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NO. 35568-0-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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JAMES A. DENSLEY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF RETIREMENT SYSTEMS  
AND THE WASHINGTON STATE ATTORNEY GENERAL'S OFFICE,

Respondents.

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**BRIEF OF RESPONDENT DEPARTMENT OF RETIREMENT  
SYSTEMS**

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COURT OF APPEALS  
DIVISION II  
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*RM 2/15/07*

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## I. INTRODUCTION

James A. Densley seeks judicial review pursuant to RCW 34.05, the Administrative Procedure Act (APA), of the Final Order<sup>1</sup> of the Department of Retirement Systems (Department). The Department's Final Order denied Mr. Densley's request for additional retirement service credit from the Public Employees' Retirement System (PERS) Plan 1<sup>2</sup>. PERS Plan 1 provides for retirement service credit for military service in certain situations that do not involve a public employee leaving his position to engage in the military service. This is called "non-interruptive" service. Mr. Densley sought PERS Plan 1 service credit for weekend and summer training and drills for the Washington Army National Guard (National Guard) between 1972 and 1976, prior to his becoming a public employee under PERS Plan 1. The Department concluded that the PERS statutes that define service and govern when military service is creditable do not provide for service credit for Mr. Densley's National Guard activities and denied his request. The Department also denied a similar request for travel time for active duty training for similar reasons. The Superior Court affirmed the Department's decision, and Mr. Densley appealed to this Court.

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<sup>1</sup> See attached copy of Final Order designated as Appendix A.

<sup>2</sup> Codified at RCW 41.40.

## II. STATUTORY PROVISION AT ISSUE

RCW 41.40.170 sets out the requirements for granting retirement service credit in PERS Plan 1 for military service.<sup>3</sup> It currently provides, in pertinent part:

(1) A member who has served or shall serve on **active federal service in the military or naval forces of the United States** and who left or shall leave an employer to enter such service shall be deemed to be on military leave of absence if he or she has resumed or shall resume employment as an employee within one year from termination thereof.

...

(3) In any event, after completing twenty-five years of creditable service, any member may have **service in the armed forces** credited to him or her as a member whether or not he or she left the employ of an employer to enter **the armed service**: PROVIDED, That in no instance, described in this section, shall **military service** in excess of five years be credited: AND PROVIDED FURTHER, That in each instance the member must restore all withdrawn accumulated contributions, which restoration must be completed within five years of membership service following the first resumption of employment or complete twenty-five years of creditable service: AND PROVIDED FURTHER, That this section will not apply to any individual, not a veteran within the meaning of RCW 41.04.005.

RCW 41.40.170(1),(3) (emphasis added).

Under subsection (1) of this statute, a member may receive retirement service credit for military service that interrupts the member's

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<sup>3</sup> AR at 7, Final Order.

PERS employment. This is commonly referred to as “interruptive” service. Interruptive military service is not at issue in this case.

Under subsection (3) of the statute, the member may receive retirement service credit for military service that does not interrupt his PERS employment (if all other statutory requirements are met). This is commonly referred to as “non-interruptive” military service. Mr. Densley is seeking retirement service credit for non-interruptive military service. To receive retirement service credit for non-interruptive military service, a PERS Plan 1 member must meet the definition of veteran in RCW 41.04.005. In addition, the member is limited to receiving no more than five years of retirement service credit for the military service. These requirements of the statute are not in dispute in this case. What is in dispute is (1) whether the amount of military service in the month must meet the definition of service in the retirement statutes at the time it was performed, and, (2) whether the type of military service that must be performed to receive credit for non-interruptive military service under RCW 41.40.170(3) is active federal service, as it is under subsection (1) of the statute.

### **III. COUNTER STATEMENT OF THE ISSUES**

The issues in this case are as follows:

1. Is Mr. Densley required to meet the PERS Plan 1 definition of “service” under RCW 41.40.010(9) that was in effect at the time he performed his National Guard duty in order to receive retirement service credit in PERS?
2. Does RCW 41.40.170(3) require that Mr. Densley’s non-interruptive military service be “active federal service” to qualify for retirement service credit?
3. Is RCW 41.40.170 in conflict with any federal or state law that would preempt it in favor of granting Mr. Densley retirement service credit for his National Guard duty?
4. Did the Department commit any procedural errors in processing Mr. Densley’s request that would result in his being given PERS retirement service credit for his National Guard duty?

### **IV. COUNTER STATEMENT OF THE CASE**

#### **A. Mr. Densley’s Military Service And PERS Employment**

##### **1. Active Federal Duty Under Title 10 USC In 1972**

In June 1972, Mr. Densley received his commission as a Reserve Officer (Second Lieutenant) with the United States Army.<sup>4</sup> From August 7, 1972, through November 7, 1972, Mr. Densley attended active duty for training in Ft. Eustis, Virginia.<sup>5</sup> Mr. Densley’s DD-214<sup>6</sup> reflects his release from this active duty for training with a total time served of

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<sup>4</sup> AR at 6.

<sup>5</sup> AR at 3.

