasonable interpretations of USERRA proffered by the Union and Brumbaugh. The selection of one those interpretations, while employing Brumbaugh at a lesser position and bringing a declaratory action to obtain a judicial answer, demonstrates good faith and not willful conduct. As such, the Court determines that Brumbaugh is not entitled to liquidated damages.

Pension Benefits

Finally, there is disagreement concerning whether Brumbaugh should receive credit for the time of his military service (some 16 years) toward his civilian pension. The Sheriff, the County and the pension administrator take the position that Brumbaugh is not entitled to "double dip" relating to his pension rights because of state statutory prohibitions and because of the pension plan language prohibiting "double dipping." Brumbaugh takes the position that USERRA explicitly requires pension credit for

military service and that contrary provisions of state law and the pension plan are preempted.

As noted by Brumbaugh, two provisions of USERRA are pertinent to the dispute concerning the pension. Title 38 U.S.C. § 4318 provides, in pertinent part, that:

....

> (a) (2) (A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.
>
> (B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan. (b) (1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a) (2) (B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a) (2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent *1112 the allocation occurs for other employees during the period of service.....

38 U.S.C. § 4318.

Furthermore, USERRA expressly contemplates that its provisions preempt inconsistent state laws and prevent employers and unions from engaging in bargaining which discriminates against returning veterans. Title 38 U.S.C. § 4302 provides in pertinent part:

> (b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

38 U.S.C. § 4302(b).

The language of Section 4302 broadens the protections available under the predecessor statutes and case precedents. Prior to enactment of USERRA, federal courts interpreted the predecessor statutes as preempting any state law and collective bargaining agreements which would lessen the protections available under the statutes. *See Jennings v. Illinois Office of Education,* 589 F.2d 935, 944 (7th Cir. 1979); *Peel v. Florida Dept. of Transportation,* 600 F.2d 1070 (5th Cir. 1979), *affirming* 443 F. Supp. 451

(N.D.Fla.1977); *Waltermyer v. Aluminum Co. of America,* 804 F.2d 821 (3d Cir.1986); *Rudisill v. Chesapeake & Ohio Ry. Co.,* 167 F.2d 175, 178-9 (4th Cir.1948); *Fitz v. Board of Educ. of Port Huron Area Schools,* 662 F. Supp. 1011, 1014-1015 (E.D.Mich.1985) (citing *Peel*).

In enacting USERRA, Congress intended a *uniform* set of protections available to returning veterans in the several states and expressly forbade modification of these protections by either state law, benefit plans or contractual bargaining because it would frustrate the statutory purpose. Preemption of state law is intended in precisely those kind of circumstances. *See Jones v. Rath Packing Co.,* 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977) (holding that a state law imposing different labeling standards for bacon and flour was preempted because it would frustrate the Congressional purpose of providing direct comparisons for consumers); *City of Burbank v. Lockheed Terminal, Inc.,* 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (1973) (holding state statute imposing airport curfew preempted because it inhibited Congress' purpose in fostering flexible, air traffic flow). Congressional intent is the "touchstone" for making such preemption determinations. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

In this case, because of the clear expression of Congress that inconsistent state law, contracts and benefit plans be preempted, the Court determines that the state law and plan provisions referenced by Plaintiffs are preempted by USERRA. The Court also determines that under USERRA Brumbaugh is entitled to service credit as to his pension for the period in which he was engaged in active military service following his departure from the employment and that the employer shall make allocations and fund Brumbaugh's pension benefits for the period of his active military service.

CONCLUSION

Accordingly, a Final Judgment and Permanent Injunction shall enter in favor of Defendant/Counter-Plaintiff Ellis Brumbaugh and against Plaintiffs. Said Judgment shall award only reinstatement, back pay, costs and attorney fees, clothing allowance and pension benefits as more particularly described in this Opinion. Said awards shall bear interest as permitted under Federal law.

NOTES

[1] Ordinarily costs are billed post-judgment in accordance with Local Rule 54 and attorney fees are assessed post-judgment in accordance with Federal Rule of Civil Procedure 54. However, in this case, there is no reason to delay entry of judgment as to these amounts given that there is apparent agreement as to these amounts.

Document:Seltzer v. Office of Personnel Management, 833 F.2d 975

Seltzer v. Office of Personnel Management, 833 F.2d 975

United States Court of Appeals for the Federal Circuit

November 16, 1987, Decided

No. 87-3257

Reporter

833 F.2d 975 * | 1987 U.S. App. LEXIS 684 **

Richard L. Seltzer, Petitioner, v. Office of Personnel Management, Respondent

Prior History: [**1] Appealed from Merit Systems Protection Board.

Core Terms

retirement, double, civil service, days, calendar, military service, credited, civil service retirement, civilian, military, annuity

Counsel: Michael A. Nardolilli, Spriggs, Bode & Hollingsworth; for Petitioner.

Hillary A. Stern, Commercial Litigation Branch, Department of Justice, of Washington, District of Columbia, argued for Respondent. With him on the brief were Richard K. Willard, Assistant Attorney General, David M. Cohen, Director and Robert A. Reutershan, Assistant Director. Also on the brief were Hugh Hewitt, General Counsel, Thomas F. Moyer, Assistant General Counsel and Murray M. Meeker, Office of Personnel Management; of Counsel.

Judges: Friedman, Circuit Judge, Miller, Senior Circuit Judge, and Nies, Circuit Judge.

Opinion by: MILLER

Opinion

[*975] MILLER, Senior Circuit Judge.

This appeal is from a decision of the Merit Systems Protection Board (Board), 32 M.S.P.R. 306, Docket No. CH08318610427, affirming the Office of Personnel Management's (OPM's) denial of civil service annuity credit for time spent on active duty as a reserve officer in the U.S. Army while concurrently earning credit as a federal civilian employee. We affirm.

BACKGROUND

Petitioner earned civil service annuity credit for time spent as a federal civilian employee [**2] from January 30, 1964, until his retirement on August 30, 1974. During this time, while on leave which was credited toward his civil service retirement, he spent several active duty training periods as a reserve officer in the U.S. Army for which he seeks an additional 71 days of civil service annuity credit. OPM denied his request, citing the Federal Personnel **[*976]** Manual (FPM) Supplement 831-1, Subchapter S3-5(d):

> *Double credit not permitted*. Under no circumstances is credit allowed under the law for both civilian and military service covering the same period of time. The period of creditable service cannot exceed the actual calendar time.

The board affirmed OPM's decision and, after full consideration, denied a petition for review. Appeal followed.

OPINION

Petitioner argues that the prohibition against double credit contained in the FPM is invalid because it conflicts with section 8332(c)(1)(A) of the Civil Service Retirement Act (CSRA), 5 U.S.C. § 8332(c)(1)(A) (1982), which provides that civil service retirement credit "shall include credit for each period of military service performed before the date of the separation [**3] on which the entitlement to an annuity . . . is based." According to petitioner, section 8332 mandates not only that credit be given for military service performed while civilian credit was not being earned, but also that double credit be awarded for concurrent periods of military and civilian service. It is reasoned that because petitioner's situation is not within the exceptions enumerated in section 8332, *see* 5 U.S.C. §§ 8332(c), (d), and (j), Congress intended that double credit be awarded. *See Espenschied v. Merit Systems Protection Board*, 804 F.2d 1233, 1237 (Fed. Cir. 1986), *cert. denied* 481 U.S. 1017, 107 S. Ct. 1896, 95 L. Ed. 2d 503 (1987) (where exceptions are specifically enumerated in a statute, rules of statutory construction suggest that situations not excepted are covered by the statute's general provisions).

Contrary to petitioner's urgings, we conclude that OPM's interpretation (as embodied in FPM Supplement 831-1, Subchapter S3-5(d)) does not conflict with the language, purpose, or history of the CSRA. Section 8332(a) of the statute defines creditable service in terms of calendar years and months of [**4] service, and section 8332(c)(1)(A) mandates that certain periods of military service be recognized or "included" in civil service retirement computations. One purpose of this provision was to provide adequate recognition of years spent in federal service by persons who might not otherwise receive full annuity credit. *See Bailey v. United States*, 206 Ct. Cl. 169, 511 F.2d 540 (1975) (interpreting an earlier version of the act); *Prentiss v. United States*, 123 Ct. Cl. 225, 105 F. Supp. 989 (1952). As we read the statute, the mandate of section 8332(c)(1)(A) is satisfied when the relevant calendar periods of qualified military service are recognized, i.e., when they are "included" in an annuitant's civil service annuity computations. We note that OPM has credited petitioner with calendar periods of active duty service performed while he was not receiving credit as a civilian employee.

We also note that petitioner received civil service credit for the disputed 71 calendar days during which he served on active duty. Petitioner's argument, that these 71 days of service should have been "included" twice, conflicts with a Congressional objective to avoid [**5] double credits while providing what was deemed to be adequate credit for services rendered. *See* 5 U.S.C. § 8332(b)(9) (service as a substitute teacher for the government of the District of Columbia is creditable unless such service is credited for benefits under other retirement systems); 5 U.S.C. § 8332(d)(2) (members of Congress may not receive credit for military service for which credit is allowed for purpose of retired pay under other statutes); 5 U.S.C. § 8332(j) (military service is excluded when eligible for social security benefits under 42 U.S.C. § 402). Rules of statutory construction suggest that interpretations at odds with a legislative scheme are not favored. *United States v. Clark*, 454 U.S. 555, 561, 70 L. Ed. 2d 768, 102 S. Ct. 805 (1982).

Petitioner acknowledges that the statute generally forbids double credits, noting that section 8332(c)(2) precludes recipients of military retired pay from receiving civil service credit for periods already credited toward their military retirement. However, petitioner points to the two exceptions listed in section [**6] 8332(c)(2). The first exception applies to persons receiving military **[*977]** retired pay on account of service-connected disabilities, and the second applies to persons retired under chapter 67 of title 10 (10 U.S.C. § 1331 et seq.) Petitioner argues that because he was retired under chapter 67 of title 10, he is entitled to double credit. What petitioner fails to recognize is that this exception would, at most, entitle him to 71 days' credit toward his military retirement as well as 71 days' credit toward his civil service retirement. This is the type of double credit to which section 8332(c)(2) speaks -- not the 142 days of civil service credit for 71 calendar days of service that petitioner seeks. *See Merrill v. United States*, 168 Ct. Cl. 1, 338 F.2d 372 (1964). It should be emphasized that petitioner *has* received credit toward his military retirement and credit toward his civil service retirement for the calendar periods involved.

Nothing in the statute, apart from one provision that permits unused sick leave to be credited toward retirement (5 U.S.C. § 8339(m)), suggests that one could earn more than [**7] a day's civil service credit for a day's work. Indeed, the existence of an explicit provision, providing additional civil service credit for unused sick leave that accrued concurrently with calendar year credit, suggests that if Congress had intended to permit double credit in petitioner's situation, it would have done so explicitly with a similar provision. *See* 2A Singer, *Sutherland Statutory Construction*, § 47.23 (4th ed. 1984).

Moreover, the prohibition against double credit and the provisions of the statute relied upon by petitioner have co-existed (in various forms) for decades. *See* 5 U.S.C. § 2253 (Supp. IV 1957); 5 U.S.C. § 8332 (1970); 5 U.S.C. § 8332 (1982); *Federal Personnel Manual*, Chapter R5 (August 14, 1945 ed.); *Federal Personnel Manual*, Chapter R-5-20 (Feb. 15, 1962 ed.); *Federal Personnel Manual*, Supp. 831-1, Subchapter S3-5(d) (Sept. 21, 1981 ed.). If, as petitioner urges, this prohibition is without statutory foundation and is contrary to what Congress intended, then Congress has done nothing to "correct" an erroneous interpretation for more than thirty years. Congressional [**8] inaction in this context lends support to the Government's position that Congress is satisfied with the interpretation given the statute by the agency charged with its administration. *United States v. Clark*, 454 U.S. at 566-67, *United States v. Federal Insurance Co.*, 805 F.2d 1012, 1017 (Fed. Cir. 1986) ("Congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."); *Beneficial Corp. v. United States*, 814 F.2d 1570, 1574 (Fed. Cir. 1987) (construction given to a statute by the administrative agency charged with carrying it out is entitled to great weight); *Ganse v. United States*, 180 Ct. Cl. 183, 189, 376 F.2d 900, 904 (1967) (courts will pay great deference to an administrative construction of a statute contemporaneously adopted and consistently maintained by the agency charged with its administration).

In view of all the foregoing, we hold that the Board did not err when it affirmed OPM's denial of double credit and refused further review of petitioner's claim. The decision of the board is affirmed.

AFFIRMED.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Almeida v. Retirement Bd. of Rhode Island Employees Retirement System, D.R.I., October 5, 2000

707 F.Supp. 1087
United States District Court, E.D. Missouri, Eastern Division.

Gerry H. DAILEY, Plaintiff,
v.
PUBLIC SCHOOL RETIREMENT SYSTEM OF MISSOURI, Defendant.

No. 87–2302C(6).
|
March 8, 1989.

Teacher brought action to purchase retirement credit for five-year period of active duty in Missouri Air National Guard. The District Court, Gunn, J., held that federal statutes concerning reemployment of veterans preempted Missouri statutes to extent that they provided for limitation of teacher's retirement benefits as result of his military service.

Judgment for teacher.

West Headnotes (4)

[1] **Education**
Service credit
Public Employment
Military service
States
Pensions and benefits

Federal statute, providing that retirement credits due military reservist cannot be excluded in determining eligibility for civilian employment pension benefits, preempted Missouri law to extent that law allowed school district to deny pension credit for those periods in which teacher received military service retirement credit. 10 U.S.C.A. § 1336; V.A.M.S. § 169.055, subd. 3.

1 Cases that cite this headnote

[2] **Education**
Eligibility for, and right to pension or benefits in general
Public Employment
Pensions and retirement benefits in general
States
Pensions and benefits

Federal statute, establishing military veterans' rights, preempted Missouri statute to extent that that statute empowered school board to disallow pension benefits beyond first period of enlistment based on determination that term of reenlistment was unreasonably long. 38 U.S.C.A. §§ 2021, 2024; V.A.M.S. § 169.055, subd. 3.

Cases that cite this headnote

[3] **Armed Services**
Liberal construction

Reemployment rights of military service personnel are to be liberally construed in their favor. 38 U.S.C.A. §§ 2021–2026.

1 Cases that cite this headnote

[4] **Education**
Amount and computation in general
Public Employment
Pensions and retirement benefits in general
States
Pensions and benefits

Federal statute, providing that civilian retirement benefits for former military personnel are to be calculated on salary and benefit schedule employee would have received had he continued in his employment continuously from time of entry into military service until time of return to civilian employment, preempted Missouri statute for calculating teacher's retirement benefits, to extent that it required

benefits to be calculated on basis of teacher's salary and benefits when he began his active duty. 38 U.S.C.A. § 2021(b)(2); V.A.M.S. § 169.055.

Cases that cite this headnote

Attorneys and Law Firms

***1087** Bartley, Goffstein, Bollato and Lange, William E. Moench, St. Louis, Mo., for plaintiff.

Jerry B. Buxton, Asst. Atty. Gen., Jefferson City, Mo., for defendant.

MEMORANDUM OPINION

GUNN, District Judge.

Plaintiff teaches in the Ferguson–Florissant School District in St. Louis County, Missouri. He has been so employed since 1958, interrupted only by two tours of active duty in the Missouri Air National Guard.

By this action he seeks to purchase retirement credit in the Public School Retirement System of Missouri (defendant) for a five-year period of active duty in the Missouri Air National Guard. The defendant raises § 169.055.3, R.S.Mo. as bulwark against plaintiff's access to matching contributions from the Retirement System.

Specifically, defendant argues that § 169.055 imposes three grounds of insuperable revetment to plaintiff's claim for pension benefits:

1. Pension benefits can be denied during any period in which plaintiff receives military service retirement credits. In other words, the statute disallows "double dipping."

2. There is a prohibition against voluntary reenlistment where the initial period ***1088** of service has been completed. Defendant argues that the purpose is to allow credit only for a reasonable period of time and to prevent successive reenlistment periods as is the case *sub judice.*

3. Should any retirement credits be allowed, they should be calculated on the salary and fringe benefit amounts at the time plaintiff left employment to enter military service, rather than at the salary and benefits schedule which includes his time in military service.

