

00-024

**PENSIONS, BENEFITS, AND RETIREMENT: VIRGINIA
RETIREMENT SYSTEM.**

Statutory prohibition against allowing member of Virginia Retirement System to receive credit for prior active duty military service may not withstand constitutional scrutiny. Board of Trustees of Retirement System has limited authority to adopt rules and policies to conform conflicting military service credit provisions of Retirement System to federal law which allows credit for same service under state and federal retirement systems.

Mr. William H. Leighty
Director, Virginia Retirement System

October 20, 2000

You inquire concerning the prohibitions in §§ 51.1-142(B) and 51.1-143(B)(i) of the *Code of Virginia*, relating to the purchase of credit by a member of the Virginia Retirement System for prior active duty military service,¹ and whether they conflict with federal law that also allows credit for military reservists.

You relate that a member of the Virginia Retirement System has applied to purchase credit for military service under § 51.1-142(B). You also relate that the member served in active military duty for three years, eleven months. You further relate that, after his release from active duty, the member entered a military reserve component and accumulated total military service of twenty-three years, eleven months.

You inquire whether the member is eligible to receive credit for prior active duty military service, despite the disallowance of such credit in § 51.1-142(B).

Sections 51.1-142(B)² and 51.1-143(B)(i)³ expressly prohibit a member of the Virginia Retirement System from purchasing prior active duty military service as a credit toward retirement. These statutes thus prevent the practice of receiving credit for the same service under both the state and federal systems.

Chapter 67 of Title 10 of the United States Code governs retired pay for certain members of the reserves.⁴ Generally, to be eligible for retirement benefits, a person must have served in the reserves for at least twenty

years.⁵ Section 12736 of Chapter 67, which authorizes a person to receive credit for the same service under both systems, states:

No period of service included wholly or partly in determining a person's right to, or the amount of, retired pay under this [law] may be excluded in determining his eligibility for any annuity, pension, or old-age benefit, under any other law ... in determining the amount payable under that law, if that service is otherwise properly credited under it.^[6]

The leading case concerning this matter, *Cantwell v. County of San Mateo*,⁷ involves a county employee who was eligible to receive retirement pay for service in the Naval Reserve. The amount payable to the employee under the reserve pension was based in part on his three-year, eight-month service on active duty, prior to his employment by the county. At that time, California law allowed employees to purchase service time for prior service, provided that such service time would not be calculated in any other public retirement service.⁸

The Ninth Circuit resolved the conflict in *Cantwell* between California and federal law by allowing the employee to receive credit for the same service under both systems. The court reasoned that, given Congress' intent of creating an inducement for service in a reserve component, prohibiting credit under both systems would discourage membership in the reserve.⁹ The court held that the California statute must yield under the Supremacy Clause of the Constitution of the United States¹⁰ to Congress' constitutional power to raise and maintain armies.¹¹ Furthermore, the court concluded that the federal law was not invalid under the Tenth Amendment.¹²

Courts in other states have cited *Cantwell* in reaching similar conclusions.¹³ Additionally, in Wisconsin, the legislature cited *Cantwell* in amending its statutory provision prohibiting receipt of credit for the same service under both the state and federal retirement systems, so as to allow state employees to include active duty service time in the calculations for both the state retirement system and that of the reserves under federal law.¹⁴

Although the Attorney General has a long-standing policy of generally refraining from declaring a statute unconstitutional,¹⁵ it is my opinion that the provisions of §§ 51.1-142 and 51.1-143, which prohibit receipt of credit for the same service under both the state and federal retirement systems, clearly would not withstand constitutional challenge by a member of the Virginia Retirement System who was similarly situated.

In light of my opinion that §§ 51.1-142(B) and 51.1-143(B)(i) do not conform with the federal statutes allowing military reservists to receive credit for the same service under both systems, you also inquire whether the Board of Trustees of the Virginia Retirement System ("Board") may adopt rules and policies that, in order to comply with federal law, are inconsistent with Virginia's statutes which prohibit a member of the Retirement System from receiving credit for the same service under both the state and federal retirement systems.