<sup>6</sup> A DD-214 is a form that is completed upon a military service member’s discharge from federal duty.

three months and one day.<sup>7</sup> Mr. Densley applied to the Department for retirement service credit for this time, and the Department gave him three months of retirement service credit for this non-interruptive military service.<sup>8</sup> This represents August, September, and October 1972, in which Mr. Densley was engaged in active federal service under orders issued under Title 10 USC and in which he had ten or more days of such duty each month, which was required to receive retirement service credit for the month under the version of the retirement statutes in effect in 1972. This time is not at issue in this appeal. However, Mr. Densley also sought service credit for five days of travel in connection with seven days of active federal service, and two days of drill in November 1972, which the Department denied and which is among the time at issue in this case.<sup>9</sup>

## **2. Weekend Drills, Summer Training, And Medical Examination In 1972-76**

Between November 1972 and March 1976, Mr. Densley attended two days of weekend drill each month in Yakima for a total of 41 weekend drills.<sup>10</sup> He also completed fifteen days of required training in each of the following years: 1973, 1974, and 1975.<sup>11</sup> Mr. Densley also underwent one

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<sup>7</sup> AR at 3, attached hereto as Appendix B.

<sup>8</sup> AR at 4.

<sup>9</sup> AR at 216.

<sup>10</sup> AR at 3.

<sup>11</sup> AR at 3, 163, 153, 159. See Appendix C.

physical examination in September 1976.<sup>12</sup> The Department did not grant Mr. Densley service credit for any of this time because it did not amount to ten days in any one month and/or because it was under Title 32 USC, rather than active military service under Title 10 USC.

For this period, Mr. Densley is requesting approximately 14 months of retirement service credit broken down as follows:

9¼ months service credits for weekend drill duty performed between 1972 and 1976.<sup>13</sup>

¼ month service credit for medical examination conducted in September 1976.<sup>14</sup>

3 months service credits for fifteen day trainings conducted in June 1973, June 1974, and July 1975.<sup>15</sup>

### **3. PERS Employment From 1977 To 2006**

All of the activity described above occurred prior to Mr. Densley's entering into PERS employment. Mr. Densley began his PERS employment with the Pierce County Prosecutor's Office in May 1977,<sup>16</sup> and he retired from that position in 2006.<sup>17 18</sup>

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<sup>12</sup> AR at 3, 201. See Appendix D.

<sup>13</sup> AR at 216.

<sup>14</sup> AR at 216.

<sup>15</sup> AR at 216.

<sup>16</sup> AR at 3.

<sup>17</sup> AR at 3. Mr. Densley retired effective January 2006—after the administrative decision was rendered and prior to the superior court decision.

<sup>18</sup> Mr. Densley received three more months of retirement service credit for

## **B. History Of The National Guard**

From the Department's standpoint, a significant issue in Mr. Densley's request for retirement service credit was whether his military service was active federal service or some other kind of service. To understand the distinction among the various types of service, it is essential to understand how the National Guard developed and how it currently functions.<sup>19</sup>

Under Article I, Section 8, Clauses 15 and 16 of the U.S. Constitution, Congress has broad power to provide for the common defense, raise and support armies, make rules for governance of the Armed Forces, and to enact necessary and proper laws to carry out these functions. Early attempts to create an organized militia proved unsatisfactory, and in 1903, Congress passed the Dick Act<sup>20</sup> which established an "organized militia," to be known as the National Guard. The Act created an organizational chart for the National Guard that conformed to the organization of the Regular Army. The Act also

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military service performed in 1990. This service is not at issue here. AR at 4, 99.

<sup>19</sup> See *Perpich v. Dep't of Defense*, 496 U.S. 334, 110 S. Ct. 2418, 110 L.Ed.2d 312 (1990) (in which the Supreme Court examined the evolution of the National Guard from its inception and in which the court discussed the state and federal nature of the Guard). The Department offers a truncated version of the history of the National Guard as stated in that decision. A copy of the *Perpich* decision is attached and designated as Appendix E.

<sup>20</sup> Ch. 196, 32 Stat. 75 (January 21, 1903).

provided federal funds and Regular Army instructors to train National Guard members.<sup>21</sup>

In 1916, Congress decided to “federalize” the National Guard, which provided greater federal control and federal funding.<sup>22</sup> Every Guardsman was required to take a dual oath to support the federal government as well as the state government, and to obey the President as well as the Governor. The President was authorized to draft members of the Guard into federal service.<sup>23</sup> The Army of the United States included not only “the Regular [federal] Army,” but also “the National Guard while in the service of the United States.”<sup>24</sup> Guard members who were drafted into the service of the United States were discharged from the state militia and became subject to the rules and regulations of the Regular Army.<sup>25</sup>

Since 1933, enlistment in a State National Guard unit is considered to be simultaneous enlistment in the National Guard of the United States. Thus, a member of the Guard who is ordered to active duty in the federal service is relieved of his or her status in the State Guard for the entire period of federal service. The two distinct classifications of service, state and federal, are governed by their respective provisions in the United States Code. A member of the Guard can be called into active federal service by the President or Congress pursuant to Title 10 of the United States Code. Other military service, such as training, is reserved to the states and is rendered under Title

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<sup>21</sup> *Perpich*, 496 U.S. at 341.

<sup>22</sup> *Id.* at 343.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 343-44.

<sup>25</sup> *Id.* at 344.