Plaintiff contends that the Veteran's Reemployment Rights Act, 38 U.S.C. §§ 2021–2026, entitles him to all reemployment rights and benefits as a returning military service person and preempts the limiting features of § 169.055.3 as asserted by the defendant.

The Court agrees with plaintiff's contention and enters judgment for him.

The facts are not in dispute and follow with the Court's conclusions of law in accordance with Fed.R.Civ.P. 52.

Plaintiff taught in the Ferguson–Florissant School District from September 1958 to December 1, 1980 at which time he volunteered for active service in the Missouri Air National Guard. Pursuant to 32 U.S.C. § 502(f) he served on active duty for a period of 731 days to November 30, 1982. At this time, plaintiff requested and received further orders extending his active duty for 1096 days to November 30, 1985, when he was honorably discharged. The total active duty for which plaintiff was granted a leave of absence was five years.

Upon his discharge from the Air Guard, plaintiff resumed his teaching duties with the Ferguson–Florissant School District, commencing on July 1, 1985.

Plaintiff has requested the right to purchase credit in the Retirement System for his term of active military duty from December 1, 1980 through November 30, 1985. He argues that this period should be considered in determining his eligibility for retirement benefits.

Relying on § 169.055.3, R.S.Mo., defendant has denied plaintiff's request to purchase credit and for the matching contribution which he seeks.

Section 169.055.3, R.S.Mo. upon which the defendant relies to defeat plaintiff's claim states as follows:

> 3. A member [person holding membership in the retirement system] who enters the service of the armed forces of the United States of America, provided he is a teacher in a district included in the system at the time he is inducted, enlisted, or called to active duty,

> and who without voluntary reenlistment is reemployed as a teacher within one year after discharge from such service or within one year of said date plus time spent as a student in a standard college or university in further preparation for service as a public school employee, shall not be subject to the provisions of subsection 4 of section 196.050 with regard to termination of membership because of unemployment as a teacher due to his actual service in the armed forces of the United States and such subsequent period spent as a student. Such a member may elect within five years after his reemployment or before July 1, 1983, and prior to retirement, whichever is later, to purchase membership service credit, including any creditable service which he had applied to reinstate on or before September 1, 1980, but for which payment was not made within the prescribed time period, with a rate of compensation the same as the annual salary rate at which he was employed at the time of his induction for the period of service in the armed forces of the United States. The purchase shall be effected by the member's paying to the retirement system with interest the amount he would have contributed thereto had he been teaching during the period for which he is electing to purchase credit, and had his compensation during such period been the same as the annual salary at the time of this induction, and had the contribution rate as in effect at date of purchase been in effect at that time. The payment shall be made over a period of not longer than five years, measured from the date of election, and with interest on the unpaid balance; provided, ***1089** that such member is not receiving and is not eligible to receive retirement credit or benefits from any other public school or military retirement system for the years for which membership service credit is being purchased, and a sworn affidavit to this effect has been submitted by such member; and provided that he was discharged or separated from the armed forces by other than a dishonorable discharge. In no event may a member receive any benefits for any period of membership service credit purchased which exceeds in length his period of membership service in this system.

The basic issue in this case is whether federal enactments have preempted the defendant's defense. The simple fact is that they have. It is evident that the state law which the defendant injects into this case "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and must therefore fail. *California Federal S & L Ass'n v. Guerra,* 479 U.S. 272, 281, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987), *citing Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

[1] The defendant argues that § 169.055.3 may deny pension credit for those periods in which the plaintiff received military service retirement credit. But this cannot be. 10 U.S.C. § 1336 provides that retirement credits due a reservist under that law cannot be excluded in determining eligibility for civilian employment pension benefits under any other law. *Cantwell v. County of San Mateo,* 631 F.2d 631 (9th Cir.1980), and *Arrington v. State of Florida,* 117 LRRM 3105, 102 CCIT Labor cases 23541 (N.D.Fla.1985) hold that state enactments similar to § 169.055.3 conflict with 10 U.S.C. § 1336 and are therefore preempted by the federal enactment. Such is the situation here.

[2] The defendant's second challenge to plaintiff's cause of action is that § 169.055.3 disallows pension benefits beyond the first period of enlistment based on a determination that the term of reenlistment was unreasonably long. But, again, § 169.055.3 runs afoul of federal enactment preempting the area of veterans' rights. The Veteran's Reemployment Rights Act, specifically, 38 U.S.C. §§ 2021 and 2024, imposes no § 169.055.3 limitation. The Missouri law would discriminate against veterans who extend their military service to their country—a circumstance which the Veteran's Reemployment Rights Act is promulgated to avoid. There is no time limitation for terms of reenlistment in 38

U.S.C. § 2024(d) nor is there a reasonableness requirement. To the extent that § 169.055.3 imposes such a restriction, it conflicts with federal statute and is preempted thereby. *Cronin v. Police Dept. of City of New York,* 675 F.Supp. 847 (S.D.N.Y.1987). *See also Arrington v. State of Florida.*

[3] Congress intended to protect and compensate persons who serve in the armed forces, including reservists such as plaintiff. Reemployment rights of military service personnel are to be liberally construed in their favor. *Gulf States Paper Corp. v. Ingram,* 811 F.2d 1464, 1468 (11th Cir.1987). Section 169.055.3 hampers that intent of Congress and is not congruent with the Veteran's Reemployment Rights Act.

Lee v. City of Pensacola, 634 F.2d 886 (5th Cir.1981), raised by defendant as suggesting that an outer time limit for service may be imposed, is not apt. *Lee* contained a bad faith element on the part of the plaintiff, a factor not present in this case. *See Cronin v. Police Dept. of City of New York,* 675 F.Supp. at 852–53.

[4] Finally, defendant argues that, under § 169.055, any award of retirement benefits must be calculated on the basis of the teacher's salary and benefits when he began his active duty. That is, defendants assert that any salary and benefit increases received while the teacher was on leave from the school district cannot enter into the retirement benefit calculus. This position must be rejected as being inimical to the plain language of 38 U.S.C. § 2021(b)(2) which provides that benefits are to be calculated on the salary and benefits schedule plaintiff would have received had he continued in his employment continuously from ***1090** the time of entry into military service until the time of return to such employment. *See Monroe v. Standard Oil Co.,* 452 U.S. 549, 553 n. 7, 101 S.Ct. 2510, 2513 n. 7, 69 L.Ed.2d 226 (1981); *Cronin v. Police Dept. of City of New York,* 675 F.Supp. at 854.

Based on the foregoing findings of fact and conclusions of law, plaintiff is entitled to judgment as prayed. Therefore,

Defendant is ordered to allow plaintiff to purchase retirement credit from it for the time period from December 1, 1980 through November 30, 1985. Defendant is further ordered to calculate plaintiff's retirement credit in accordance with the schedule of salary and benefits in effect at the Ferguson–Florissant School District during the time period from December 1, 1980 through November 30, 1985, as though plaintiff had been continuously employed with the district during that time period.

Judgment for plaintiff.

JUDGMENT

In accordance with the Court's Memorandum Opinion filed this date,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment be and is entered in favor of plaintiff Gerry H. Dailey and against defendant Public School Retirement System of Missouri.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff recover of defendant the right to purchase retirement credit from defendant for the time period from December 1, 1980 through November 30, 1985.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that defendant calculate plaintiff's retirement credit in accordance with the schedule of salary and benefits in effect at the Ferguson–Florissant School District during the time period from December 1, 1980 through November 30, 1985, as though plaintiff had been continuously employed with the district during that time period.

All Citations

707 F.Supp. 1087, 131 L.R.R.M. (BNA) 2189, 57 USLW 2596, 111 Lab.Cas. P 11,126, 52 Ed. Law Rep. 582, 10 Employee Benefits Cas. 2207

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Harapat v. Califano, 598 F.2d 474 (8th Cir.), *cert. denied*, 444 U.S. 980, 100 S.Ct. 482, 62 L.Ed.2d 406 (1979) (district court lacks jurisdiction to review dismissal, on *res judicata* grounds, of repetitious claim); *Sheehan v. Secretary of Health, Education, & Welfare*, 593 F.2d 323 (8th Cir. 1979) (district court lacks jurisdiction to review Appeals Council denial of an extension of the period within which to file an administrative appeal of an administrative law judge's denial of benefits).

Peterson attempts to distinguish *Sanders*. He asserts that HEW's decision in *Sanders* was made without a hearing, while in his case a hearing was granted. However, the *Sanders* case turned not on whether the decision had actually been preceded by a hearing but on whether a hearing was mandatory. This distinction differentiates decisions on the merits governed by the procedures established in 42 U.S.C. § 405(b) (1976) from discretionary decisions not subject to those procedures. The reasons for the distinction are well stated in *Cappadora v. Celebrezze*, 356 F.2d 1 (2d Cir. 1966):

> On a strictly literal reading, § 405(g) could be interpreted as applying to any final decision of the Secretary that was handed down after a hearing, albeit a hearing not required by the statute. Such an interpretation, however, would be unnatural and unsound.... [T]he reasonable reading of § 405(g) is that it was intended to apply to a final decision rendered after a hearing [required by section 405(b)], not to a decision which could lawfully have been made without any hearing at all.... Indeed, the broader reading could operate adversely to claimants generally since if a nonmandatory hearing would entail judicial review not otherwise available, this might deter the agency from giving a procedural benefit which the statute does not demand.

356 F.2d at 4–5. We agree with this analysis. The dismissal of Peterson's complaint and action are affirmed.

of the Appeals Council's refusal to reopen his case, as its own regulations authorized it to do upon a showing of good cause. The court held that judicial review of the denial was available. However, the decision actually cuts against Peterson's position, because the court expressly held that judicial review was available under the APA but not under the Social Security Act. 356 F.2d at 5–7.

Sidney H. CANTWELL, Jr., Plaintiff–Appellee,

v.

COUNTY OF SAN MATEO, a political subdivision of the State of California, and the Retirement Board of San Mateo County, Defendants–Appellants.

Sidney H. CANTWELL, Jr., Plaintiff–Appellant,

v.

COUNTY OF SAN MATEO, a political subdivision of the State of California and the Retirement Board of San Mateo County, Defendants–Appellees.

Nos. 78–1765, 78–1820.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 15, 1980.

Decided Oct. 31, 1980.

County employee brought action alleging that county had improperly denied him credit in county retirement system for his prior active Navy service. The United States District Court for the Northern District of California, George B. Harris, J., entered judgment in favor of the employee, and the county and retirement board of the county appealed. The Court of Appeals, Hug, Circuit Judge, held that: (1) federal statute governing retirement pay for reserve military personnel conflicted with state statute governing county retirement systems, in that the former authorized credit for active service in both reserve military and county retirement plans while the latter denied such double credit, but the federal statute prevailed over the state statute,

and (2) county employee, who prior to his employment by county had served on active duty in the United States Navy and who after leaving active Navy service had served in the Naval Reserve, was entitled to receive credit in the county retirement system for his prior active Navy service, despite state statute which provided that credit for prior public service was to be allowed only if employee was not entitled to receive a pension from the public agency for which he previously worked.

Judgment affirmed as modified and remanded.

1. Statutes ⇐217.4

If plain meaning of statutory language leads to a result contrary to or at variance with statutory purpose, Court of Appeals will look to legislative history or other extrinsic aids so that the legislative purpose may be fulfilled.

2. Armed Services ⇐23.4(1)

Purpose in enacting overall retirement pay program for reserve personnel was to provide an inducement to qualified personnel to remain active in reserves in order to maintain a cadre of trained soldiers for use in active duty if the need should arise. 10 U.S.C.A. § 1331 et seq.

3. States ⇐4.13

Federal statute governing retirement pay for reserve military personnel conflicted with state statute governing county retirement systems, in that the former authorized credit for active service in both reserve military and county retirement plans while the latter denied such double credit; however, the federal statute prevailed over the state statute, inasmuch as the federal statute was enacted pursuant to Congress's power to raise and maintain armies and a navy and the state statute was in conflict with that purpose. West's Ann. Cal.Gov. Code, §§ 31450–31898, 31641.1, 31641.2, 31641.4; 10 U.S.C.A. §§ 1331 et seq., 1332, 1336; U.S.C.A.Const. Art. 1, § 8, cls. 12, 13.

4. States ⇐4.17

Federal statute governing retirement pay for reserve military personnel, which conflicted with state statute governing county retirement systems with respect to the credit to be given for active military service, was not invalid as an infringement of the state's rights under the Tenth Amendment to the United States Constitution, inasmuch as the federal statute was enacted under the Congress's power to raise and maintain armies and a navy. West's Ann.Cal.Gov. Code, §§ 31450–31898, 31641.1, 31641.2, 31641.4; 10 U.S.C.A. §§ 1331 et seq., 1332, 1336; U.S.C.A.Const. Art. 1, § 8, cls. 12, 13; Amend. 10.

5. Counties ⇐69(3)

County employee, who prior to his employment by county had served on active duty in the United States Navy and who after leaving active Navy service had served in the Naval Reserve, was entitled to receive credit in county retirement system for his prior active Navy service, despite California statute which provided that credit for prior public service was to be allowed only if the employee was not entitled to receive a pension from the public agency for which he previously worked. 10 U.S.C.A. § 1336; West's Ann.Cal.Gov. Code, § 31641.4.

6. Counties ⇐69(3)

County employee's oral communications with administrator of county retirement system did not satisfy statutory mandate that a county employee must affirmatively elect to apply for and receive credit for prior public service. West's Ann.Cal. Gov. Code, § 31641.1.

7. Counties ⇐69(3)

Earliest possible date at which county could have approved county employee's written request for credit for his prior active military service was correct date for discontinuing employee's contributions to county retirement plan under statute providing that no contributions should be deducted from salary of employee having credit for 30 years' service. West's Ann. Cal.Gov. Code, §§ 31625.2, 31641.1.

8. **Federal Civil Procedure** ⇐2737.6

County employee whose successfully challenged provision of state statute, which was utilized to deny county employees credit in county retirement system for prior active military service, was not entitled to award of attorney fees on common benefit theory. West's Ann.Cal.Gov. Code, § 31641.4.

Keith C. Sorenson, Dist. Atty., Redwood City, Cal., on brief; Thomas Daniel Daly, Deputy Dist. Atty., Redwood City, Cal., for San Mateo, etc.

Howard M. Daschbach, Law Offices of Howard, Daschbach, Menlo Park, Cal., for Cantwell.

Appeal from the United States District Court for the Northern District of California.

Before HUG and ALARCON, Circuit Judges, and BLUMENFELD *, District Judge.

HUG, Circuit Judge:

The principal issue in this appeal involves the resolution of an apparent conflict between federal statutes granting retirement pay to military reserve personnel and California statutes establishing retirement plans for county employees. The appellants, the County of San Mateo ("County") and the Retirement Board of San Mateo County ("Board"), challenge the district court's decision determining that the federal statutes were controlling. The County also contends that the district court erred in determining the date as of which the appellee, Sidney H. Cantwell, Jr., was entitled to have deductions from his salary to the retirement fund discontinued. Cantwell appeals the denial of his request for an award of attorney's fees.

I

Cantwell has been continuously employed by the County as an engineer since April, 1948. He has been a member of the San Mateo County Employees Retirement Association ("Association") since 1948. The benefits Cantwell will receive and the requirements he must fulfill as a member of the Association are set forth in the County Employees Retirement Law of 1937, Cal. Gov't Code §§ 31450–31898.

Prior to his employment by the County Cantwell had served on active duty in the United States Navy from January 6, 1943 to October 3, 1946, a total of 3 years, 8 months and 27 days. After leaving active Navy service, Cantwell served in the United States Naval Reserve until October, 1968, the last 20 years and 6 months of which was concurrent with his County employment.

Cantwell brought this action claiming that the County had denied him credit for his prior active Navy service to which he claims he was entitled under Cal. Gov't Code §§ 31641.1 and 31641.2.[1] These sec-

* The Honorable M. Joseph Blumenfeld, Senior United States District Judge for the District of Connecticut, sitting by designation.

1. Cal. Gov't Code § 31641.1 provides:

> A member who was in public service before becoming a member may elect by written notice filed with the board to make contributions pursuant to Section 31641.2 and to receive credit in the retirement system for all allowed public service time. Credit for part-time service shall be calculated as provided in Section 31641.5.