Section 51.1-124.22(A)(8) sets forth as one of the powers and duties of the Board, "[p]romulgating regulations and procedures and making determinations necessary to carry out the provisions of [Title 51.1]." This authority is typical of the authority granted to most state agencies and localities. Regulations under this type of authority must implement the policies of the enabling statute and be consistent with the enabling statute, other Virginia laws and the Constitution of Virginia.¹⁶

Additionally, § 51.1-124.22(A)(10) imbues the Board with the power and duty of "[a]dopting rules and policies that bring the Retirement System into compliance with any applicable law or regulation of this Commonwealth or the United States." This authority contemplates a situation in which regulations, policies, and procedures adopted to implement an enabling statute are in conflict with other state statutes, the regulations of other state agencies, federal statutes, or regulations of federal agencies. Such conflict may arise because (1) the *particular method* chosen to implement the enabling statute violates another state or federal law, or (2) the enabling statute itself is in conflict with another law or regulation (i.e., *any method* implementing the enabling statute would be in conflict).

In the first situation, it is clear that the authority granted pursuant to § 51.1-124.22(A)(8) is broad enough to correct the situation. The Retirement System would merely be switching from one authorized method of implementing the enabling statute to another. A principle of statutory construction is that every word be given its intended meaning,¹⁷ and another provides that every section is given effect, if possible.¹⁸ Construing § 51.1-124.22(A)(10) to address only the first situation would be superfluous. Accordingly, this section addresses the second situation, where the conflict is attributable to the enabling statute itself.

Although I am mindful that an agency generally would not have the authority to adopt regulations, rules, policies, and procedures that are contrary to the Virginia Constitution or state law, in this case, the General Assembly clearly has delegated such authority to the Board and has limited the exercise of such authority to actions necessary to conform to a conflicting provision of Virginia or federal law or regulation. Thus, the

Board may adopt rules and policies in conformance with the federal law at issue.

¹"[A]ctive duty military service' means full-time service of at least 180 consecutive days in the United States ... reserve components" Section 51.1-142(B).

²Section 51.1-142(B) provides:

"Any vested member in service with at least twenty-five years of creditable service in the Retirement System may purchase prior service credit for (i) active duty military service in the armed forces of the United States

"... Such prior service credit shall not be otherwise creditable as prior service in the calculation of any retirement benefit by [the Virginia Retirement System], but shall be creditable as prior service under [the Retirement System] and, if applicable, shall be considered in determining the actuarial equivalent for early retirement."

³Section 51.1-143(B) provides that "[s]ervice purchased under this section shall not be considered (i) in the calculation of any retirement benefit by another retirement system."

⁴*See* 10 U.S.C.A. §§ 12731-12740 (West 1998 & Supp. 2000).

⁵*See id.* § 12731(a)(2) (West 1998).

⁶*Id.* § 12736 (West 1998).

⁷631 F.2d 631 (9th Cir. 1980).

⁸*See id.* at 633-34.

⁹*See id.* at 635 (citing *Alexander v. Fioto*, 430 U.S. 634, 639 (1977)); *see also* *Merrill v. United States*, 338 F.2d 372, 375 (Ct. Cl. 1964).

¹⁰The Supremacy Clause commands that the Constitution and laws of the United States "shall be the supreme law of the land," notwithstanding the laws of any state to the contrary. U.S. Const. art. VI.

¹¹*See* 631 F.2d at 635-36.

¹²*See id.* at 636-37. The Tenth Amendment to the U.S. Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states."

¹³*See, e.g.,* Arrington v. Florida, No. GCA 82-0015, 1985 U.S. Dist. LEXIS 14131, at *5, *12 (N.D. Fla. Nov. 5, 1985); Dailey v. Public School Retirement System of Mo., 707 F. Supp. 1087, 1089 (E.D. Mo. 1989).

¹⁴*See* Morris v. Employee Trust Funds Bd., 554 N.W.2d 205, 214 (Wis. Ct. App. 1996).

¹⁵*Compare* Op. Va. Att’y Gen.: 1995 at 164; 1992 at 14, 18; 1985-1986 at 76, 77.

¹⁶When an enabling statute is silent on the method by which a regulatory power is to be exercised, the state agency or local governing body adopting regulations under that enabling statute normally is free to select any method that is reasonable and not in conflict with the state constitution or laws. *See* Commonwealth v. Arlington County Bd., 217 Va. 558, 572-81, 232 S.E.2d 30, 39-44 (1977); Op. Va. Att’y Gen.: 1992 at 53, 56; 1989 at 352, 353.

¹⁷*See* School Board v. Griffin, 204 Va. 650, 659, 133 S.E.2d 565, 571 (1963); Harrison v. Day, 200 Va. 439, 451, 106 S.E.2d 636, 646 (1959); 1982-1983 Op. Va. Att’y Gen. 444, 445.

¹⁸*See* Pierce v. Dennis, 205 Va. 478, 481-82, 138 S.E.2d 6, 9 (1964); 1987-1988 Op. Va. Att’y Gen. 93, 94.