32 USC, which governs the rights and procedures surrounding Reservists in their state capacity.

**C. Evolution Of RCW 41.40.170**

**1. Originally RCW 41.40.170 Provided Retirement Service Credit Only For Interruptive Military Service**

Originally, RCW 41.40.170 provided retirement service credit only for military service in situations where the member left PERS employment for active federal service and subsequently returned to PERS employment (now commonly referred to as interruptive service). For example, as amended in 1963, the statute stated:

A member of the retirement system who has served or shall serve on **active federal service** in the military . . . and who left or shall leave an employer to enter **such service** shall be deemed to be on military leave of absence if he has resumed or shall resume employment as an employee within one year from termination thereof, or if he has applied or shall apply for reinstatement of employment and is refused employment for reasons beyond his control within one year from termination of the military service shall upon resumption of service within ten years from termination of military service have his **service in such armed forces** credited to him as a member of the retirement system: *Provided*, That no such military service in excess of five years shall be credited ~~unless such service was actually rendered during time of war or emergency~~: *And provided further*, That he restore all withdrawn accumulated contributions, which restoration must be completed within three years of membership service following his first resumption of employment.<sup>26</sup>

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<sup>26</sup> Laws of 1963, ch. 174, § 10 (bolding added and legislative deletions shown by strikethrough).

The statute only allowed retirement service credit for active federal military service that interrupted a member's employment.

**2. In 1967, The Legislature Amended RCW 41.40.170 To Expand A Member's Ability To Receive Retirement Service Credit For Interruptive Military Service**

In 1967, the Legislature amended RCW 41.40.170 to allow members who had performed active federal military service that had interrupted their PERS employment to receive retirement service credit after twenty-five years of PERS employment, regardless of the amount of time it took for the member to become reemployed. The statute read in part:

A member of the retirement system who has served or shall serve on **active federal service** in the military . . . and who left or shall leave an employer to enter **such service** shall be deemed to be on military leave of absence if he has resumed or shall resume employment as an employee within one year from termination thereof, or if he has applied or shall apply for reinstatement of employment and is refused employment for reasons beyond his control within one year from termination of the military service shall upon resumption of service within ten years from termination of **military service** or shall in all events after completing 25 years of creditable service have his **service in such armed forces** credited to him as a member of the retirement system.<sup>27</sup>

By its terms, the statute continued to apply *only* to those members who *left* PERS employment for active federal service. However, it

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<sup>27</sup> Laws of 1967, ch. 127, § 8 (bolding added; legislative addition shown by underlining).

extended PERS service credit to those who ultimately completed 25 years of PERS employment, *whether or not* their reemployment in PERS occurred within ten years of the termination of their military service.

**3. In 1972, The Legislature Expanded RCW 41.40.170 To Provide PERS Service Credit For Non-Interruptive Service**

In 1972, the Legislature amended the statute to extend retirement service credit for military service to members who performed non-interruptive military service. The amendment provided that persons who participated in military service *prior* to PERS membership could receive retirement service credit for such periods of military service after accruing 25 years of creditable service in PERS.

(1) ~~A member of the retirement system who has served or shall serve on **active federal service** in the military or naval forces of the United States and who left or shall leave an employer to enter **such service** shall be deemed to be on military leave of absence if he has resumed or shall resume employment as an employee within one year from termination thereof, or if he has applied or shall apply for reinstatement of employment and is refused employment for reasons beyond his control within one year from termination of military service shall upon resumption of service within ten years from termination of military service or shall in all events after completing 25 years of creditable service have his service in such armed forces credited to him as a member of the retirement system: Provided, That no such military service in excess of five years shall be credited: And provided further, That he restore all withdrawn accumulated contributions, which restoration must be completed within~~

~~three five years of membership service following his first resumption of employment.~~

(2) If he has applied or shall apply for reinstatement of employment, within one year from termination of the military service, and is refused employment for reasons beyond his control, he shall, upon resumption of service within ten years have such service credited to him.

(3) In any event, after completing twenty-five years of creditable service, any member may have his **service in the armed forces** credited to him as a member whether or not he has left the employ of an employer to enter **such armed service**: *Provided*, That it no instance, in subsection (1), (2) and (3) of this section, shall military service in excess of five years be credited: *And Provided Further*, That in each instance, the member must restore all withdrawn accumulated contributions, which restoration must be completed within five years of membership service following his first resumption of employment: *And Provided Further*, That this section will not apply to any individual, not a veteran within the meaning of RCW 41.06.150, as now or hereafter amended: *And Provided Further*, That in no instance, described in subsection (1), (2) and (3) of this section, shall military service be credited to any member who is receiving full military retirement benefits pursuant to 10 USC § 3911 or § 3914, as now or hereafter amended.<sup>28</sup>

The references to “active federal service” remained the same throughout these amendments despite the rearrangement of the statute into subsections in 1972. That is, the primary reference in the initial portion of the statute is to “active federal service.” The later references in the statute relate back to that language, in that they refer to “such” service. In 1991,

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<sup>28</sup> Laws of 1972, Ex. Sess., ch. 151, § 3 (bolding added; legislative additions and deletions shown by underlining and strikethrough).

the statute was amended from “such” armed service to “the” armed service. This can be seen in the chart below.