Cal. Gov't Code § 31641.2 provides:

> Any member of the retirement system who elects pursuant to Section 31641.1 to make contributions and receive credit as service for time for which he claims credit because of public service shall contribute to the retirement fund, prior to the effective date of his retirement, by lump sum payment or by installment payments over a period not to exceed five years, an amount equal to the sum of:
>
> (a) Twice the contributions he would have made to the retirement fund if he had been a member during the same length of time as that for which he has elected to receive credit as service, computed by applying the rate of contribution first applicable to him upon commencement of his membership in this system to the monthly compensation first earnable by him at the time as provided in Section 31641.3, multiplied by the number of months for which he has elected to receive credit for county service, including time, if any, prior to the establishment of the system,

tions allow members of county retirement systems to receive credit for prior public service. The County refused to allow Cantwell to receive such credit based on Cal. Gov't Code § 31641.4,[2] which provides that credit for prior public service is to be allowed only if the employee is not entitled to receive a pension from the public agency for which the employee previously worked. Cantwell asserted that 10 U.S.C. § 1336[3] prevents the County from denying him credit for his active Navy service, despite Cal. Gov't Code § 31641.4.

II

The district court found a conflict between the federal and the state statute, in that 10 U.S.C. § 1336 authorizes credit in both pension plans for the active service, while Cal. Gov't Code § 31641.4 denies such double credit. The court held that under the supremacy clause of the United States Constitution, art. VI, cl. 2, the federal statute must prevail; otherwise, the congressional policy of encouraging and rewarding military reserve service would be frustrated.

On appeal, the County presents three arguments opposing the district court's decision that section 1336 of the federal statute must prevail. The first contention is that the language in section 1336, which requires that the service be "otherwise properly credited," shows on its face that section 1336 does not apply to Cantwell's active service because it is not "properly credited" under Cal. Gov't Code § 31641.4.

[1] In the context of interpreting statutory language, this court has recently stated:

> While there may be instances where the language of a statute is so lucid on a particular issue that resorting to legislative history would be inappropriate . . ., such a rule is not normally applicable where . . . the court must construe the meaning of an undefined term in a statute when the term used does not consist of words of art.

Church of Scientology v. United States Department of Justice, 612 F.2d 417, 421 (9th Cir. 1979). If the plain meaning of statutory language leads to a result contrary to or at variance with the statutory purpose, this court will look to legislative history or other extrinsic aids so that the legislative purpose may be fulfilled. *Id.* at 420–422.

At first glance the County's reliance on the phrase "if otherwise properly credited" appears to have merit. Such an interpretation would have the effect of rendering section 1336 meaningless, however, because it would allow any state to circumvent section 1336 merely by passing a law denying membership in a retirement system to anyone eligible to receive a reserve pension. This would frustrate the congressional purpose underlying the reserve pension system and section 1336.

and which will constitute current service under this system.

. . . . .

2. Cal. Gov't Code § 31641.4 provides:

> A member shall receive credit for employment in public service only for such service as he is not entitled to receive a pension or retirement allowance from such public agency. The service for which he elects to contribute and the fact that no pension or retirement allowance will accrue to such member by virtue of his employment in such public agency must be certified to by an officer of the public agency where he rendered such public service or must be established to the satisfaction of the board.

. . . . .

3. The statutes governing retired pay for non-regular (reserve) military service are contained in Chapter 67 of Title 10 of the United States Code. 10 U.S.C. § 1336, which is a part of this chapter provides:

> 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 credited under it.

Pursuant to 10 U.S.C. § 1332, Cantwell's period of active service will be included in computing his pension for his reserve service.

[2] We have searched in vain for pertinent legislative history of section 1336 or for any cases directly interpreting it. The purpose in enacting the overall retirement pay program for reserve personnel is clearly, however, "to provide an inducement to qualified personnel to remain active in the Reserves in order to maintain a cadre of trained soldiers for use in active duty if the need should arise." *Alexander v. Fioto*, 430 U.S. 634, 639, 97 S.Ct. 1345, 1348, 51 L.Ed.2d 694 (1977) (footnote omitted). "One of the specific inducements to these part-time servicemen (many of whom worked for the Federal Government) was to allow them to count concurrent periods of federal civilian service and of military duty for both civilian and military retirement." *Merrill v. United States*, 338 F.2d 372, 375 (Ct.Cl. 1964).

[3] Adopting the County's interpretation of the language of section 1336 would undermine the purpose of the retirement pay program for reserve personnel. Congress intended that periods of service used in computing retirement pay under Chapter 67 could not be excluded from retirement programs established by other laws solely because the reservist would also receive a Chapter 67 pension.[4] Such an intent is consistent with the language "if otherwise properly credited."[5] We conclude that "otherwise" refers to any criteria the other pension plan may impose except for the fact that a person is receiving a pension under Chapter 67.[6] Therefore, 10 U.S.C. § 1336 does conflict with Cal. Gov't Code § 31641.4, because section 1336 requires that double credit for Cantwell's active service be given him in both his retirement plans and section 31641.4 denies it. Having reached this conclusion, we must determine whether section 1336 prevails over the California statutes.

When federal legislation conflicts with state legislation this court has stated:

> State legislation must yield under the supremacy clause of the Constitution to the interests of the federal government when the legislation as applied interferes with the federal purpose or operates to impede or condition the implementation of federal policies and programs.

Rust v. Johnson, 597 F.2d 174, 179 (9th Cir.), *cert. denied*, 444 U.S. 964, 100 S.Ct. 450, 62 L.Ed.2d 376 (1979). *See also Jones v. Rath Packing Co.*, 430 U.S. 519, 525–26, 97 S.Ct. 1305, 1309–10, 51 L.Ed.2d 604 (1977); *United States v. Brown*, 552 F.2d 817, 821 (8th Cir.), *cert. denied*, 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 (1977). The military

4. The only reason the County gave for refusing to credit Cantwell for his active service is because he will receive a pension for it. That is the same position taken by the California Attorney General in similar cases. *See* 30 Op. Atty.Gen. Cal. 49 (1957).

5. When originally enacted in 1948, section 1336 read:

> . . . . . .
>
> No period of service otherwise creditable in determining the eligibility of any person to receive, or the amount of, any annuity, pension, or old-age benefit payable under any provision of law on account of civilian employment, in the Federal Government or otherwise, shall be excluded in such determination because such period of service may be included, in whole or in part, in determining the eligibility of such person to receive, or the amount of, any retired pay payable under this title.

62 Stat. 1089 (1948). In 1956 the words "otherwise creditable" were changed to the present language. 70A Stat. 104.

6. We find support for this conclusion in analogous statutes governing the federal employee retirement system. Prior military service is creditable in the federal system, in a manner similar to the California county system. The statute also provides that the military service may not be credited if the employee is awarded retired pay on account of the military service. However, the statute specifically permits inclusion of the military service, even though the person will receive a pension under Chapter 67 of Title 10. *See* 5 U.S.C. § 8332(c)(2). This is persuasive evidence of congressional intent that the service for which a person receives a pension under Chapter 67 may not be excluded on that basis alone from credit in another retirement system.

Any other construction of section 1336 might actually discourage membership in the reserves. Someone who has served on active duty but will not receive a pension for that service could receive credit under Cal. Gov't Code § 31641.4. The employee might choose not to join the reserves so that he could obtain credit in the California county pension system for the prior active service.

reserve retirement pay program was enacted pursuant to Congress's power to raise and maintain armies and a navy. U.S. Const. art. 1, § 8, cls. 12 and 13. Because the state statute is in conflict with the federal statute implementing that purpose, we agree with the district court that the federal legislation must prevail.

The County's second argument, which relies on *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), is that even if section 1336 is interpreted as conflicting with the California statutes, it is invalid as an infringement of the state's rights under the tenth amendment to the United States Constitution. In *Usery* the Court considered the 1974 amendments to the Fair Labor Standards Act, which extended the Act's minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions. The Court held that the amendments directly displaced "the States' freedom to structure integral operations in areas of traditional governmental functions," (i. e., the State's power to determine the wages it will pay to its employees, what hours the employees will work and how they will be compensated for overtime) and were, therefore, "not within the authority granted Congress by Art. I, § 8, cl. 3 [the Commerce Clause]." *Id.* at 852, 96 S.Ct. at 2474 (footnote omitted). The Court specifically limited its holding to the power of Congress under the Commerce Clause by stating:

> We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment.

Id. at 852 n. 17, 96 S.Ct. at 2474 n.17.

In the present case section 1336 affects the same state interest as in *Usery, i. e.*, the amount of compensation county employees receive (in this instance, in the form of pension benefits). As noted above, however, the authority under which Congress enacted section 1336 is not art. I, § 8, cl. 1, it is art. I, § 8, cls. 12 and 13. This is the key distinction between this case and *Usery*. The Court in *Usery* noted that it was not overruling *Case v. Bowles*, 327 U.S. 92, 66 S.Ct. 438, 90 L.Ed. 552 (1946), in which the Court held that Congress could set maximum prices in order to carry on war even if this affected a state's sale of goods. *Usery*, 426 U.S. at 854–55 n.18, 96 S.Ct. at 2475 n.18, 49 L.Ed.2d 245. The Court specifically stated, "Nothing we say in this opinion addresses the scope of Congress's authority under its war power." *Id.*

In *Jennings v. Illinois Office of Education*, 589 F.2d 935 (7th Cir.), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979), the Seventh Circuit considered the tenth amendment objections of the State of Illinois to the provisions of the Veterans' Reemployment Rights Act, which requires states to restore employees inducted into the United States Armed Forces pursuant to the Selective Service Act to their former positions following the person's discharge. Illinois had declined to restore Jennings to his former position following his discharge on the ground that no position was open at the time. The Court found authority for the Act under the war powers contained in art. I, § 8, cls. 11–13. *Id.* at 937. Relying on *Case v. Bowles*, which the court noted had explicitly not been overruled by *Usery*, the Court found the grant of war powers to be sufficient to sustain a statute that might otherwise violate the tenth amendment.

[4] We adopt the reasoning of the Seventh Circuit in *Jennings* and of the Supreme Court in *Case v. Bowles*, and conclude that *Usery* is inapposite to the present case. Although the congressional power to declare war, art. I, § 8, cl. 11 is not directly involved in the present case, the power to raise and maintain armies and a navy, art. I, § 8, cls. 12 & 13, is so closely intertwined with that power that the rationale of *Case v. Bowles* and *Jennings* applies. We find that congressional power to pass section 1336 exists under art. I, § 8, cls. 11, 12, & 13, and conclude that the constitutional grant of these powers is sufficient to sus-

tain section 1336 against a tenth amendment challenge. We note parenthetically that California could have chosen not to afford credit for any prior public service. Having chosen to do so, however, it cannot do so in a manner which conflicts with section 1336.

The County's final argument against applicability of section 1336 is that it applies only when the reservist is employed by the Federal Government, and not when the person is employed by a state government. The County relies upon the above-quoted language of *Merrill v. United States*, 338 F.2d at 375 that one of the purposes of Chapter 67 was to allow employees "to count concurrent periods of federal civilian service and of military duty. . . ."

This argument is without merit for several reasons. The *Merrill* court did not indicate in any way that Chapter 67 applied only to federal civilian employment. As the district court pointed out, adopting the County's argument would be ignoring the words "civilian employment by the United States or otherwise" in section 1336. Such a construction would also ignore the words "under any other law."

[5] For all the above reasons we agree with the district court that Cantwell is entitled to receive credit in the County retirement system for his 3 years, 8 months and 27 days of active Navy service.

III

When the period of Cantwell's prior Navy service is added to his employment period with the County, he has a total of 30 years' service as a member of the retirement system as of August 17, 1974. Because Cal. Gov't Code § 31625.2 [7] states that no contributions shall be deducted from the salary of an employee having credit for 30 years' service, the district court ordered the County to refund to Cantwell the deductions which had been made from his salary since that date, provided that Cantwell made the appropriate contribution pursuant to Cal. Gov't Code § 31641.2 to receive credit for his Navy service.[8] Cantwell did not notify the County in writing that he desired to contribute and to receive credit for his active military service until November 17, 1975. The County contends that this was the first time Cantwell submitted the appropriate notice required by Cal. Gov't Code § 31641.1 to receive credit for prior service. The earliest the County could have approved the request would have been December 11, 1975, when the Board met, and thus, the County contends that if Cantwell is entitled to reimbursement, it is as of December 11, 1975. The County argues that only after Cantwell gave the written notice and made the appropriate contribution would he have had credit for the required 30 years of service under Cal. Gov't Code § 31641, which defines "service." [9]

7. Cal. Gov't Code § 31625.2 provides:

> Notwithstanding any other provisions of this chapter, contributions shall not be deducted from the salary of any member having credit for 30 years' service providing such member was a member on the effective date of this section and remained in membership continuously until credited with 30 years' service.

8. The court found, and the parties agree, that the amount Cantwell would have to contribute would be $3,065.04. The amount which had been deducted that was to be reimbursed to Cantwell was $4,820.65. The court subsequently vacated for further consideration the portion of the order requiring reimbursement. After holding a further hearing, the court again determined that Cantwell was entitled to discontinuance of the contribution as of August 17, 1974. By the time of this supplemental decision, the amount deducted from Cantwell's salary had risen to $7,094.73, which the court again ordered the County to refund to Cantwell.

9. Cal. Gov't Code § 31641 provides:

> "Service" means uninterrupted employment of any person appointed or elected for that period of time:
>
> (a) For which deductions are made from his earnable compensation from the county or district for such service while he is a member of the retirement association.
>
> (b) In military service for which the county or district or member is authorized by other provisions of this chapter to make, and does make, contributions.
>
> (c) For which he receives credit for county service or for public service or for both pursuant to the provisions of this article.
>
> (d) Allowed for prior service.

The district court found that the August 17, 1974 date was proper because, although the elements of estoppel were not present, Cantwell's filing of a written notice would have been a futile act. The County does not dispute that it would have denied any such request. Cantwell expressed his belief orally on three separate occasions between April of 1967 and July of 1973 to the administrator of the County retirement system that he should be given credit for his prior Navy service. Each time Cantwell was told he was ineligible. Only later did Cantwell discover, and write the letter concerning, section 1336.

We agree with the County's argument on this point. Cal. Gov't Code § 31641.1 clearly requires an employee to file written notice of an election to make the contributions for prior credit. Section 31625.2 requires discontinuance of contributions to the retirement system from an employee "having credit" for 30 years' service. An employee relying on prior service toward his 30 years' service cannot "have credit" until he has filed the required written notice.

[6] We do not agree with the district court that the filing of such a notice would have been a "futile" act.[10] Filing such a notice serves two purposes. First, the employee gives official notice that he has some prior public service and that he desires to make appropriate contributions to receive credit for it in the County system. Second, the entire Board is put on official notice of the employee's intentions so that it may make a thorough investigation of the prior service and so that the amount of the contribution may be computed. Cantwell's oral communications with the administrator of the County system simply do not satisfy the statutory mandate that "a county employee must affirmatively elect to apply for and receive credit for prior public service." *Los Angeles County Firefighters, Local 1014 v. Board of Retirement*, 46 Cal.App.3d 762, 768, 120 Cal.Rptr. 478 (1975).

It is true that the Board would have denied, and subsequently did deny, Cantwell's request. The purposes behind the statutory requirements are satisfied, however, only by compliance therewith.

[7] We agree that the earliest possible date at which the County could have approved Cantwell's written request is the correct date for discontinuing Cantwell's contributions. That is the date on which Cantwell could have actually made the appropriate contributions, and thus would "have [the] credit" necessary for discontinuance of deductions under Cal. Gov't Code § 31625.2.[11]

Between August 17, 1974, the date as of which the district court ordered a refund of Cantwell's contributions, and December 11, 1975, the date we have determined is the appropriate date from which the refund should be given, deductions from Cantwell's salary totalled $2,596.35. The district court ordered the County to refund $7,094.73, plus interest, to Cantwell. Subtracting $2,596.35 from that amount leaves a refund due of $4,498.38, plus interest.

