BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:	)	
	)	
J. R. C.	)	
	)	OAH No. 08-0107-PER
	)	Div. R & B No. 2008-004

DECISION AND ORDER

I. Introduction

This appeal relates to whether J. C. should have been permitted to purchase credit in the Public Employees Retirement System (PERS) corresponding to his approximately four years of active military service as a warrant officer in the United States Army Reserve. The Administrator has rejected Ms. C.'s request to add this time to his credited service for retirement. This order affirms the Administrator's action because the fundamental legal premise underlying Mr. C.'s request for credit is mistaken.

II. Facts

A. Procedure for Taking Evidence and Argument

By agreement, the Office of Administrative Hearings heard Mr. C.'s appeal through written submissions from both sides. Mr. C. had the first opportunity to submit evidence and argument: He was asked to submit a brief and to attach to it any documents he wished to rely on that were not already included in the numbered administrative record. He submitted a memorandum of argument and two documents, one of them an affidavit attesting to his military service and the second an authorization permitting the administrative law judge to review the personnel records of an individual named D. F. The Division of Retirement and Benefits then submitted a responsive brief. The responsive brief contained a "Statement of Undisputed Facts," with citations to the record, and attached two pages from D.F.'s file.

After reviewing the parties' submissions the administrative law judge issued an order setting the following procedure with a May 30, 2008 deadline:

> 1. Mr. C. may submit a short memorandum responding to the Administrator's April 28 brief. The response should indicate whether he agrees with each of the "undisputed facts" listed on pages 1-2 of the Administrator's brief, and if not, should cite evidence in the record

showing the facts to be otherwise. The response may present rebuttal arguments on any other point Mr. C. wishes to address.

2. Mr. C. may submit any items from the personnel records of D. F. that he wishes the ALJ to consider. Mr. C. appears to have assumed that the ALJ could use Mr. F,'s release and go to the Division of Retirement and Benefits to gather and read these materials on his own. This is not possible. The judge can only review evidence brought to the Office of Administrative Hearings by one of the parties, and cannot conduct an independent factual investigation.

Mr. C. has submitted nothing further, and Mr. C. is therefore deemed to have accepted the "Statement of Undisputed Facts" and to have acquiesced in the consideration of only the limited material regarding D.F. assembled by the Division.

B. Facts Established

The following statement of facts is drawn from the "Statement of Undisputed Facts" described above, except where otherwise attributed.

J. R. C. served 11 years as an enlisted man in the regular army and was honorably discharged from that service on February 26, 1980.[1] The following day he began service as an active-duty reserve warrant officer, remaining in that capacity for three years, nine months, and six days. He then was appointed a warrant officer in the regular army. He remained in the regular army until his retirement and honorable discharge from the military in August of 1989 with service totaling a little more than 20 years.

Mr. C. retired as a Chief Warrant Officer Three with regular army retirement benefits governed by United States Code Title 10, Chapter 65. All of his military service, including his three years, nine months, and six days as an active-duty reserve warrant officer, were included in his total years of service for which he has been awarded regular army retirement benefits.

On October 10, 2007, Mr. C., who was then an employee of the Alaska Department of Commerce, Community & Economic Development, submitted to PERS an Application for Military Service Credit, seeking credit for his three years, nine months, and six days as an active-duty reserve warrant officer.[2] He noted on the application that he was "eligible for a federal retirement benefit for this same service."[3] The Administrator denied the application and this appeal followed.

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1 R. 36.
2 R. 32-33.
3 R. 33.

In connection with his request for credit, Mr. C. has relied in part on his belief, apparently correct, that PERS credit was granted to another employee, D. F., who like Mr. C. retired after 20 years of enlisted and warrant officer service. D. F. retired from the army reserve, not the regular army.[4]

III. Discussion

The starting point for Mr. C.'s claim is AS 39.35.340(a), which provides in pertinent part:

> A vested employee is entitled to credited service for active military service in the armed forces of the United States . . . if the employee received a discharge under honorable conditions and is not entitled to receive retirement benefits from the United States government for the same service. The credited service allowed may not exceed an aggregate period of five years. Benefits are not payable on credited service for military service unless the employee makes retroactive contributions to the plan . . . .

On its face, this provision does not provide benefits to Mr. C. for his military service because of its express exclusion of retirees "entitled to receive retirement benefits from the United States government for the same service." However, several courts and state attorneys general have held[5] in the context of statutes very similar to Alaska's that exclusions of double benefits such as the one in AS 39.35.340(a) are preempted in some circumstances by a federal statute, 10 U.S.C. § 12736.[6] That law 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 . . . pension . . . on account of civilian employment . . . or in determining the amount payable under that law, if that service is otherwise properly credited under it.