<b>Laws of 1963 Ch. 174, § 10</b>	<b>Laws of 1967 Ch. 127, § 8</b>	<b>Laws of 1972 Ex. Sess. Ch. 151, § 3</b>	<b>Laws of 1991 Ch. 35, § 78</b>
The following language is all contained in one section.	The following language is all contained in one section.	The following language was broken out into 3 subsections.	The following language was broken out into 3 subsections.
“active federal service” “such service”	“active federal service” “such service”	<b><u>Subsection (1):</u></b> “active federal service” “such service”	<b><u>Subsection (1)</u></b> “active federal service” “such service”
“military service”	“military service”	<b><u>Subsection (2)</u></b> “military service”	<b><u>Subsection (2)</u></b> “military service”
“service in such armed forces”	“service in such armed forces”	<b><u>Subsection (3)</u></b> “service in the armed forces” “such armed service”	<b><u>Subsection (3)</u></b> “service in the armed forces” “the armed service”
		<b><u>Subsection (3), proviso 1:</u></b> “military service”	<b><u>Subsection (3), proviso 1:</u></b> “military service”

Throughout the history of the statute, the Department has consistently interpreted it to require active federal service for both interruptive and non-interruptive service.

**D. Procedural History**

Mr. Densley requested review of the PERS Administrator’s determination that he was not entitled to PERS service credit for military

service he performed between 1972 and 1976.<sup>29</sup> According to the Department's procedure, review of a Plan Administrator's decision may be requested first through a petition process.<sup>30</sup> The petition process is an internal administrative process used by the Department to provide an additional level of review before an adjudicative proceeding is started; it is not itself an adjudicative proceeding.<sup>31</sup> The Petition Examiner denied Mr. Densley's request for retirement service credit for the military service requested.<sup>32</sup>

Mr. Densley appealed the petition decision to the Department's Presiding Officer.<sup>33</sup> Proceedings before the Presiding Officer are adjudicative proceedings governed by the APA.<sup>34</sup> The parties filed motions for summary judgment,<sup>35 36</sup> and later agreed that an evidentiary hearing would be unnecessary.<sup>37</sup>

The Presiding Officer issued a Decision and Order on July 28, 2005, denying Mr. Densley's request for retirement service credit for the

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<sup>29</sup> Administrative Record (AR) at 312.

<sup>30</sup> See generally WAC 415-04.

<sup>31</sup> See generally WAC 415-08-010, which states that Chapter 415-08 WAC governs all adjudicative proceedings under Chapter 34.05 RCW. The petition's process is found in WAC 415-04. It is not an adjudicative proceeding and therefore makes no reference to RCW 34.05.

<sup>32</sup> Administrative Record (AR) at 316.

<sup>33</sup> AR at 283.

<sup>34</sup> WAC 415-08-010.

<sup>35</sup> AR at 275.

<sup>36</sup> AR at 272.

<sup>37</sup> AR at 271.

military service at issue,<sup>38</sup> and a Corrected Decision and Order on September 6, 2005, that reached a similar result.<sup>39</sup> Mr. Densley appealed to the Pierce County Superior Court,<sup>40</sup> which affirmed the Department's order.<sup>41</sup> This appeal followed.

## V. ARGUMENT

### A. Standard Of Review

Judicial review of a Final Order by the Department is governed by the Washington Administrative Procedure Act (APA), RCW 34.05. Mr. Densley, as the party asserting the invalidity of the Department's Final Order, has the burden to demonstrate that the Department's Final Order is invalid.<sup>42</sup>

In reviewing an agency order arising out of an adjudicative proceeding, the court shall grant relief *only if* it determines that one or more of the enumerated statutory bases for relief are established. *See Heidgerken v. Dep't of Natural Res.*, 99 Wn. App. 380, 384, 993 P.2d 934 (2000). The APA provides in relevant part:

The Court shall grant relief from an agency order in an adjudicative proceeding only if it determines that: . . .

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<sup>38</sup> AR at 270.

<sup>39</sup> AR at 22.

<sup>40</sup> CP at 283-290.

<sup>41</sup> CP at 116-117.

<sup>42</sup> RCW 34.05.570(1)(a).

- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, . . . ; [or]
- (i) The order is arbitrary or capricious.

RCW 34.05.570(3).

**1. Mr. Densley Has Not Challenged The Department's Findings Of Fact And These Are Verities On Appeal**

The substantial evidence standard applies where there is a challenge to findings of fact. However, Mr. Densley has not challenged the facts found in the Final Order. In fact, he has adopted the facts of the Final Order. Therefore, the Department's unchallenged Findings of Fact are to be considered verities on appeal.<sup>43</sup>

**2. This Court's Review Of The Department's Legal Conclusions Is Governed By The Error-of-Law Standard, Giving Substantial Deference To The Agency's Interpretation Of The Law It Administers**

When the petitioning party has challenged an agency's conclusions of law or otherwise raised a question of law under RCW 34.05.570(3)(d), the error-of-law standard applies. The court must review the law de novo and apply it to the facts in the record. The court may substitute its judgment for that of the agency only if the agency's interpretation or

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<sup>43</sup> *Davis v. Dep't of Labor and Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

statement of the law is incorrect. *Franklin Cy Sheriff's Ass'n v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982).