IV

[8] Cantwell requested that the district court award him $4,000 in attorney's fees. The court denied the request for several reasons, none of which Cantwell challenges on appeal. Instead, Cantwell proposes for

10. We agree with the district judge that under the facts of this case, Cantwell could not assert estoppel against the County. This is true whether we apply California law, as the district court did, *see Strong v. County of Santa Cruz*, 543 P.2d 264, 266 (Cal.1975); *City of Long Beach v. Mansell*, 476 P.2d 423, 442 (Cal.1970), or federal law, *see Oki v. I. & N. S.*, 598 F.2d 1160, 1162 (9th Cir. 1979); *United States v. Ruby Co.*, 588 F.2d 697, 703–04 (9th Cir. 1978), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2838, 61 L.Ed.2d 284 (1979); *Santiago v. I. & N. S.*, 526 F.2d 488, 491 (9th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976).

11. In using the earliest possible date at which the Board could approve an employee's request, the Board is prevented from unreasonably delaying in taking action upon a request. Of course, in the majority of cases, request for credit for prior service is made before the 30 years' service, including the prior service, has expired, and thus there will be no such problem.

the first time on appeal a system for apportioning the fees. His suggestion is that as the first nineteen members of the County retirement system who have backgrounds similar to Cantwell's elect to receive credit for their service, they also be required to contribute one–twentieth of Cantwell's fees, to be remitted to Cantwell.[12] Aside from the fact that this suggestion was neither presented to nor considered by the district court, it has serious flaws.

The only tenable theory upon which such a fee award could be made would be the common benefit exception to the general rule against allowance by the federal courts of attorney's fees. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257, 264–65 n.39, 95 S.Ct. 1612, 1625 n.39, 44 L.Ed.2d 141 (1975). This court has set forth criteria for an award of fees under such a theory:

> The common benefit exception . . . applies where a litigant confers a substantial benefit on an easily identifiable class of persons, where the benefits can be traced with reasonable accuracy, and the costs of litigation can be shifted with some exactitude, to those benefiting.

Stevens v. Municipal Court, 603 F.2d 111, 112 (9th Cir. 1979).

At least two of the above factors are absent in the present case. The class of persons benefited is not easily ascertainable. The decision in this case will affect all county employees in the entire state of California, a fact which Cantwell apparently overlooks. There is no ready way to identify all the employees who might be able to avail themselves of section 1336. More importantly, for the same reason, there is no method of shifting the costs with some exactitude. Requiring only the first nineteen county employees who elect to receive credit to contribute toward the fees will result in their paying a far higher amount than their proportionate share. That alone would be enough to deny Cantwell's request.

In addition, Cantwell's proposal raises serious jurisdictional questions because none of the other affected employees are parties to this case or have filed similar cases in federal court. *See Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 765–66, 771–72 (9th Cir. 1977). There would also be problems with the fact that the other employees would be personally contributing to Cantwell's fees, rather than having the award come from an easily identifiable fund. *See id.* at 770. *See also National Association for Mental Health, Inc. v. Weinberger*, 68 F.R.D. 387, 392 (D.D.C.1975).

For all the above reasons, we affirm the district court's denial of Cantwell's original motion for allowance of attorney's fees, and we reject Cantwell's new proposal.

V

We conclude that the district court was correct in determining that 10 U.S.C. § 1336 prevails over sections of the California Government Code governing county retirement systems. We modify the district court's order requiring the County to refund $7,094.73, plus interest, to Cantwell, upon his making the appropriate contribution for prior service. The County is required to grant Cantwell credit for his prior service upon Cantwell's contribution of $3,065.04, and to refund to Cantwell $4,498.38, plus interest. Of course, the amounts may be offset upon Cantwell's being granted the credit. We affirm the district court's denial of attorney's fees.

As modified, the judgment is affirmed and remanded to the district court for computation of interest.

12. Cantwell estimates there are approximately twenty county employees similarly situated, thus the one–twentieth figure. No basis in fact is given for this estimate.

Document:Wrigglesworth v. Brumbaugh, 121 F. Supp. 2d 1126

Wrigglesworth v. Brumbaugh, 121 F. Supp. 2d 1126

United States District Court for the Western District of Michigan, Southern Division

November 30, 2000, Decided ; November 30, 2000, Filed

Case No. 5:00-CV-15

Reporter

121 F. Supp. 2d 1126 * | 2000 U.S. Dist. LEXIS 17418 ** | 166 L.R.R.M. 2560

GENE WRIGGLESWORTH, in his capacity as Ingham County Sheriff and INGHAM COUNTY, Plaintiffs/Counter-Defendants, v. ELLIS BRUMBAUGH, Defendant/Cross and Counter-Plaintiff, and CAPITOL CITY LODGE NO. 141 OF THE FRATERNAL ORDER OF POLICE, a labor association, Defendant/Cross-Defendant.

Disposition: [**1] Plaintiffs/Counter-Defendants Motion for Summary Judgment (Dkt. No. 33) DENIED and Defendant Ellis Brumbaugh's Motion for Summary Judgment (Dkt. No. 34) GRANTED.

Core Terms

re-employment, resignation, veteran, military service, seniority, summary judgment, rights, statutory right, collective bargaining agreement, uniformed services, parties, waive, benefits, statutory language, provisions, legislative history, matter of law, requirements, returning, military, cases, service member, employees, re-employ, entitlement, determines, provides, statutes, notice, days

Case Summary

Procedural Posture

Plaintiff, employer-sheriff, sought declaratory judgment that defendant employee, who had been on extended military leave, but was unaware of his reemployment rights under 38 U.S.C.S. §§ 4311, 4312, until six years after he signed a resignation letter prepared by plaintiff employer, had no such statutory rights. Plaintiff countersued for reinstatement and back pay and joined cross-defendant union. All moved for summary judgment.

Overview

Defendant was employed as a detective by plaintiffs, sheriff and county. Defendant was granted military leave, and was on active duty for five years. While serving, defendant requested that he be deputized as a special deputy so that he could avoid the requirement of retraining in the event of his future return. Plaintiff sheriff denied the request, and tendered defendant a resignation letter which defendant signed. Six years later, defendant became aware of his right to be reemployed under the Uniformed Services Employment and Re-employment Rights Act of 1994, 38 U.S.C.S. §§ 4301-4333, and Mich. Comp. Laws § 35.355. Plaintiff filed a motion for declaratory relief to deny benefits to defendant and defendant sued for benefits. The court granted summary judgment for defendant and against plaintiffs. Defendant had shown he was entitled to the relief sought under the statute as a matter of law. The statute was intended to benefit veterans and should be construed to their benefit, and any waiver of rights had to be clear and specific.

Outcome

Plaintiffs and counter-defendants motion for summary judgment denied and defendant employee's motion for summary judgment granted on claims. Defendant's rights under both federal and state law were violated by plaintiffs' failure to rehire him at the detective rank, pay, benefits and perquisites. The parties could brief or stipulate to the issues material fact as to damages and remedies.

LexisNexis® Headnotes

Counsel: For GENE WRIGGELSWORTH, INGHAM, COUNTY OF, plaintiffs: John R. McGlinchey, Cohl, Stoker & Toskey, PC, Lansing, MI.

For INGHAM, COUNTY OF, plaintiff: Richard D. McNulty, Cohl, Stoker & Toskey, PC, Lansing, MI.

For ELLIS BRUMBAUGH, defendant: Thomas A. Baird, White, Przybylowicz, Schneider & Baird, PC, Okemos, MI.

For CAPITOL CITY CAPITOL CITY LODGE NO. 141 OF THE FRATERNAL ORDER OF POLICE, defendant: R. David Wilson, Wilson, Lawler & Lett, Lansing, MI.

For ELLIS BRUMBAUGH, counter-claimant: Thomas A. Baird, White, Przybylowicz, Schneider & Baird, PC, Okemos, MI.

For GENE WRIGGELSWORTH, INGHAM, COUNTY OF, counterdefendants: John R. McGlinchey, Cohl, Stoker & Toskey, PC, Lansing, MI.

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For CAPITOL CITY CAPITOL CITY LODGE NO. 141 OF THE FRATERNAL ORDER OF POLICE, cross-defendant: [**2] R. David Wilson, Wilson, Lawler & Lett, Lansing, MI.

Judges: RICHARD ALAN ENSLEN, Chief Judge.

Opinion by: RICHARD ALAN ENSLEN

Opinion

[*1127] This matter is before the Court on the parties' cross-motions for summary judgment. **[*1128]** For the reasons which follow, the Court will grant summary judgment in favor of Defendant/Cross and Counter-Plaintiff Ellis Brumbaugh, Jr. and against the other parties.

FACTS

The following facts appear from the evidence filed by the parties: Ellis Brumbaugh, Jr. enlisted in the National Guard reserves on August 19, 1968. He remained on reserve status until March 14, 1984. (Brumbaugh Deposition at 5.)

On July 5, 1971, Brumbaugh was hired by Ingham County as a Jailer II. (Brumbaugh Dep. at 16.) On January 10, 1972, he was promoted to the position of patrol officer. (*Id.*) On August 2, 1976, he was promoted to the position of detective. (*Id.*)

On March 14, 1984, Brumbaugh requested military leave from the Ingham County for the purpose of undertaking two years of active duty with the Michigan National Guard. (Plaintiffs' Exhibit 3.) This leave was granted.

On February 22, 1986, Brumbaugh requested an extension of his military leave for a period of three years. (Plaintiffs' [**3] Exhibit 5.) This extension was also granted.

In early 1989, Brumbaugh contacted Gene Wrigglesworth, Sheriff, to schedule a meeting to discuss his military status. According to Brumbaugh, his purpose in meeting was to inform Wrigglesworth that he intended to remain on military leave and to request that he be deputized as a special deputy so that he

could avoid the requirement of retraining in the event of his future return to the Sheriff's Department. (Brumbaugh Dep. at 40.) On March 10, 1989, Brumbaugh met with the Sheriff. [1] At the meeting, Brumbaugh informed Wrigglesworth that he was continuing on active military duty and requested that he be deputized. (Brumbaugh Dep. at 50.) Wrigglesworth declined to deputize Brumbaugh on the basis that he disliked special deputies. Wrigglesworth also requested that Brumbaugh sign a resignation letter that Wrigglesworth drafted at the suggestion of his attorney. (Wrigglesworth Dep. at 26-28.) Brumbaugh signed the resignation letter, which simply stated: "I the undersigned request that this be accepted as my resignation from the Ingham County Sheriff Department, effective March 13, 1988." (Plaintiff's Exhibit 9.) Brumbaugh understood that his [**4] resignation was for "administrative purposes." (Brumbaugh Dep. at 108.) He did not come to understand his statutory right to re-employment until after 1994. (Brumbaugh Dep. at 109.)

Brumbaugh remained an active duty officer of the National Guard until his honorable discharge and retirement effective September 30, 1999. At the same time, he remained an "associate" union member of the Sheriff's Department's union (Defendant Capitol City Lodge No. 141 of the Fraternal Order of Police) and paid union dues on a yearly basis. (Brumbaugh Exhibit 5.)

On January 21, 1999, Brumbaugh wrote to Wrigglesworth to request that he return to his detective assignment with no loss of seniority. (Brumbaugh Exhibit 6.) The letter was drafted after both a discussion of legal issues with Brumbaugh's attorney (John McGlinchey) and a conference as to these issues with Wrigglesworth. (*Id.*) The letter made a formal request [**5] for return to employment under the Uniformed Services Employment and Re-Employment Rights Act of 1994. (*Id.*)

Following the request, Wrigglesworth contacted the union regarding its position on reinstatement of Brumbaugh. The union responded that, under its collection bargaining agreement and under its reading of the Act, Brumbaugh had lost seniority and his right of reinstatement through **[*1129]** his resignation. (Plaintiffs' Exhibit 12.) The union did not oppose the hiring of Brumbaugh as a entry level deputy. (*Id.*) Brumbaugh reapplied to the Department and was hired as an entry level deputy. It was understood between the parties that his right to re-employment as a detective, with seniority, would be resolved through litigation and was not waived by his accepting the entry level position.

To resolve this legal dispute, Plaintiffs Gene Wrigglesworth and Ingham County filed a declaratory action in this Court on January 31, 2000 seeking a declaration that Brumbaugh had no statutory right of re-employment because of his resignation. Brumbaugh has countersued the Plaintiffs for reinstatement, back pay and attorney fees under the federal statute and a Michigan statute relating to re-employment [**6] of public employees following active military service (Mich. Comp. Laws § 35.352). He has also cross-claimed against the union. Discovery is now complete and these cross-motions for summary judgment have been filed consistent with the Court's Case Management Order. Oral hearing of these motions is, in the opinion of this Court, unnecessary and would unduly protract the resolution of these motions.

STANDARD FOR SUMMARY JUDGMENT

These motions for summary judgment are brought pursuant to Federal Rule of Civil Procedure 56. ***HN1*** Under the language of Rule 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The initial burden is on the movant to specify the basis upon which summary judgment should be granted and to identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). ***HN2*** The burden then shifts to the non-movant [**7] to come forward with specific facts, supported by the evidence in the record, upon which a reasonable jury could find there to be a genuine fact issue for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). If, after adequate time for discovery on material matters at issue, the non-movant fails to make a showing sufficient to establish the existence of a material disputed fact, summary judgment is appropriate. *Celotex Corp.*, 477 U.S. at 323.

HN3 Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences are jury functions. *Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. *Celotex Corp.*, 477 U.S. at 323 (quoting *Anderson*, 477 U.S. at 255). The factual record presented must be interpreted in a light most favorable to the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

HN4 Rule 56 limits the materials the Court [**8] may consider in deciding a motion under the rule: "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits."

Copeland v. Machulis, 57 F.3d 476, 478 (6th Cir. 1995) (quoting Federal Rule of Civil Procedure 56(c)). ***HN5*** Moreover, affidavits must meet certain requirements:

> Affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Fed. R. Civ. P. 56(e). The Sixth Circuit has held "that documents submitted in support of a motion for summary judgment must satisfy the requirements of Rule 56(e); otherwise, they must be disregarded." *Moore v. Holbrook*, 2 F.3d 697, 699 (6th **[*1130]** Cir. 1993). Thus, ***HN6*** in resolving a Rule 56 motion, the Court should not consider unsworn or uncertified documents, *id.*, unsworn statements, *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968-969 (6th Cir. 1991), inadmissible [**9] expert testimony, *North American Specialty Ins. Co. v. Myers*, 111 F.3d 1273, 1280 (6th Cir. 1997), or hearsay evidence, *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996); *Wiley v. United States*, 20 F.3d 222, 225-226 (6th Cir. 1994).

LEGAL ANALYSIS

A. Federal Law Claim

Brumbaugh's federal law claim is made out under the Uniformed Services Employment and Re-employment Rights Act of 1994 (hereafter "USERRA"), Pub. L. No. 103-353, 1994 U.S.C.C.A.N. (108 Stat.) 3149, codified at 38 U.S.C. §§ 4301-33. This Act has an interesting legislative background that is pertinent to the claims in this suit.

1. Background

Protection of job security for armed services members is an old statutory protection which dates back to the Selective Training and Service Act of 1940. *See Trulson v. Trane Co.*, 738 F.2d 770, 772 n.4 (7th Cir. 1984). Although aspects of the statutory protection have changed through the years with the enactment of different re-employment statutes, the basic concepts and protections have largely remained unchanged. *Id.* These statutes' basic premise is that: "He who [**10] was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind." 2 *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284, 90 L. Ed. 1230, 66 S. Ct. 1105 (1946).

The nature of this special protection was described in *Fishgold*, which involved a claim of returning soldier who was laid off, by use of an "escalator" analogy:

> ***HN8*** He must be restored to his former position "or to a position of like seniority, status, [**11] and pay". . . . He is thus protected against receiving a job inferior to that which he had before entering the armed services. . . . He shall be "restored without loss of seniority" and be considered "as having been on furlough or leave of absence" during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence. . . . Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.