Congress enacted 10 U.S.C. § 12736 as part of an effort to induce experienced soldiers to remain active in the reserves so as to retain access to their skills in time of need.[7] It "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

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[4] Administrator's Exhibits 1 and 2. These two exhibits are the only records of Mr. F.'s military service and retirement that either party has provided to the Office of Administrative Hearings.

[5] The leading case on the topic is *Cantwell v. County of San Mateo,* 631 F.2d 631 (9th Cir. 1980); *see also, e.g., Almeida v. Retirement Bd. of R.I. Employees Retirement Syst.,* 116 F. Supp. 2d 269 (D.R.I. 2000); *Steven Weinberger,* Connecticut Op. A.G. May 1, 2002; Virginia Op. A.G. 00-024, Oct. 20, 2000.

[6] 10 U.S.C. § 12736 was numbered 10 U.S.C. § 1336 until 1994.

[7] *Cantwell,* 631 F.2d at 635.

retirement credit for their prior military service in the state retirement system."[8] In other words, is seeks to avoid the situation where an individual with an option to leave military service before retirement eligibility (typically, before 20 years of service) might have the opportunity to use some or all of the military service in another retirement system, but would potentially forfeit that eligibility if he or she became a reservist and continued to the point of eligibility for a federal pension. All of the cases and attorney general opinions construing the preemptive effect of 10 U.S.C. § 12736 focus on that dilemma.

Read closely, 10 U.S.C. § 12736 is tailored quite narrowly to address that particular concern. It operates only with respect to "service included wholly or partly in determining a person's right to, or the amount of retired pay *under this chapter*." "This chapter" is 10 U.S.C. chapter 1223, covering "Retired Pay for Non-Regular Service," the chapter in which § 12736 appears. Hence, § 12736 is only about individuals who follow the common path of serving any regular duty first and then completing their military service in the reserves, and thus who retire under Chapter 1223 from the reserves.

Mr. C.'s military career followed a different path. He served time in the reserves at mid-career and then, well before he became eligible for military retirement, reentered the regular army and eventually retired from the regular army. His retirement was under the chapter for regular service retirement, 10 U.S.C. chapter 65. He is not within the ambit of 10 U.S.C. § 12736, and that statute does not preempt any part of AS 39.35.340(a) in this context.

Mr. C. suggests that the Division has inconsistently applied AS 39.35.340(a) by allowing D. F. to purchase credit for military service while denying Mr. C. the same opportunity. There is no inconsistency. Mr. F. retired from the military as a reservist under 10 U.S.C. chapter 1223. He is therefore within the ambit of 10 U.S.C. § 12736, and he can benefit from the preemptive effect that federal courts and attorneys general in other states have ascribed to that law. It is appropriate to approach Mr. C.'s request differently because he falls outside the scope of 10 U.S.C. § 12736.

As a second basis for suggesting inconsistency, Mr. C. relies on an e-mail from a Division employee to an individual named D. C..[9] In that e-mail, the Division indicated that it would "process" D.C.'s claim for credit for military service if he supplied a form DD 214 showing whether and when he was on active duty. Because there is no evidence in the record to

[8] *Almeida*, 116 F. Supp. 2d at 276.
[9] R. 24.

indicate that D.C. had retired from the military under 10 U.S.C. chapter 65, as Mr. C. did, and because the e-mail does not in any event show D.C's request was ultimately granted, it provides no evidence at all of inconsistency by the Division.

Since there in no evidence that the Division has applied the law inconsistently, it is unnecessary to address whether or under what circumstances such inconsistency might entitle an appellant such as Mr. C. to prevail in his appeal.

IV. Conclusion

Alaska Statute 39.35.340(a) expressly excludes retirees in Mr. C.'s position from eligibility to purchase PERS retirement credit for their military service. Because the application of the exclusion in Mr. C.'s case is not preempted by 10 U.S.C. § 12736, the Administrator was correct to conclude that Mr. C. may not purchase such credit. The Administrator's January 17, 2008 denial of Mr. C.'s claim for military service credit is affirmed.

DATED this 30th day of June, 2008.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 39.35.006. The undersigned, in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 20th day of July, 2008.

By: *Signed*
Signature
Christopher Kennedy
Name
Administrative Law Judge
Title

[This document has been modified to conform to technical standards for publication.]