Although issues of law are clearly within the court's province to decide, courts accord substantial weight to an agency's interpretation when an agency is interpreting the law it administers. *Renton Educ. Ass'n v. Public Empl. Relations Comm'n*, 101 Wn.2d 435, 441, 680 P.2d 40 (1984); *Dana's Housekeeping v. Dep't of Labor & Indus.*, 76 Wn. App. 600, 605, 886 P.2d 1147 (1995). This is especially true, where, as here, the agency has expertise in a special field of law. *Chancellor v. Dep't of Retirement Sys.*, 103 Wn. App. 336, 343, 12 P.3d 164 (2000); *Grabicki v. Dep't of Retirement Sys.*, 81 Wn. App. 745, 752, 916 P.2d 452 (1996).

### **3. This Court's Review Of An Agency's Discretionary Actions Is Governed By The Arbitrary And Capricious Standard**

The courts may grant relief if discretionary agency action is "arbitrary and capricious." However, administrative action is not arbitrary and capricious unless it is willful, unreasoning, and taken without regard to the attending facts and circumstances. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 596, 903 P.2d 433 (1995). In judicial review, "[the court] will not set aside a discretionary decision absent a clear showing of abuse." *ARCO v. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995) (citing *Jensen v. Dep't of Ecology*, 102 Wn.2d 109, 685

P.2d 1068 (1984)). For a court to reverse a discretionary decision, “it must find that the decision was manifestly unreasonable,” “exercised on untenable grounds or for untenable reasons.” *Hadley v. Dep’t of Labor & Indus.*, 116 Wn.2d 897, 906, 810 P.2d 500 (1991); *Wilson v. Board of Governors*, 90 Wn.2d 649, 656, 585 P.2d 136 (1978), *cert. denied*, 440 U.S. 960 (1979).

**B. Mr. Densley’s National Guard Duty Does Not Meet The Definition Of “Service” In RCW 41.40.010(9) That Was In Effect At The Time The Guard Duty Was Performed And The Medical Examination Was Conducted, Which Required Ten Days Or More Of Work In A Month To Receive A Month Of Service Credit**

The starting point for determining whether PERS retirement service credit can be given for military service is whether the military service met the applicable definition of “service” under RCW 41.40.010(9). Retirement service credit that is given for military service under RCW 41.40.170 is calculated in the same manner as service credit that is earned through employment—based on the definition of “service” found in the PERS statute, RCW 41.40.010(9), at the time the service was performed.

When Mr. Densley began his National Guard weekend drills in 1972, “service” was defined as “[f]ull time work for ten days or more or

an equivalent period of work in any given calendar month.”<sup>44</sup> Thus, a PERS Plan 1 member must have worked for ten days in a month in order to receive one month of service credit. Because Mr. Densley only performed two days of weekend drill per month (or one day of medical examination), that military service does not qualify for retirement service credit regardless of the nature of his military service.

**1. This Court Has Already Decided That The Department Must Use The Definition Of “Service” In Effect At The Time The Military Service Was Performed When Calculating The Amount Of Retirement Service Credit To Be Given For Military Service.**

In *Strong v. Dept. of Retirement Sys.*, 61 Wn. App. 457, 810 P.2d 974 (1991), the court held that the definition of “service” that applies when the Department is determining whether military service qualifies for PERS Plan 1 service credit is the definition in effect at the time the military service was performed, regardless of when the member seeks retirement service credit for that service. The court specifically stated that “military service should be credited as of the time it was performed.”<sup>45</sup> At the time Mr. Densley’s military service was performed from 1972 through 1976, the PERS definition of “service” required that he perform “full time work for ten days or more” within a month.<sup>46</sup> Mr. Densley admits that his

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<sup>44</sup> Laws of 1972, 1st ex. Sess., ch. 151, § 3.

<sup>45</sup> *Strong*, 61 Wn. App. at 461.

<sup>46</sup> AR at 111. Laws of 1972, 1st ex. Sess., ch. 151, § 3.

weekend drills and medical examination in 1972-1976 do not meet that 10-day requirement.<sup>47</sup>

Mr. Densley argues that because he could not request the credit until he had obtained twenty-five years of service, he need only meet the definition of service that existed at the time he became eligible to apply for the service credit. However, in *Strong* the court rejected that argument. Mr. Strong also requested service credit for military service performed prior to his state employment. The issue was whether to calculate Mr. Strong's 1942-1946 military service at the rate that was in effect when he performed that service or at the higher current rate.<sup>48</sup> The *Strong* court held that the military service credit should be calculated at the rate in effect when the military service was performed.<sup>49</sup>

The *Strong* court found support for this conclusion in the fact that:

it avoids unfair disparity between those who served as state employees during World War II, and those who served in the military during that time. If we were to adopt Strong's position, a person who was entitled to receive credit for work rendered during World War II as a civilian employee of the State would be credited at 1.4285 percent, while a person who served in the military during that time would be credited with his or her military service as if it were state service, but at the higher rate of 2 percent. *We can find no*

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<sup>47</sup> Appendix A of Mr. Densley's brief sets forth the amount of time he spent doing military service. It shows two days per month for weekend drills and one day for a medical examination.