Id. at 284-85 (citations omitted). *See also Trailmobile Co. v. Whirls*, 331 U.S. 40, 91 L. Ed. 1328, 67 S. Ct. 982 (1947); *Oakley v. Louisville & Nashville R. Co.*, 338 U.S. 278, 283, 94 L. Ed. 87, 70 S. Ct. 119 (1949); and *Tilton v. Missouri Pac. R. Co.*, 376 U.S. 169, 174-75, 11 L. Ed. 2d 590, 84 S. Ct. 595 (1964). Thus, in the *Fishgold* case, the Supreme Court upheld an employer's right under a collective bargaining agreement to not rehire the returning soldier because that soldier, even with credit for his

service [**12] time, did not have enough seniority to avoid the layoff under the collective bargaining agreement. As the Court said, "we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services." 328 U.S. at 285-86. The *Fishgold* approach to seniority has been continued in ***HN9*** USERRA, which promises re-employment and "the seniority and other rights **[*1131]** and benefits determined by seniority that the person had on the date of the commencement of service . . . plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed." 38 U.S.C. § 4316(a); *see also* 38 U.S.C. § 4313(a)(2)(A).

One important change in veteran protections in the last decade relates to the length of service limitation. In 1991, in the case of *King v. St. Vincent's Hospital*, 502 U.S. 215, 116 L. Ed. 2d 578, 112 S. Ct. 570 (1991), the United States Supreme Court affirmed the judgment of the Eleventh Circuit Court of Appeals reversing a district court declaratory judgment in favor [**13] of an employer under the Veterans' Re-employment Rights Act, which was a predecessor statute to USERRA. The Supreme Court made this ruling on the basis that the statute had no time limitation to the right of re-employment such that the district court's reading of an implicit "reasonableness" time limitation into the statute was improper notwithstanding the difficulties that an unlimited statute might impose upon employers.

In 1994, Congress reacted to the decision in *King* by passing USERRA, which contains a five-year service limitation period. *See* 38 U.S.C. § 4312(c). However, to ensure that former veterans (those with orders issued pursuant to 32 U.S.C. § 502(f)) were not adversely affected by this statutory change, the Act included "transitions rules" under which those veterans would have a five-year period for service limitation purposes to file suit as to service performed after the enactment of the Act (December 12, 1994), but would have no service limitation as to service performed before the enactment of the Act, provided that the merged time periods together do not exceed five years. *See* 1996 Senate Report No. 104-371 at [**14] 34-35. These transitions rules, in other words, have the effect of limiting claims of veterans whose service began before the enactment of USERRA in that the service limitation applicable to all pre-amendment veterans will bar claims for service extending on or after December 12, 1999.

In this suit, in light of the transition rules, the service limitation does not apply because Brumbaugh's service ended long before the December 12, 1999 limitation period. Brumbaugh also properly provided to the employer notice of his intent to return to the employment within 90 days of the end of his military service consistent with the requirement of 38 U.S.C. § 4312(e)(D).

With this background, the parties' briefs raise the following issues: Plaintiffs and the Capitol Lodge union maintain that they are entitled to summary judgment because Brumbaugh must prove that Plaintiffs acted out of a discriminatory motive in failing to re-employ Brumbaugh and that Brumbaugh cannot prove such a discriminatory intent. They argue that the evidence of record only supports the conclusion that failure to re-employ was only due to the Collective Bargaining Agreement and that this was a non-discriminatory [**15] legal basis for the action. Second, Plaintiffs and the union maintain that Brumbaugh's signature of the resignation letter given him by Wrigglesworth waives his right to re-employment under the statute. Brumbaugh disputes both of these contentions. For the ease of discussion, the Court will consider them in reverse order.

2. Waiver

These parties briefings debate the pertinent case law on the issue of when and whether a resignation waives a right of re-employment under USERRA. Pertinent cases on this issue include: *Paisley v. City of Minneapolis*, 79 F.3d 722, 725 (8th Cir. 1996); *Smith v. Missouri Pacific Transportation Co.*, 313 F.2d 676, 680 (8th Cir. 1963); *Sykes v. Columbus & Greenville Railway*, 117 F.3d 287 (5th Cir. 1997); *Ryan v. Rush Presbyterian-St. Luke's Medical Center*, 15 F.3d 697, 699 (7th Cir. 1994); *Trulson v. Trane Co.*, 738 F.2d 770 (7th Cir. 1984); *O'Mara v. Petersen Sand* **[*1132]** *& Gravel Co.*, 498 F.2d 896, 897 (7th Cir. 1974); *Loeb v. Kivo*, 169 F.2d 346 (2nd Cir. 1948); *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981); [**16] and *Bottger v. Doss Aeronautical Services, Inc.*, 609 F. Supp. 583, 587 (D. Ala. 1985).

The above cases indicate, at a minimum, that ***HN10*** a waiver of re-employment rights under USERRA (as well as its predecessor statutes) must be clearly expressed to be effective. They differ, however, in the extent to which they require clarity as to the waiver of the statutory rights. Eighth Circuit cases such as *Paisley* and *Smith* regard a general statement of resignation (*i.e.*, "I resign") as sufficient to waive the statutory right of re-employment. However, the other cases and especially the *Sykes* and *Loeb* decisions do not treat a general statement of resignation as effective in waiving the statutory right of re-employment. Rather, those cases indicate that a waiver of statutory rights requires at least an awareness of the statutory right and an expressed intent to waive the right (*i.e.*, "I understand my right

to re-employment under USERRA and I voluntarily waive that right"). *See Loeb*, 169 F.2d at 349. Indeed, the *Sykes* decision and some of the other decisions cited question whether an employee can voluntary waive the right to re-employment [**17] in the context of leaving the employment for military service. There is reason to question, at least in the ordinary case, whether an employee can waive re-employment rights in the context of leaving employment for military service. The statute is intended to protect those rights and is "at war" against those employers who would seek to undercut the right of re-employment by sliding a resignation form across the table to the employee who has opted for military service. In such a scenario, no important societal or contract interest is served by honoring the "resignation." The "resignation" is not truly contractual in nature in that the employee receives no consideration for his "agreement" to resign the employment and to forfeit valuable rights of re-employment. Moreover, allowing such "resignations" to be effective, would undercut the effectiveness of the statute by allowing employers to take advantage of the youth and ignorance of some of those enlisting in military service to waive a valuable right of re-employment for no appreciable reason from the employee's prospective.

Given that the federal courts and especially the United States Supreme Court have expressed a clear preference [**18] for liberally interpreting this statute in favor of veterans, *see Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85, 90 L. Ed. 1230, 66 S. Ct. 1105 (1946); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196, 65 L. Ed. 2d 53, 100 S. Ct. 2100 (1980), this Court must now interpret the statutory right as not waived under the circumstances of this case. In this case, the employee, Brumbaugh, expressed rather clearly at the time of resignation an intent to return to the Sheriff's Department. He did not prepare the resignation letter himself. He signed it, only after it was prepared by the Sheriff, and at the request of the Sheriff for "administrative purposes." The resignation itself makes no mention of the statutory right of re-employment and provides no consideration for the waiver by Brumbaugh of his statutory right of re-employment. Accordingly, the Court determines as a matter of law that the right of re-employment was not waived under the circumstances of this case.

3. Proof of Discrimination

This leaves the discussion at the first issue raised by Plaintiffs--whether Section 4312 of Title 38 of the United States Code (a section [**19] of USERRA) requires proof of an intent to discriminate against the returning veteran and whether the proof of that intent is sufficient on this record to warrant relief as a matter of law. Plaintiffs urge that intent to discrimination must be proven under the Sixth Circuit Court of Appeals decision in *Curby v. Archon*, 216 F.3d 549 (6th Cir. 2000). They also urge that a decision not to re-employ **[*1133]** Brumbaugh because of the treatment of his resignation under the collective bargaining agreement is not discriminatory in violation of the statute--citing both *Curby* and *Jones v. Cassens Transport*, 982 F.2d 983 (6th Cir. 1993). This argument requires the Court to consider the statutory language, its legislative history, its administrative interpretation, and pertinent case precedents.

a. Statutory Provisions

HN11 Title 38 United States Code Section 4311, which was codified as part of USERRA, provides in pertinent part as follows:

> (a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, re-employment, [**20] 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.
>
> (b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.
>
> (c) An employer shall be considered to have engaged in actions prohibited--
>
> (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been [**21] taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or
>
> (2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation

under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

38 U.S.C., § 4311.

HN12 Title 38 United States Code Section 4312, which was codified as part of USERRA, provides in pertinent part as follows:

(a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment [**22] is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if--

(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;

(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and

[*1134] (3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e). . . .

(d)(1) An employer is not required to reemploy a person under this chapter if--

(A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;

(B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer; or

(C) the employment from which the person leaves [**23] to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

(2) In any proceeding involving an issue of whether--

(A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,

(B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or

(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period,

the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or non-recurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period. . . .

(g) The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior [**24] claim under the provisions of title 5, United States Code, relating to veterans and other preference eligibles.

(h) In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set

> forth in subsection (c) and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met.

38 U.S.C. § 4312.

Section 4316 further provides that ***HN13*** a veteran whose period of service was more than 180 days who was re-hired in accordance with Section 4312 shall not be discharged by an employer except for "cause" within "one year" of the date of re-employment. 38 U.S.C. § 4316(c). ***HN14*** Section 4304, which is incorporated as part of Section 4312 by provisions of Section 4312, also states that a service member's "entitlement to the benefits of this chapter by reason of the service of such person in [**25] one of the uniformed services terminates upon" the person's separation from the service with a "dishonorable discharge" or "under other than honorable conditions." 38 U.S.C. § 4304.

This statutory language scheme demonstrates two separate and distinct statutory protections. ***HN15*** Section 4311 provides a statutory protection for not only service members but also to persons who have provided testimony to benefit a service member. The nature of this statutory protection is a protection against discrimination which is predicated upon a showing that a discriminatory motive was a "motivating factor" for an adverse employment action. ***HN16*** Section 4312, however, is a very different statutory protection in that it creates a limited entitlement to re-employment **[*1135]** for certain qualifying service members. This entitlement applies only to returning service members under conditions specifically stated in the statute, especially including that the service members provided notice of his military service at the time he left the employment, that the length of service did not exceed the service limitation, that the service member requested re-employment within the time limits provided for [**26] under subsection (e), and that the character of the service was as described in Section 4304 (*i.e.*, not dishonorable service). Section 4312 neither contains nor implies a proof of discrimination requirement. Section 4311 also does not suggest that its requirements are applicable to Section 4312. The statutory wording is clear and is to be enforced even without resort to legislative history, agency interpretation and case precedents. *See Palmer v. United States*, 219 F.3d 580, 583 (6th Cir. 2000) (stating that federal courts are required to enforce unambiguous statutes according to their terms).

Furthermore, the wording of other federal statutes which refer to USERRA dictate this same conclusion. Section 1316 of Title 2 of the United States Code states that it was enacted to insure to the veteran-employees of the General Accounting Office and the Library of Congress the same rights protected by USERRA and it lists separately the Section 4311 protection against discrimination, the Sections 4312 and 4313 right of re-employment, and the Sections 4316 to 4318 rights to employee benefits. Similar wording as to veteran-employees occupying Article I (presidential) employment [**27] is found at Title 3 United States Code Section 416.

b. Legislative History and Agency Interpretation

Indeed, this very distinction in the statutory purposes between Section 4311 and 4312 is evident from the legislative history of USERRA. As to the purpose of Section 4311, the legislative history says as follows:

> Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment, (*see Beattie v. The Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991)), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units (*see Boyle v. Burke*, 925 F.2d 497 (1st Cir. 1991)), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson v. Trane Co.*, 738 F.2d 770, 775 (7th Cir. 1984). The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced. The definition of employee, which also includes [**28] former employees, would protect those persons who were formerly employed by an employer and who have had adverse action taken against them by the former employer since leaving the former employment.
>
> ***HN17*** If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, and processing of the claim should not await completion of the service, even if for only lost wages.
>
> ***HN18*** Section 4311(b) would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) of title 38, in

> 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. at 5320 (Feb. 23, 1966). In 1986, when Congress [**29] amended section 2021(b)(3) to **[*1136]** prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans Affairs) explained that, in accordance with the 1968 legislative intent cited above, ***HN19*** the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery) citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 76 L. Ed. 2d 667, 103 S. Ct. 2469 (1983).
>
> This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559, 69 L. Ed. 2d 226, 101 S. Ct. 2510 (1981), that a violation of this section can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988)), [**30] those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.
>
> ***HN20*** Section 4311(c) makes explicit that the anti-retaliation provisions contained in the reported bill apply to persons who not only file a complaint, either with his or her employer (*see Henry v. Anderson County, Tenn.*, 522 F. Supp. 1112, 1115 (E.D. Tenn. 1981)), or with a governmental agency, but applies as well to persons who testify in any proceeding under chapter 43, even if that person was not the subject of the proceeding, and to persons who assist or otherwise participate in an investigation under chapter 43, even if those persons were not the subject of the investigation. Accordingly, a person protected under this section need not be a member of the uniformed services.

Uniformed Services Employment and Re-employment Act of 1994, H.R. Rep. No. 103-65, 103rd Cong., 1st Sess. 1993, 1994 U.S.C.C.A.N. 2449, 2456-57 (1994).

This same House Report makes clear that the purpose of Section 4312 was to provide an automatic right of re-employment different from the right described in Section 4311:

> ***HN21*** Section [**31] 4312(a) would provide an unqualified right to reemployment to persons who leave other than temporary positions to serve on any type of military duty, whether voluntary or involuntary, if the notice requirement of subsection (a)(1) is met, the cumulative length of military service found in subsection (a)(2) is not exceeded and the reporting or application requirement of subsection (e) is complied with. This section applies with equal force to employers of private employees, state and local governments and the Federal Government.
>
> The only other exceptions to the unqualified right to reemployment would be the provisions in ***HN22*** subsection (d), which provide that the employer need not reemploy the person if the employer's circumstances have so changed as to make it impossible or unreasonable to reemploy or, in the case of a person not qualified after reasonable efforts, if reemployment would create an undue hardship.
>
> ***HN23*** The very limited exception of unreasonable or impossible, which is in the nature of an affirmative defense, and for which the employer has the burden of proof (*see Watkins Motor Lines, Inc. v. deGalliford*, 167 F.2d 274, 275 (5th Cir. 1948); *Davis v. Halifax Cty. Sch. System*, 508 F. Supp. 966, 969 (E.D. N.C. 1981)), [**32] is only applicable "where reinstatement would require creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran." *Davis, supra*, 508 F. Supp. at 968.

Id. at 2457-58. The legislative history also confirms that the escalator rule announced **[*1137]** in *Fishgold* was intended to be continued and strengthened through the wording of the statute. *Id.* at 2463-64.

Thus, the legislative history confirms the view of Brumbaugh that in enacting Section 4312 Congress intended to legislate a right of re-employment separate from the right against discrimination enacted as part of Section 4311 and that this entitlement does not depend on proof of discrimination.

Furthermore, this interpretation has been adopted by the Department of Labor in its advice to veterans concerning their statutory rights. (*See* Brumbaugh Response Brief, Exhibit 3--Dept. of Labor Fact Sheet.) ***HN24*** The interpretation of the Secretary of Labor is entitled to deference in the absence of an interpretation that is arbitrary, capricious, or manifestly contrary to the statute. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). [**33] In this case, ***HN25*** because the agency interpretation is consistent with the statutory language, legislative history and long-held judicial precedents, it is worthy of deference.

d. Case Precedents

Notwithstanding the statutory language and legislative history, Plaintiffs and the Defendant union make arguments concerning case law and especially the Sixth Circuit Court of Appeals' decision in *Curby v. Archon*, 216 F.3d 549 (6th Cir. 2000), which stated in part that a returning service member must prove discrimination under Section 4312.

As noted by Brumbaugh, this interpretation of the statute by the *Curby* Court is *dicta* in that the *Curby* Court justified its decision on other grounds before considering the interplay between Sections 4311 and 4312 of Title 38 of the United States Code. Furthermore, the Court distinguishes the *Curby* case as involving very different facts (*i.e.*, an employee fired due to gross misconduct amounting to "just cause" for termination under 38 U.S.C. § 4316(c)) and determines that the comments in *Curby* as to the interplay of Sections 4311 and 4312 are not controlling. It is worthy of notice [**34] that the long history of litigation under the predecessor statutes to USERRA, including many decisions by the United States Supreme Court, have determined that the Act protected the unqualified right of a veteran to re-employment upon proof of advance notice to the employer of the military service, proof that the service limitation is not exceeded, and proof that a timely request for re-employment is made (provided that the service was honorable and that the employer did not establish a specific statutory defense). There is no reason to now read the statute as imposing requirements not legislated by Congress.

Notwithstanding, the Court determines that regardless of whether proof of a "motivating factor" is required to establish Brumbaugh's right of re-employment, that there is sufficient proof of a motivating factor as a matter of law on the present record. Plaintiffs claims that they have only abided by the Collective Bargaining Agreement and have not taken their action for any reason apart from the Collective Bargaining Agreement--such that Brumbaugh cannot prove a discriminatory act in violation of the statute. Plaintiffs cite in favor of their argument not only the case of *Curby v. Archon*, 216 F.3d 549 (6th Cir. 2000), [**35] wherein a police department did not re-employ a returning police officer because of misconduct committed prior to his military service, but also the case of *Jones v. Cassens Transport*, 982 F.2d 983 (6th Cir. 1993). In *Jones*, the Sixth Circuit Court of Appeals held that Title VII/Elliott-Larsen Act claims for sexual discrimination in the workplace failed where the basis for the claims were the effects of a bona fide collective bargaining agreement seniority system.

Both the *Cassens* and *Curby* decisions are inapposite. In the present case, Brumbaugh was assigned his "collective bargaining status" because of a resignation **[*1138]** which was ineffective in waiving his statutory rights and which was solicited by the employer. It is simply subterfuge to pretend, in this scenario, that the resignation and collective bargaining agreement are the legitimate, non-discriminatory reasons for not re-employing the returning veteran. Were this the case, the employer could simply contract around provided statutory benefits to returning veterans. Indeed, this very argument has been rejected as a matter of law in previous cases. First of all, the Supreme Court's decision in *Fishgold* [**36] made clear that ***HN26*** a employment decision denying re-employment rights cannot be cloaked in the language of a collective bargaining agreement. *Fishgold* determined that an employee is not entitled to different treatment under a collective bargaining agreement once he was given seniority credit for his service time. However, it also made clear that the employee cannot be denied his place on the "escalator" because of military service. This aspect of *Fishgold* is retained in the current statutory language of USERRA.

Thus, in the case of *Waltermyer v. Aluminum Co. of America*, 804 F.2d 821 (5th Cir. 1986), the Fifth Circuit held that ***HN27*** the fact that a collective bargaining agreement limited bonuses to those working in a given time period did not absolve the company from paying those bonuses to reservists temporarily away on military leave. The *Waltermyer* decision, and several cases cited therein, observed that to permit this kind of distinction in a collective bargaining agreement would contradict the statutory requirement of equal treatment.

Furthermore, the Fourth Circuit Court of Appeals heard a nearly identical type of argument in *Rudisill v. Chesapeake & Ohio Ry. Co.*, 167 F.2d 175, 178-9 (4th Cir. 1948). [**37] It then considered whether a collective bargaining agreement which limited the rights of those resigning from the company could be enforced against a returning veteran who had resigned. It held both that the resignation was ineffective (because prompted by military service) and that the collective bargaining agreement treatment of resigning workers did not justify denial of the statutory right of re-employment to the veteran. *Id.* As it said in denying that argument:

> The Railway Company makes the additional contention that the plaintiff may not be legally restored to his old position or to a 'position of like seniority, status and pay,' because at the time of his resignation he was a member of the Order of Railway Telegraphers which had a contract with the Railway Company that provides that the seniority rights of a member shall be lost upon resignation, according to the interpretation placed upon the contract by the Union. The answer to this argument is clearly given by the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corporation*, 328 U.S. 275, 285, 66 S. Ct. 1105, 1111, 90 L. Ed. 1230, 167 A.L.R. 110, where in considering the seniority rights [**38] conferred upon a returned veteran by the statute the court said:
>
> > This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its house of great need. *See Boone v. Lightner*, 319 U.S. 561, 575, 63 S. Ct. 1223, 1231, 87 L. Ed. 1587. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits. (Italics supplied.)

Rudisill, 167 F.2d at 179 (quoting *Fishgold*).

For all of these reasons, the Court concludes as a matter of law that Brumbaugh has proved his entitlement to the relief sought under federal law as a matter of law. For the same reasons, Plaintiffs and the union are not entitled to relief.

[*1139] B. State Law Claim

Brumbaugh has also claimed benefits under a parallel Michigan statute providing public employees a right to re-employment [**39] upon return from military service--Michigan Compiled Laws Section 35.351 *et seq.* The Michigan statute provides in pertinent part that a public employee who leaves his public employment, voluntarily or involuntarily, to perform military service and who makes application to return to the employment within 90 days of the time that he is relieved or discharged from his duty under honorable conditions shall be restored to his original position or otherwise to a position of like seniority, status and pay and shall be regarded as having continuously worked during his military service. *See* Mich. Comp. Laws §§ 35.352 and 35.353. The statute was drafted in 1951 and parallels the federal legislation of the time.

As to the Michigan statute, Plaintiffs argue that the Court lacks authority to address the pendent law claim because the state statute assigns jurisdiction a claim for relief to the "circuit court for the district in which such public employer is located . . . ." Mich. Comp. Laws § 35.355. The argument is, in other words, that the state statute has defeated federal pendent jurisdiction by limiting jurisdiction to the Michigan state courts.

This very argument has been rejected [**40] for over one hundred years both by the United States Supreme Court and lower federal courts. The reason for rejecting such an argument is obvious. Were the federal courts limited in their exercise of diversity and supplemental jurisdiction by state statutes assigning a state forum, then the exercise of that jurisdiction, as contemplated by Congress and the Framers of the Constitution, could be frustrated in a manner inconsistent with the pre-eminence of federal law. As the Supreme Court has wisely stated:

> ***HN28*** Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation."

Railway Company v. Whitton, 80 U.S. 270, 286, 20 L. Ed. 571 (1871). *See Mullen v. Academy Life Ins. Co.*, 705 F.2d 971, 975 (8th Cir. 1983); *TBK Partners Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 n. 3 (2d Cir.1982); *Duchek v. Jacobi*, 646 F.2d 415, 418-19 (9th Cir.1981); *Miller v. Perry*, 456 F.2d 63, 64 (4th Cir.1972); [**41] *Hayes Ind., Inc. v. Caribbean Sales Associates, Inc.*, 387 F.2d 498, 500 (1st

Cir.1968); *Akin v. Louisiana National Bank of Baton Rouge*, 322 F.2d 749, 759 (5th Cir.1963); *Holt v. King*, 250 F.2d 671, 675 (10th Cir.1957); *Hibbs v. Yashar*, 522 F. Supp. 247, 250-51 n. 1 (D.R.I.1981); *Rubel-Jones Agency, Inc. v. Jones*, 165 F. Supp. 652, 654 (W.D. Mo.1958). *See also Czajkowski v. Jovanovich*, 28 F.3d 105, 1994 WL 247089 (9th Cir. 1994) (unpublished decision); *Graham v. Holiday Inns, Inc.*, 1986 U.S. Dist. LEXIS 27618, 1986 WL 15783 (W.D. Tenn. 1986) (unpublished decision). Accordingly, the Court determines that the state statute's designation of the state circuit court as the forum for grievances under the statute does not defeat federal jurisdiction as to this pendent state law claim.

Plaintiffs also argue that the state statute *requires* that the state court action be brought by the Michigan Attorney General as a condition for relief to be granted and that this requirement is not met. This argument derives from the statutory language that:

> Upon application to the attorney general by any person [**42] claiming to be entitled to the benefits of such provisions, the attorney general, if reasonably satisfied that the person so applying is entitled to such benefits shall appear and act as attorney for such person . . . ."

Mich. Comp. Laws § 35.355. Plaintiffs cite no legislative history nor court precedent to support their construction of the statute. The Court believes that their construction is simply wrong. This statute is **[*1140]** intended to benefit veterans and should be construed to their benefit. The reference to the attorney general appears from the statutory language to provide veterans with a right of legal representation should they elect to apply to the attorney general. The statute does not appear to require veterans to apply for this representation as a condition for relief. Rather, it simply leaves veterans the option of whether to seek state representation or private representation in pursuing their statutory rights. Accordingly, the Plaintiffs' argument is rejected as inconsistent with the statutory language.

This brings the legal discussion to the issue of liability. Plaintiffs argue that they cannot be liable under the statute because the statute contains a three-year [**43] service limitation--unlike the federal statute described above. *See* Mich. Comp. Laws § 35.351(f). As to this argument, Plaintiffs also overlook pertinent statutory language. In describing the "three year service limitation," the Michigan legislature further stated: "And provided further, That if the re-employment provision of the selective service act is amended to provide a period of other than three years, such a period provided by the selective service act shall apply." The purpose of this provision is make state law consistent with federal law by providing that the federal service limitation, if different, shall apply. Applying this statutory language, since the federal statutory limitation is different from three-years (as more particularly described above), the federal limitation applies. Under the federal limitation, as stated above, the request for re-employment was timely notwithstanding the length of Brumbaugh's service.

Furthermore, as to liability generally, Michigan's statute was interpreted by the Michigan Supreme Court in the case of *Borseth v. City of Lansing*, 338 Mich. 53, 61 N.W.2d 132 (1953). There, the Michigan Supreme Court held that the [**44] fact that Borseth had separated himself from the City by a resignation rather than by a request for a leave of absence was insignificant. Despite the resignation, Borseth was entitled to re-employment at his previous position with credit for his service. *Id.* In light of the Michigan Supreme Court's construction, the statutory language and its similarity to the language and purpose of the federal statute, the Court determines that Baumbaugh is also entitled to an summary judgment on his state law claim.

CONCLUSION

Accordingly, partial summary judgment shall be entered in favor of Defendant Brumbaugh and against Plaintiffs/Counter-Defendants determining that Brumbaugh is entitled to summary judgment as a matter of law as to liability in that his rights under USERRA and under Michigan law (Michigan Compiled Laws

Section 35.351 *et seq.*) were violated by the Plaintiffs' failure to rehire him at the detective rank, pay, benefits and perquisites. However, because of the failure of the parties to address in their motion practice the issue of damages and equitable relief, a final judgment cannot yet be entered. *See Shelby County Health Care Corp. v. Southern Council of Industrial Workers Health and Welfare Trust Fund*, 203 F.3d 926, 932 (6th Cir. 2000) [**45] (holding that it is error to award damages on summary judgment when issue was not briefed.)

Since this case has not been fully resolved by the motion practice to date, the Court will further order that all parties shall *either*, pursuant to Federal Rule of Civil Procedure 56(d), file further legal memoranda, with supporting evidence, within 14 days on the issue of whether there are genuine issues of material fact as to the award of equitable remedies and the amount of monetary damages recoverable in this suit, *or* submit a stipulation as to the amount of damages and equitable remedies. In the event of the filing of legal memoranda, all parties shall respond to the other legal memoranda within 14 days of filing. Upon completion of the briefing or the filing of the stipulation, the Court **[*1141]** will determine whether a final judgment may be summarily entered as a matter of law.

Partial Judgment shall enter consistent with this Opinion.

DATED in Kalamazoo, MI:

Nov 30, 2000

RICHARD ALAN ENSLEN

Chief Judge

PARTIAL JUDGMENT

In accordance with the Court's Opinion of this date;

IT IS HEREBY ORDERED that the Plaintiffs/Counter-Defendants Motion for Summary Judgment [**46] (Dkt. No. 33) is **DENIED** and Defendant Ellis Brumbaugh's Motion for Summary Judgment (Dkt. No. 34) is **GRANTED.**

IT IS FURTHER ORDERED that the Court determines as a matter of law, pursuant to Federal Rule of Civil Procedure 56(d), that the Plaintiffs are not entitled to the declarations of law sought by them and that Plaintiffs/Counter-Defendants are liable to Defendant/Counter-Plaintiff Ellis Brumbaugh as to both his federal and state law counterclaims.

IT IS FURTHER ORDERED that, since this case has not been fully resolved by the motion practice to date, all parties shall *either*, pursuant to Federal Rule of Civil Procedure 56(d), file further legal memoranda, with supporting evidence, within 14 days on the issue of whether there are genuine issues of material fact as to the award of equitable remedies and the amount of monetary damages recoverable in this suit, *or* submit a stipulation as to the amount of monetary damages and the appropriateness of the remedies sought. In the event of the filing of legal memoranda, all parties shall respond to the other legal memoranda within 14 days of filing. Upon completion of the briefing or the filing of the stipulation, [**47] the Court will determine whether there are genuine issues of material fact warranting trial or whether judgment should be entered based on evidence filed together with the Court's findings of this date.

DATED in Kalamazoo, MI:

11-30-00

RICHARD ALAN ENSLEN

Chief Judge

Footnotes

1 The parties have different recollections as to whether persons other than themselves were present at the meeting.

2 Under the present statute, ***HN7*** the right to re-employment does not depend upon whether the military service was voluntary or involuntary, provided that the service member was not dishonorably discharged. *See* 38 U.S.C. § 4303(13) (defining "service" as including both kinds of service); 38 U.S.C. § 4304 (defining the "character of service" which is protected).

Content Type: Cases

Terms: Wrigglesworth v. Brumbaugh, 121 F. Supp. 2d 1126

Narrow By: -None-

Date and Time: Jul 21, 2017 10:34:28 a.m. EDT

116 F.Supp.2d 269
United States District Court,
D. Rhode Island.

August ALMEIDA, Joseph Almonte, Dennis Avila, John Baxter, Bernard George, Charles Caley, William Cambio, Paul Desrochers, James Dunn, Howard Indell, Phillip Lucca, John Mancini,Thomas Marcello, Tobias Martin, Gary Mazzie, Russell Molloy, Dennis Morgan, Lawrence McDonald, John Recupero, John Ricci, Philip Sheridan, Russell Spaight, Theodore Stolaz, Vernon Stromberg, Peter Todd, George Truman, Bruce Vittner, Eugene Wiggington, PlaintiffS,
v.
RETIREMENT BOARD OF THE RHODE ISLAND EMPLOYEES RETIREMENT SYSTEM, Nancy Mayer, Chairperson and Treasurer of the Retirement Board of the Rhode Island Employees' Retirement System in her official capacity, and Joanne E. Flaminio, Executive Director of the Retirement Board of the Rhode Island Employees' Retirement System in her official capacity, Defendants.

No. C.A.98–383–L.
|
Oct. 5, 2000.

State employees and public school teachers who were active members of Rhode Island Employees Retirement System brought § 1983 action for declaratory and injunctive relief against retirement board and its officials, seeking to purchase retirement credit in the retirement system for their prior or concurrent service in the United States armed forces. Parties filed cross-motions for summary judgment. The District Court, Lagueux, J., held that: (1) federal statute preventing states from denying pension benefits to those members of their retirement system who receive a military pension was in direct conflict with, and thus preempted, Rhode Island statute prohibiting the purchase of credits in the retirement system for any period of time that is counted in any other retirement or pension system in which the individual already receives or will receive a pension, and so defendants were required to allow members to purchase up to four years of credit in the retirement system for their prior military service, and (2) Rhode Island statute providing that no member of the retirement system shall receive more than one year of retirement credit for any one year of service did not conflict with, and was not preempted by, the subject federal statute, and so those members who simultaneously worked for the state and served in the military could not "double count" and were only eligible to receive one year of retirement credit for one calendar year of service.

Motions granted in part and denied in part

West Headnotes (20)

[1] **States**
Congressional intent

In deciding whether a federal law preempts a state statute, court must determine the intent of Congress, which must be "clear and manifest" before preemption is found.

Cases that cite this headnote

[2] **States**
Preemption in general

State law is preempted under the Supremacy Clause in three circumstances: first, Congress may evince its preemptive intent through explicit preemption language, second, even without explicit language, preemption will occur if court concludes that Congress has manifested an intent to occupy exclusively the field of law in issue, preempting even supplemental state laws that do not actually conflict with federal law, and finally, state law is preempted to the extent that it actually conflicts with federal law. U.S.C.A. Const. Art. 6, cl. 2.

Cases that cite this headnote

[3] **States**
Conflicting or conforming laws or regulations

"Conflict" between state and federal law occurs, for preemption purposes, when compliance with

both state and federal law is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Cases that cite this headnote

[4] **Public Employment**
Pensions and retirement benefits in general
States
Right to benefits, and amount

Congress designed federal statute preventing states from denying pension benefits to those members of their retirement system who receive a military pension to protect military personnel who have earned a military pension from being denied state or local pension benefits for which they would otherwise be eligible. 10 U.S.C.A. § 12736.