<sup>48</sup> *Strong*, 61 Wn. App. at 459-460.

<sup>49</sup> *Strong*, 61 Wn. App. at 460.

*indication that the legislature intended to create this disparity.*<sup>50</sup>

(emphasis added).

By requesting one-quarter of a service credit month for each two day weekend drill he performed between 1972 and 1976—even though PERS members who provided employment service from 1972 to 1976 would not be entitled to *any* service credit for working two days per month—Mr. Densley is asking this Court to approve the same unfair disparity in service credit that the *Strong* court rejected. The Court should reject Mr. Densley’s argument, just as it did in *Strong*.

**2. The 1991 Amendment To The Definition Of Service In RCW 41.40.010(9) Is Not Remedial In Nature**

Mr. Densley also asserts, without citation to authority, that the 1991 amendment to the “service” definition allowing one-quarter service credit months for Plan 1 members is a “remedial” statute that should be applied retroactively to military service he performed between 1972 and 1976. In *State v. T.K.*, 139 Wn.2d 320, 329-330, 987 P.2d 63 (1999), the court stated that “[a] statute is presumed to operate prospectively unless the Legislature indicates that it is to operate retroactively. *Courts disfavor retroactivity*” (internal citations omitted) (emphasis added). The presumption of prospectivity can be overcome if (1) the Legislature

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<sup>50</sup> *Strong*, 61 Wn. App. at 461.

explicitly provides for retroactivity, (2) the amendment is curative, or (3) the statute is “remedial.”<sup>51</sup> Mr. Densley’s only argument is that the statute is “remedial” and should therefore be retroactively applied.

“A remedial statute is one which relates to “practice, procedures, and remedies.”<sup>52</sup> The 1991 amendment substantively changed and broadened the definition of service, providing that a member need only work one hour in a month in order to qualify for one quarter of a service credit. Increasing a benefit is a substantive change, not a change in a practice, procedure, or remedy.

In sum, Mr. Densley’s weekend drill duty and one day medical examination in 1972-1976 do not meet the definition of “service” in RCW 41.40.010(9) that was in effect during those years. Under *Strong*, he is not entitled to retirement service credit for this military service, regardless of whether the service is in the “active federal service” or otherwise. The Court can affirm the Department’s denial of service credit for this service on that basis, without reaching the issue of the nature of the military service.

**3. Mr. Densley Has Provided No Legal Authority To Support His Assertion That He Is Entitled To The Inclusion Of Discretionary Travel Time To Or From Training**

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<sup>51</sup> *State v. T.K.*, 139 Wn.2d at 332.

<sup>52</sup> *Id.*

In addition to the weekend drills and medical examination, Mr. Densley seeks to obtain a month of retirement service credit for November 1972 for his seven days of active federal service. Because he did not meet the ten or more days of work in a month under the service requirement in RCW 41.40.010, as discussed above, he was not given a service credit for this month.<sup>53</sup> Mr. Densley claims he meets that service definition requirements arguing that five days of travel time should be added to the seven days of active federal service he performed in November 1972. The Department correctly denied him retirement service credit for the month.

Mr. Densley's Orders for active federal duty training authorized "[t]ravel by air, rail, bus, ship or privately owned vehicle."<sup>54</sup> The DD-214 that he received upon completion of training, lists "10 days travel time,"<sup>55</sup> in the remarks section, but Mr. Densley did not provide any evidence that he used ten days of travel time.

Mr. Densley provides no authority for his assertion that travel time should be credited in the PERS system.<sup>56</sup> Mr. Densley relies on *Shelton v. Azar*, 90 Wn. App. 923, 954 P.2d 352 (1998), an employer liability case,

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<sup>53</sup> He did receive three months of retirement service credit for active federal service performed in August, September, and October 1972.

<sup>54</sup> AR at 182.

<sup>55</sup> AR at 183.

<sup>56</sup> AR at 183.

for the proposition that he was within the course of his (military) employment when he was traveling.<sup>57</sup> That case is not relevant to whether Mr. Densley is entitled to retirement service credit under RCW 41.40.170. More importantly, Mr. Densley has not even explained how this reference to travel time equates in any way to active federal service.

Moreover, the military did not grant Mr. Densley payment for or retirement service credit for the 10 days of travel for which he seeks PERS retirement credit. However, even if Mr. Densley is correct and employer liability cases are instructive in this regard, cases dealing directly with the military and military travel are more instructive and more on point than general employer liability cases such as the one Mr. Densley relies on. In *Craft v. United States*,<sup>58</sup> the court held that a soldier was within the scope of his employment when “the Army bore the expenses [of travel] which were ‘necessary in the military service.’”<sup>59</sup> The court also held that “it is controlling that at the time of this collision, Capt. Westcott was performing a specific duty which had been assigned him to travel to Fort

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<sup>57</sup>See Petitioner’s Memorandum for Review Hearing of Administrative Decision, page 31.

<sup>58</sup> 542 F.2d 1250 (5th Cir. 1977).

<sup>59</sup> *Craft v. United States*, 542 F.2d at 1255.