Cases that cite this headnote

[5] **Armed Services**
Pay and allowances

Pursuant to its Article I power over the military, Congress created the military pension system, in part, to induce members of the armed forces to remain in the reserves for at least the period of time necessary for them to perform the 20 years of service needed to qualify for a military pension, thereby keeping a significant cadre of trained people in reserve should the United States need to call on them. U.S.C.A. Const. Art. 1, § 8, cls. 12, 13.

Cases that cite this headnote

[6] **Public Employment**
Military service
States
Right to benefits, and amount

Federal statute preventing states from denying pension benefits to those members of their retirement system who receive a military pension prevents states from forcing former military personnel to choose between joining the reserves, qualifying for a military pension, but not being able to purchase credit in the state retirement system for their prior military service, and not joining the reserves but being permitted to purchase retirement credit for their prior military service in the state retirement system. 10 U.S.C.A. § 12736.

Cases that cite this headnote

[7] **Public Employment**
Military service
States
Right to benefits, and amount

Although federal statute preventing states from denying pension benefits to those members of their retirement system who receive a military pension does not require states to allow employees to purchase credit in the state retirement system for military service, the statute does prohibit states from limiting the option to purchase retirement credit for prior military service only to those who do not enjoy a federal military pension. 10 U.S.C.A. § 12736.

Cases that cite this headnote

[8] **Public Employment**
Authority to regulate
States
Right to benefits, and amount

Pursuant to federal statute preventing states from denying pension benefits to those members of their retirement system who receive a military pension, states are free to regulate their pension system in any manner they deem appropriate, as long as they do not deny benefits to individuals receiving a military pension because they receive that pension. 10 U.S.C.A. § 12736.

Cases that cite this headnote

[9] **Public Employment**
Pensions and Benefits
States
Public officers and employees; elections

Although Congress has not preempted the entire field of public employee pension law, a state statute will be preempted if there exists a direct conflict between it and a federal law.

Cases that cite this headnote

[10] **Public Employment**
Military service
States
Public officers and employees; elections
States
Right to benefits, and amount

Federal statute preventing states from denying pension benefits to those members of their retirement system who receive a military pension was in direct conflict with, and thus preempted, Rhode Island statute prohibiting the purchase of credits in the Rhode Island Employees Retirement System for any period of time that is counted in any other retirement or pension system in which the individual already receives or will receive a pension, and so retirement board and its officials were required to allow members of Retirement System to purchase up to four years of credit in the retirement system for their prior military service. U.S.C.A. Const. Art. 6, cl. 2; 10 U.S.C.A. § 12736; R.I.Gen.Laws 1956, §§ 36–9–31(a), 36–10–9(5).

Cases that cite this headnote

[11] **Statutes**
Plain Language; Plain, Ordinary, or Common Meaning

When interpreting a statute, court should give the statute its plain meaning and read the statute so as to effectuate Congress' intent.

Cases that cite this headnote

[12] **Public Employment**
Pensions and retirement benefits in general
States
Right to benefits, and amount

Phrase "otherwise properly credited," as used in federal statute preventing states from denying pension benefits to those members of their retirement system who receive a military pension, refers to any criteria the state pension plan may impose except for the fact that a person is receiving a military pension. 10 U.S.C.A. § 12736.

Cases that cite this headnote

[13] **Public Employment**
Pensions and retirement benefits in general
States
Right to benefits, and amount

By enacting federal statute preventing states from denying pension benefits to those members of their retirement system who receive a military pension, Congress sought to ensure that serving in the reserves long enough to earn a pension would not prevent an individual from receiving any retirement benefits a state may offer its employees. 10 U.S.C.A. § 12736.

Cases that cite this headnote

[14] **Public Employment**
Service Credit
States
Public officers and employees; elections
States

⇐Right to benefits, and amount

Despite federal statute preventing states from denying pension benefits to those members of their retirement system who receive a military pension, states are free to enact limitations on the type and amount of service for which members of their retirement system can purchase retirement credit. 10 U.S.C.A. § 12736.

Cases that cite this headnote

[15] **Public Employment**
⇐Military service
States
⇐Right to benefits, and amount

If a state chooses to offer the opportunity to purchase retirement credit to former military personnel, then it cannot differentiate between those who receive a military pension and those who do not. 10 U.S.C.A. § 12736.

Cases that cite this headnote

[16] **Public Employment**
⇐Military service
States
⇐Right to benefits, and amount

Under Rhode Island law, members of the Rhode Island Employees Retirement System who simultaneously work for the state and serve in the National Guard or reserves are only eligible to receive one year of retirement credit for one calendar year of service. R.I.Gen.Laws 1956, § 36–9–25(b).

Cases that cite this headnote

[17] **Public Employment**
⇐Pensions and retirement benefits in general
States
⇐Public officers and employees; elections
States
⇐Right to benefits, and amount

Federal statute preventing states from denying pension benefits to those members of their retirement system who receive a military pension has not displaced all of state pension law, and those regulations which do not discriminate on the basis of a military pension will not be preempted by the statute. 10 U.S.C.A. § 12736.

Cases that cite this headnote

[18] **Public Employment**
⇐Service Credit
States
⇐Public officers and employees; elections
States
⇐Right to benefits, and amount

Rhode Island statute providing that no member of the Rhode Island Employees Retirement System shall receive more than one year of retirement credit for any one year of service did not conflict with, and thus was not preempted by, federal statute preventing states from denying pension benefits to those members of their retirement system who receive a military pension, and so those members who simultaneously worked for the state and served in the military could not "double count" and were only eligible to receive one year of retirement credit for one calendar year of service; Rhode Island statute applied universally, regardless of whether an individual received a military pension. 10 U.S.C.A. § 12736; R.I.Gen.Laws 1956, § 36–9–25(b).

Cases that cite this headnote

[19] **Civil Rights**
⇐Results of litigation; prevailing parties

Although § 1983 action brought by members of Rhode Island Employees Retirement System

seeking retirement credit for their military service resulted in a split decision, most members were prevailing parties in the case, and thus entitled to costs and an award of attorney fees. 42 U.S.C.A. §§ 1983, 1988.

Cases that cite this headnote

[20] **Civil Rights**
Taxation

Application for counsel fees by prevailing parties in § 1983 action had to be supported by a detailed, contemporaneous accounting of the time spent by the attorneys on the case. 42 U.S.C.A. §§ 1983, 1988.

Cases that cite this headnote

Attorneys and Law Firms

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David D. Barricelli, Hinckley, Allen & Snyder, Providence, RI, for Defendants.

OPINION AND ORDER

LAGUEUX, District Judge.

This case is before the Court on cross-motions for summary judgment. Plaintiffs, the twenty-eight[1] above named individuals, are members of the Rhode Island Employees Retirement System ("Retirement System"). They brought this suit for declaratory and injunctive relief under 42 U.S.C. § 1983 (1994) against the Retirement Board of the Rhode Island Retirement System ("Retirement Board"), Nancy Mayer in her official capacity as General Treasurer of the State of Rhode Island ex officio chairperson and treasurer of the Retirement Board, and Joanne Flaminio in her official capacity as executive director of the Retirement Board (collectively "defendants").[2] The parties have placed two issues before the Court. First, does 10 U.S.C. § 12736 (1994) preempt R.I. Gen. Laws § 36–10–9(5) (1997), thereby enabling plaintiffs to purchase up to four years of retirement credit in the Retirement System for prior active duty military service? And, second, does 10 U.S.C. § 12736 preempt R.I. Gen. Laws § 36–9–25(b) (1997), thereby enabling some plaintiffs to purchase credit in the Retirement System for military service performed concurrently with their state employment? Because this Court concludes that 10 U.S.C. § 12736 preempts R.I. Gen. Laws § 36–10–9(5) but does not preempt R.I. Gen. Laws § 36–9–25(b), plaintiffs' motion for summary judgment is granted in part and denied in part. Likewise, defendants' ***273** motion for summary judgement is granted in part and denied in part.

I. Background

All plaintiffs are either Rhode Island state employees or public school teachers in various communities in Rhode Island and are active members of the Retirement System. *See* R.I. Gen. Laws § 36–9–2 (1997)(establishing that state employees shall become members of the Retirement System); *id.* § 16–16–2 (extending membership in the Retirement System to teachers). When a member of the Retirement System retires, the state employs a statutorily prescribed formula to calculate the individual's pension. *Id.* § 36–10–10(b). Under this formula, the greater the number of years of service credit, the greater the individual's retirement benefits. *Id.*

The Rhode Island legislature has decided to allow some members of the Retirement System to augment their number of years of service for pension purposes by permitting members to purchase a limited number of retirement credits for service that otherwise would not count in the Retirement System. *E.g.,* R.I. Gen. Laws § 36–9–31.1 (1997)(providing that any active member of the Retirement System who served in the peace corps, teacher corps, or volunteers in service to America may purchase up to four years of retirement credit for that service). Through R.I. Gen. Laws § 36–9–31(a) (1997), the state legislature extended the opportunity to purchase retirement credit to members of the Retirement System that had formerly served in the United States armed forces, stating:

> Any active member of the retirement system, who served on active duty in the armed service of the United States ... may purchase

> credit for that service up to a maximum of four (4) years provided that he or she has received an honorable discharge.

Id. See also id. § 16–16–7.1 (explicitly extending the same terms to any teachers who were members of the Retirement System); *id.* § 45–21–53 (1999)(allowing any active municipal employee to purchase credit in the Retirement System for prior active duty military service).

Plaintiffs seek to purchase service credits in the Retirement System for their military service pursuant to R.I. Gen. Laws §§ 16–16–7.1, 36–9–31 and 45–21–53. All plaintiffs have served in various capacities in the United States armed forces. Twenty-six of the twenty-eight plaintiffs have performed at least some active duty military service prior to beginning their employment with the state. The remaining two plaintiffs, August Almeida and Garry Mazzie, have performed all of their military service while they have been employed by the state. Joint Statement of Undisputed Facts ¶¶ 6 and 7. In addition, all plaintiffs are qualified or will qualify for federal military pensions.

At this point it is appropriate to distinguish the types of service for which the plaintiffs seek retirement credit. All plaintiffs, except Almeida and Mazzie, seek to purchase credit for military service prior to their membership in the Retirement System ("Prior Military Service"). Some plaintiffs, including several who wish to purchase credit for Prior Military Service, want to purchase credit for military service performed concurrently with their membership in the Retirement System ("Concurrent Military Service").[3]

In order to maintain the actuarial soundness of the state pension system, the Rhode Island legislature has limited the number of years of retirement credit, both purchased and earned, that a member may accumulate in the Retirement System. Plaintiffs agree that their proposed purchases of retirement credit for military service are properly limited by ***274** R.I. Gen. Laws §§ 36–10–10(b)(capping the total number of retirement credits, either purchased or earned, at thirty-five years); 16–16–13(b)(applying the same thirty-five year cap to teachers); 36–9–31(a)(limiting to four years the number of credits in the Retirement System that may be purchased for Prior Military Service); and 36–10–9(3)(iv)(limiting to five years the total number of credits in the Retirement System that may be purchased by any member). Moreover, plaintiffs stipulate that they have received full service credit in the Retirement System during any leave of absence for military training or active service. Joint Statement of Undisputed Facts ¶ 11.

Although plaintiffs acknowledge the legitimacy of the above constraints and the State's need to establish protocols to ensure the fiscal solvency of its pension system, plaintiffs contest the validity of R.I. Gen. Laws §§ 36–10–9(5)(limiting the opportunity to purchase credit in the Retirement System for Prior Military Service to those individuals whose service has not been credited in another pension system) and 36–9–25(b)(providing that no member of the Retirement System shall receive more than one year of retirement credit for any one year of service). Section 36–10–9(5) states that no individual may receive credit in the Retirement System for any period of time that "counts as service credit in any other retirement system in which the member is vested or from which the member is receiving a pension and/or any annual payment for life," excepting any payments received pursuant to the federal Social Security Act. *Id.* Plaintiffs object to this limitation and argue that it has been preempted by 10 U.S.C. § 12736, which states:

> 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 credited under it.

Id. Whether this language preempts R.I. Gen. Laws § 36–10–9(5) is the first issue presented by this case.

The second issue before the Court is whether § 12736 preempts R.I. Gen. Laws § 36–9–25(b), which provides that no member of the Retirement System may receive more than one year of retirement credit for any one year of service. That subset of plaintiffs seeking to purchase retirement credit for Concurrent Military Service argues that the state statute is preempted. They claim that receiving more than one year of credit for any one year of service is "double dipping" and as such should be upheld by this Court. Defendants argue that the limitation imposed by R.I. Gen. Laws § 36–9–25(b) is not preempted by 10 U.S.C. § 12736 because it classifies what type of service may be properly credited and does not discriminate on the basis of whether plaintiffs receive a military pension. Defendants further contend that

plaintiffs should not be permitted to purchase any retirement credit that would result in an accumulation of more than one year of retirement credit for any one calendar year of service because such additional credit would not be "otherwise properly credited" under § 12736. The Court will address each issue in turn.

II. Jurisdiction

This court has jurisdiction over the parties and the matter pursuant to 28 U.S.C. § 1331 (1994) and 42 U.S.C. §§ 1983 and 1988.

III. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure sets forth the standard for ruling on a summary judgment motion:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine ***275** issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c). Summary judgment is appropriate when no "reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In deciding a motion for summary judgment the Court must view the facts on the record and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Continental Cas. Co. v. Canadian Universal Ins. Co.,* 924 F.2d 370, 373 (1st Cir.1991). When ruling on cross motions for summary judgment, the court must consider each motion separately, drawing inferences against each movant in turn. *Blackie v. Maine,* 75 F.3d 716, 721 (1st Cir.1996). Summary judgment is appropriate when there is no dispute as to any material fact and only questions of law remain. *Id.*

IV. Discussion

A. 10 U.S.C. § 12736 Preempts R.I. Gen. Laws § 36–10–9(5)

The first issue in this case is whether plaintiffs, pursuant to R.I. Gen. Laws § 36–9–31(a), are eligible to purchase up to four years of retirement credit in the Retirement System for Prior Military Service. Defendants argue that plaintiffs are not eligible to purchase credit for such service because they fail to meet the requirements of R.I. Gen. Laws § 36–10–9(5), which prohibits the purchase of credits in the Retirement System for any period of time that is counted in any other retirement or pension system in which the individual already receives or will receive a pension. In this case, plaintiffs have been prevented from purchasing credit for years of Prior Military Service that have already been counted toward their federal military pensions.

Plaintiffs contend that 10 U.S.C. § 12736 preempts R.I. Gen. Laws § 36–10–9(5) to the extent that individuals with vested military pensions are treated differently from those similarly situated individuals who do not receive a military pension. This Court will examine first the requirements for federal preemption of a state statute and then whether 10 U.S.C. § 12736 preempts R.I. Gen. Laws § 36–10–9(5).

1. Preemption Standard

[1] In deciding whether a federal law preempts a state statute, a court must determine the intent of Congress, which must be " 'clear and manifest' before preemption is found." *Talbott v. C.R. Bard, Inc.,* 63 F.3d 25, 27 (1st Cir.1995)(quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)).

[2] [3] The United States Supreme Court has established that "state law is pre-empted under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, in three circumstances." *English v. Gen. Elec. Co.,* 496 U.S. 72, 78, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). First, Congress may evince its preemptive intent through explicit preemption language. *Id.* Second, even without explicit language, preemption will occur if the Court concludes that Congress has manifested an intent to occupy exclusively the field of law in issue, preempting even supplemental state laws that do not actually conflict with federal law. *Philip Morris Inc. v. Harshbarger,* 122 F.3d 58, 68 (1st Cir.1997)(citing *Rice,* 331 U.S. at 230, 67 S.Ct. 1146). Finally, "state law is pre-empted to the extent that it actually conflicts with federal law." *English,* 496 U.S. at 79, 110 S.Ct. 2270. A conflict occurs when compliance with both state and federal law is a "physical impossibility," *Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142–43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312

U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

Because there is no explicit preemption language in § 12736, this Court must examine Congress' intent in enacting the statute and then determine whether ***276** § 12736 meets either of the other two standards for preemption.

a. Congressional Intent

[4] [5] [6] Although there is scant legislative history relating to § 12736, it seems clear that Congress designed § 12736 to protect military personnel who have earned a military pension from being denied state or local pension benefits for which they would otherwise be eligible. This intent can be found in the language of the statute itself. The phrase "under any other law" indicates that Congress specifically sought to protect those individuals receiving a military pension from being denied retirement benefits by government action. 10 U.S.C. § 12736. Pursuant to its Article I power over the military, Congress created the military pension system, in part, to induce members of the armed forces to remain in the reserves for at least the period of time necessary for them to perform the 20 years of service needed to qualify for a military pension, thereby keeping a significant cadre of trained people in reserve should the United States need to call on them. U.S. Const. art. 1, § 8, cls. 12 and 13; *Alexander v. Fioto,* 430 U.S. 634, 639, 97 S.Ct. 1345, 51 L.Ed.2d 694 (1977); *Cantwell v. County of San Mateo,* 631 F.2d 631, 635 (9th Cir.1980). In furtherance of this goal, § 12736 prevents states from forcing former military personnel to choose between joining the reserves, qualifying for a military pension, but not being able to purchase credit in the state retirement system for their Prior Military Service and not joining the reserves but being permitted to purchase retirement credit for their Prior Military Service in the state retirement system.

b. Field Preemption

[7] [8] While Congress enacted § 12736 to prevent states from denying benefits to those members of their retirement system who receive a military pension, it did not intend that § 12736 preempt the entire field of pension law, even as those laws apply to military personnel. Congress evinced the limited nature of the restrictions imposed on states by § 12736 when it included the phrase "unless otherwise properly credited." 10 U.S.C. § 12736. Although, as plaintiffs recognize, § 12736 does not require states to allow employees to purchase credit in the state retirement system for military service, *e.g., Ass'n of Orange County Deputy Sheriffs v. County of Orange,* 138 Cal.App.3d 569, 188 Cal.Rptr. 54, 56 (1982)(holding that Prior Military Service was not otherwise properly credited in a county retirement system when the county had explicitly opted not to allow any members to purchase retirement credit for prior federal service), § 12736 does prohibit states from limiting the option to purchase retirement credit for Prior Military Service only to those who do not enjoy a federal military pension. *Cantwell,* 631 F.2d at 635. States, therefore, are free to regulate their pension system in any manner they deem appropriate, as long as they do not deny benefits to individuals receiving a military pension because they receive that pension. *See id.* at 637.

c. Direct Conflict

[9] [10] Although Congress has not preempted the entire field of pension law, a state statute will be preempted if there exists a direct conflict between it and a federal law. *English,* 496 U.S. at 79, 110 S.Ct. 2270. In this case, R.I. Gen. Laws § 36–9–31(a) allows members of the Retirement System to purchase up to four years of retirement credit for Prior Military Service. *Id.* But, the Retirement Board has prohibited those members of the Retirement System who receive a military pension from purchasing credit for their Prior Military Service because that service has been counted toward their military pension. This results in the bizarre outcome in which an individual who served in the military on active duty for four years and did not join the reserves could, upon becoming a member of the Retirement System, purchase credit in the Retirement System for those four years of Prior Military Service. Whereas an individual ***277** who served four years of active duty in the military, and then served in the reserves for another sixteen years and qualified for a military pension, would *not* be able to purchase credit in the Retirement System for that Prior Military Service upon becoming a member of the Retirement System. Such a result directly undermines Congress' intent to encourage military reserve service through § 12736. Therefore, this Court concludes that the state and federal statutes are in direct conflict on this issue and that, pursuant to the Supremacy Clause of the Constitution, 10 U.S.C. § 12736 preempts R.I. Gen. Laws § 36–10–9(b). U.S. Const. art VI, § 1, cl. 2.

Although the First Circuit has not previously addressed this issue, the Ninth Circuit authored the leading opinion on this issue nearly two decades ago in *Cantwell v. County of San Mateo,* 631 F.2d 631 (1980), a case nearly identical to the one before this Court today. In *Cantwell,* the Ninth Circuit held that 10 U.S.C. § 1336 (currently 10 U.S.C. § 12736) preempted a California state regulation that prohibited the purchase of retirement credit for Prior

Military Service if the individual was receiving a military pension. *Cantwell,* 631 F.2d at 635–36. Although that decision does not bind this Court, the *Cantwell* Court's conclusions are persuasive in this instance. Like the majority of plaintiffs in the case at bar, Cantwell had served on active duty in the United States armed forces. *Id.* at 633. After leaving active service, Cantwell remained in the reserves for more than twenty years and qualified for a military pension. *Id.* During part of his time in the reserves, Cantwell was simultaneously employed by the County of San Mateo. *Id.* Cantwell brought suit seeking credit in the County retirement system for his prior active Navy service, not the time spent in the reserves, to which he believed he was entitled under Cal. Gov't Code §§ 31641.1 and 31641.2. *Cantwell,* 631 F.2d at 633. These sections of the California code allow members to receive credit in county retirement systems for prior public service. *Id.* at 633–34. The County refused to credit Cantwell's prior service, however, citing Cal. Gov't Code § 31641.4, which allows credit for that prior public service only if the employee is not entitled to receive a pension from the public agency for which he worked. *Cantwell,* 631 F.2d at 634. The Ninth Circuit affirmed the district court's holding that the federal statute and the state statute were in direct conflict and that the federal statute therefore preempted the state legislation. *Id.* at 637. This Court reaches the same conclusion today and concludes that 10 U.S.C. § 12736 and R.I. Gen. Laws § 36–10–9(5) are in direct conflict and that the federal statute preempts the state regulation.

2. Prior Military Service Is "Otherwise Properly Credited" Under Rhode Island Law

Despite the decision in *Cantwell,* defendants argue that the credits which plaintiffs seek to purchase in the Retirement System are not "otherwise properly credited" under Rhode Island law as required by § 12736. Defendants suggest that because the prohibition in R.I. Gen. Laws § 36–10–9(5) against purchasing credit in the retirement system for a period of service that has already been credited in another pension system applies to all members of the Retirement System and not just to those with military service, the Prior Military Service for which plaintiffs seek to purchase credit cannot be "otherwise properly credited" in the Retirement System.

[11] [12] Well-settled principles of statutory interpretation dictate that this Court must disagree with defendants' construction of § 12736 because to do otherwise would effectively render § 12736 meaningless and undermine Congress' intent. *Cantwell,* 631 F.2d at 634. When interpreting a statute a court should give the statute its plain meaning and read the statute so as to effectuate Congress' intent. *Parisi by Cooney v. Chater,* 69 F.3d 614, 617 (1st Cir.1995). To interpret the ***278** phrase "otherwise properly credited" as defendants suggest would enable states to evade § 12736 and render impotent the statute's "under any other law" language. *Cantwell,* 631 F.2d at 634. Further, defendants' interpretation would effectively permit states to discriminate between similarly situated members of a state retirement system on the basis of whether a member received a military pension; this would directly contradict Congress' intent in enacting § 12736. *Cantwell,* 631 F.2d at 634. Therefore, this Court rejects defendants' proposed interpretation and agrees with the Ninth Circuit's understanding of the phrase-namely, that " 'otherwise [properly credited]' refers to any criteria the [state] pension plan may impose except for the fact that a person is receiving a [military] pension." *Id.* at 635.

[13] By enacting § 12736, Congress sought to ensure that serving in the reserves long enough to earn a pension would not prevent an individual from receiving any retirement benefits a state may offer its employees. This intent is certainly consistent with the "otherwise properly credited" language in § 12736. Section 12736 does not prevent states from operating their pension system in the manner they deem appropriate, rather it ensures that reservists are not forced to forego retirement benefits because they receive a military pension.

[14] [15] As a result, the "otherwise properly credited" language cannot be construed so as to allow states to circumvent § 12736. *Cantwell,* 631 F.2d at 634. Instead, that language must be read to promote Congress' intent to protect reservists from being forced to choose in which retirement system to apply their Prior Military Service, while still affording states substantial control over their own pension systems. As plaintiffs acknowledge, Rhode Island is under no obligation to even allow members of the Retirement System to purchase credit for Prior Military Service. *See Cantwell,* 631 F.2d at 637; *Deputy Sheriffs,* 188 Cal.Rptr. at 57. Further, Rhode Island is free to enact limitations on the type and amount of service for which members of the Retirement System can purchase retirement credit. *E.g.,* R.I. Gen. Laws § 16–16–13(b); *id.* § 36–9–31(a); *id.* § 36–10–9(3)(iv); *id.* § 36–10–10(b). But Congress has declared that if a state chooses to offer the opportunity to purchase retirement credit to former military personnel, that it cannot differentiate between those who receive a military pension and those who do not. *Cantwell,* 631 F.2d at 635. Accordingly, the Court declares that defendants are required to allow plaintiffs to purchase up to four years of credit in the retirement system pursuant to the limitations of R.I. Gen. Laws § 36–9–31(a).

B. Concurrent Military Service Is Not "Otherwise Properly Credited" Under § 12736

Although the "otherwise properly credited" language in § 12736 does not affect the rights of those plaintiffs seeking to purchase credit for Prior Military Service, it effectively eliminates the claims of those plaintiffs seeking to purchase credit for Concurrent Military Service. *Id.*

1. Double Dipping

Plaintiffs claim that they should be allowed to purchase credit in the Retirement System for Concurrent Military Service, arguing that such a purchase would amount to "double dipping," a practice which other federal courts have sanctioned under § 12736. To support their claim, Plaintiffs rely on *Dailey v. Pub. Sch. Ret. Sys.,* 707 F.Supp. 1087 (E.D.Mo.1989) and *Arrington v. Florida,* 1984 WL 3181 (N.D.Fla.1984). This reliance, however, is misplaced. Although both the *Dailey* and *Arrington* Courts concluded that § 12736 contemplated and sanctioned the practice of "double dipping," the definition of "double dipping" used by those courts differs greatly from that which plaintiffs urge this Court to adopt today. *Dailey,* 707 F.Supp. at 1089; *Arrington,* 1984 WL 3181 at *4–5. In both *Dailey* and *Arrington,* "double ***279** dipping" described the situation in which an individual receives credit in both the federal and state retirement systems for the same period of Prior Military Service. *Dailey,* 707 F.Supp. at 1089; *Arrington,* 1984 WL 3181 at *4–5. As this Court has decided earlier in this opinion, plaintiffs are entitled to purchase credit in the Retirement System for their Prior Military Service even though that service has already been credited in the federal pension system. Such a purchase of retirement credit for Prior Military Service was the "double dipping" at issue in the *Dailey* and *Arrington* cases. Therefore, those plaintiffs seeking to purchase retirement credit for Concurrent Military Service are not seeking to "double dip" and *Dailey* and *Arrington* do not support their claim.

2. Double Counting

Instead, plaintiffs' request to purchase credit for Concurrent Military Service, if granted, would amount to a "double counting" of a period of service in a single retirement system. Effectively, plaintiffs seek to evade the limitation imposed by R.I. Gen. Laws § 36–9–25(b) and acquire more than twelve months of retirement credit in the Retirement System during a single twelve month period. *Id.*

This somewhat complicated issue is best expressed through an example. Pursuant to R.I. Gen. Laws § 16–16–5 (Supp.1999), school teachers receive a full year's credit in the Retirement System even though they actually work only nine months during the year. *Id.* Conceivably, a school teacher could serve on "active duty"[4] for three months during the summer and seek to purchase credit in the Retirement System for those three months. If permitted, this in effect would enable that teacher to accumulate 15 months of credit in the Retirement System for only 12 months of service. This "double counting" of time in a single retirement system is not contemplated by § 12736 and is not permitted under Rhode Island law.

[16] Section 36–9–25(b) of the Rhode Island General Laws provides that:

> Notwithstanding any other section of law, no member of the retirement system shall be permitted to purchase service credit for any portion of a year for which he or she is already receiving service credit in this retirement system.

Id. Therefore, those plaintiffs who simultaneously worked for the state and served in the National Guard or reserves are only eligible to receive one year of retirement credit for one calender year of service.

[17] In this instance the "otherwise properly credited" language in § 12736 is appropriately applied to bar plaintiffs' request. *See Sawyer v. County of Sonoma,* 719 F.2d 1001, 1006 (9th Cir.1983); *Deputy Sheriffs,* 188 Cal.Rptr. at 56. Both *Sawyer* and *Deputy Sheriffs* stand for the proposition that § 12736 has not displaced all of state pension law and that those regulations which do not discriminate on the basis of a military pension will not be preempted by § 12736. *Sawyer,* 719 F.2d at 1005; *Deputy Sheriffs,* 188 Cal.Rptr. at 56.

In *Sawyer,* a former county employee brought suit against the county and county retirement board seeking retirement benefits for his Prior Military Service. *Id.* at 1004 The Ninth Circuit held that retirement benefits could be denied under the "otherwise properly credited" language of § 12736 if the member of the retirement system failed to comply with the system's procedural requirements. *Id.* at 1006. In *Sawyer,* appellant failed to file a written notice of his election to claim his Prior Military Service. *Id.* at 1004. The *Sawyer* Court determined that the decision in *Cantwell* did not preempt

the entire state regulatory scheme. ***280** *Sawyer,* 719 F.2d at 1005 (interpreting *Cantwell,* 631 F.2d at 639). Instead, the *Sawyer* Court concluded that the decision in *Cantwell* dictates that although states may not differentiate between members of a state retirement system on the basis of the member's eligibility for a military pension, states may require members to comply with otherwise applicable statutory prerequisites for receiving retirement credit. *Sawyer,* 719 F.2d at 1006.

[18] Like the procedural requirement at issue in *Sawyer,* R.I. Gen. Laws § 36–9–25(b) is precisely the type of provision which comes within the "otherwise properly credited" language contained in § 12736. Because § 36–9–25(b) applies universally, regardless of whether an individual receives a military pension, it does not conflict with federal law and is not preempted by § 12736. Accordingly, plaintiffs will not be allowed to "double count" in the Retirement System.

Conclusion

For the preceding reasons, plaintiffs' motion for summary judgment is granted as to those plaintiffs seeking to purchase up to four years of credit in the Retirement System for Prior Military Service as defined in R.I. Gen. Laws § 36–9–31(a) and denied as to those plaintiffs seeking to purchase credit in the Retirement System for Concurrent Military Service for any period of time that has already been credited in the Retirement System. Accordingly, defendants motion is granted in part and denied in part.

[19] [20] Although this is a split-decision, most plaintiffs are prevailing parties in this case, and thus entitled to costs and an award of attorney fees under 42 U.S.C. § 1988. Any motion for such costs, including counsel fees shall be made within thirty days of this decision. The application for counsel fees must be supported by a detailed, contemporaneous accounting of the time spent by the attorneys on this case. *Grendel's Den, Inc. v. Larkin,* 749 F.2d 945, 952 (1st Cir.1984). To avoid piecemeal appeals, no judgment declaring the rights of the parties shall enter until the issue of costs and counsel fees is resolved.

It is so ordered.

All Citations

116 F.Supp.2d 269, 25 Employee Benefits Cas. 2427

Footnotes

1 Although twenty-nine individuals are listed as plaintiffs in the Joint Statement of Undisputed Facts ¶¶ 6 and 7, only twenty-eight individuals are named in the Complaint. Accordingly, Edward Charbonneau, whose name appears neither in the Complaint nor in any other Court document relating to this case prior to the Joint Statement of Undisputed Facts, is not a plaintiff in this case.

2 Since the filing of the suit both Mayer and Flamino have left office. Pursuant to Federal Rule of Civil Procedure 25(d)(1), their successors are automatically substituted as parties.

3 Those plaintiffs seeking to purchase credit for Concurrent Military Service include: August Almeida, Joseph Almonte, Paul Desrochers, James Dunn, Gary Mazzie, Lawrence McDonald, John Ricci, Russell Spaight, Peter Todd, and George Truman. Joint Statement of Undisputed Facts ¶ 7.

4 For purposes of this example and pursuant to the standard for summary judgment which requires that this Court make all reasonable assumptions in favor of the non-moving party, this Court assumes, without deciding, that the type of service indicated in this example meets the definition of "active duty" as contained in R.I. Gen. Laws § 36–9–31.

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