Sam Houston.”<sup>60</sup> The court further noted that Capt. Westcott was “receiving Army pay, subject to military discipline and not on leave.”<sup>61</sup>

Mr. Densley’s situation is unlike that in *Craft*. First, in Mr. Densley’s DD-214, the Army gave Mr. Densley *no credit* for his ten days of travel time. Neither his beginning date of August 7, 1972, nor his end date of November 7, 1972, contain the ten days of travel that are referenced in the remarks section of his Orders. Furthermore, under “statement of service” within the DD-214, it states: net service this period 3 months 1 day.<sup>62</sup>

In sum, 10 days of travel were referenced in the remarks section of Mr. Densley’s DD-214 with no explanation as to their meaning. Mr. Densley has provided no evidence that he was reimbursed for that time. Mr. Densley has provided no information except his DD-214, which does not show whether the Army gave him pay or credit for service for those ten days of travel time. There is no evidence and no legal support for Mr. Densley’s claim that he is entitled to retirement service credit for his “travel time.” Therefore, the Department properly denied his request for PERS retirement service credit for November 1972.

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> AR 107.

**C. Even If Mr. Densley’s Military Service Met The Definition Of “Service,” His Military Service Does Not Meet The Requirement Under RCW 41.40.170 Of Being “Active Federal Service,” Which Is Required For Non-Interruptive Military Service**

Even if Mr. Densley’s military service was deemed to meet the definition of “service” under the PERS 1 statute, which it does not, Mr. Densley’s military service for 1972-1975 would not entitle him to retirement service credit because it was not “active federal service” as required by RCW 41.40.170. Contrary to Mr. Densley’s position, the history of RCW 41.40.170 and the Department’s long-standing interpretation of the statute indicate that the requirement that military service be in the “active federal service” applies to non-interruptive military service, not just to interruptive military service.

**1. The Court Can Examine The History And Administrative Interpretation Of RCW 41.40.170**

Ultimately, only the courts have the power under the Washington Constitution to engage in statutory construction, that is, to state definitively what the law is.<sup>63</sup> “At the outset it must be recognized that the primary objective of statutory construction is to carry out the intent of the

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<sup>63</sup> *Salvation Army v. White*, 118 Wn. App. 272, 75 P.3d 990 (2003). See also Philip A. Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25 Seattle U.L.Rev. 179 (2001).

Legislature.”<sup>64</sup> “The adopted interpretation should always be that which best advances the legislative purpose of the statute.”<sup>65</sup>

If a statute is plain and unambiguous, “then the Court must give effect to that plain meaning as an expression of legislative intent.”<sup>66</sup> “[A]mbiguity exists if the language of a statute is susceptible to more than one reasonable interpretation. If a statute is ambiguous, resort to the tools of statutory construction is appropriate.”<sup>67</sup> “Such statutory construction may involve a consideration of the legislative history . . . other statutes dealing with the same subject . . . and administrative interpretation of the statute.”<sup>68</sup> If the statute is ambiguous, the agency’s interpretation is accorded substantial weight.<sup>69</sup>

Mr. Densley contends that he should receive PERS service credit for all the time that he spent in the uniformed services, whether that time was served in “active federal service” or some other type of military service. He argues that subsection (3) of RCW 41.40.170 does not specifically state that service credit is limited to active federal service. He

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<sup>64</sup> *Dep’t of Transportation v. State Employees’ Insurance Board*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982).

<sup>65</sup> *Chancellor v. Dep’t of Retirement Sys.*, 103 Wn. App. 336, 342, 12 P.3d 164 (2000)(citing *Grabicki v. Dep’t of Retirement Sys.*, 81 Wn. App. 745, 750, 916 P.2d 452 (1996)).

<sup>66</sup> *Dep’t of Ecology v. Campbell*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

<sup>67</sup> *Harmon v. Dep’t of Social and Health Serv.*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998).

<sup>68</sup> *Dep’t of Transportation*, 97 Wn.2d at 458.

<sup>69</sup> *Chancellor v. Dep’t. of Retirement Sys.*, 103 Wn. App. 336, 12 P.3d 164 (2000).

distinguishes between the service requirements in RCW 41.40.170(3) and the “active federal service” requirement found in RCW 41.40.170(1).

Mr. Densley’s argument fails to take into account the overall language of the RCW 41.40.170, the history of the statute, and the Department’s interpretation of the statute. In interpreting a statute the Court does not look at language in isolation. In *State v. Nam*, 150 Wn. App. P.3d 617 (2007), this Court held that “[w]hile the court may not look beyond unambiguous statutory language, the court must read the statute as a whole and harmonize each provision.” 150 P.3d at 620.

RCW 41.40.170(3) does not contain any definition of “service in the armed forces.” The thrust of subsection (3) is to allow retirement service credit for non-interruptive military service. Under subsection (3) a member of PERS 1 may (after 25 years of PERS service) “have service in the armed forces credited to him or her as a member *whether or not he or she left the employ of an employer to enter the armed service . . .*” RCW 41.40.170(3) (emphasis added). As indicated by its lead-in language (“in any event”), subsection (3) is in juxtaposition to subsection (1), which provides for retirement service credit for situations in which the member has left the employer to “serve on active federal service in the military.” The purpose of subsection (3) is not to extend retirement service credit to a different type of military service but simply to grant

retirement service credit even though the member did not leave employment (so long as the member has 25 years of creditable retirement service).

Considering the language of RCW 41.40.170(3) in the context of the entire statute, it does not provide for retirement service credit for all types of military service, as Mr. Densley argues. The statute can reasonably be read as requiring that the service be “active federal service” for non-interruptive military service under subsection (3), just as it is for interruptive military service under subsection (1). Because the statute is susceptible of at least two reasonable interpretations, it is ambiguous and the Court can look to the statute’s history and administrative construction for assistance in interpreting it.

**a. The History Of RCW 41.40.170 Indicates That The Legislature Intended To Require Service In The Active Federal Service To Receive Retirement Service Credit For Non-Interruptive Military Service**

Despite minor changes to the phraseology of the statute, the substantive provisions of RCW 41.40.170 have never changed—the only change was to the formatting of the statute.

Even in 1972, when non-interruptive military service was added to RCW 41.40.170, nothing substantive was changed with regard to the language. In 1963 the statute allowed for “service in such armed forces”

to be credited within ten years (still referring to interruptive service). In 1972, the reference to “within ten years” was eliminated and “whether or not he has left the employ of an employer” was added. The reference to “service in the armed forces” remained the same, except that in 1972, it was now found in the newly created subsection (3) and not all together in one section. The statute has always started with the premise that retirement service credit is being given for “active federal service.” While the recasting of the statute into subsections and minor changes to the language may have made this connection more attenuated, nothing in the legislative history shows any intent to change the threshold requirement of “active federal service”.

Nothing in the legislative history of RCW 41.40.170 indicates the Legislature intended to expand the coverage of the statute to provide retirement service credit to those who did *not* serve on active federal service.<sup>70</sup> The financial impact to the public pension trust funds to pay for the costs of up to five years of free military service to *every* PERS member who served in the *state* Guard would be enormous. If the intent of the 1972 amendment had been to expand service credit to include state Guard

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<sup>70</sup> The legislative history of RCW 41.40.170's amendments in 1972 (Substitute Senate Bill 438) are found in Appendix E. The handwritten markings on the documents were made contemporaneously with the passage of the bill. Legislative history may be used to interpret language of a military benefit statute which may appear clear on 'superficial examination.' *Cass v. United States*, 417 U.S. 72, 78-79, 94 S. Ct. 2167, 2171 (1974).

work, the documents found in the 1972 legislative history would certainly have noted the expansion. There is no indication in the legislative history that an expansion of this magnitude was intended.<sup>71</sup>

**b. Mr. Densley's Interpretation Of RCW 41.40.170 Is Inconsistent With The Overall Intent Of The Legislature And Would Lead To Unfair And Absurd Results**

Mr. Densley's narrow reading of RCW 41.40.170 should be rejected. Mr. Densley takes the phrase "service in the armed forces" out of context of the entire statute and imports definitions from Chapter 38 RCW and Chapter 73 RCW to support his interpretation. His interpretation would lead to unfair and absurd results, in that it would provide greater retirement benefits for one type of military service (participation in the National Guard) over another (active service in the armed forces). Nothing in the legislative history indicates the legislature intended such a result.

In *City of Seattle v. State*<sup>72</sup>, the Washington Supreme Court said:

If a statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading, if it would result in unlikely,

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<sup>71</sup> Mr. Densley argues that reliance by the Presiding Officer on the documents reflecting the legislative intent was impermissible. However, the Presiding Officer relied on changes to the statute itself to support her conclusion. She did not improperly rely on any outside evidence as Mr. Densley suggests. See AR at 007-012, reflecting the Presiding Officer's consideration of the evolution of the amendments to RCW 41.40.170 in making her decision.

<sup>72</sup> 136 Wn.2d 693, 965 P.2d 619 (1998).

absurd, or strained consequences. *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). The purpose of an enactment should prevail over express but inept wording. *Id.*; *State ex rel. Royal v. Board of Yakima County Comm'rs*, 123 Wn.2d 451, 462, 869 P.2d 56 (1994).<sup>73</sup>

In the present case, a literal reading of RCW 41.40.170(3) in isolation, as urged by Mr. Densley, would create an absurd result. It would give PERS members who left PERS employment to perform military service fewer benefits than those whose military service was performed before they began PERS covered employment. As it has been the intent of both state and federal law<sup>74</sup> to protect military service members whose service is interrupted, it is clear that the legislature did not intend to grant greater benefits for non-interruptive military service than it did for interruptive military service. Mr. Densley's reading of the statute should be rejected. RCW 41.40.170 relates to only one kind of service—active federal service. Whether “active federal service” is later referred to in the statute by the shorthand terms “service in the military,” “such service,” “service in such armed forces,” or “service in the armed forces,” it all refers to the same kind of service.

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<sup>73</sup> *City of Seattle v. State*, 136 Wn.2d 693, 697, 965 P.2d 619 (1998) (citing *Whatcom Cy. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)). See also *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 971, 977 P.2d 554 (1999).

<sup>74</sup> I.e., USERRA, VRRRA, and Chapter 73.16 RCW, discussed below.

**c. The Department's Interpretation Of  
RCW 41.40.170 Is Entitled To Great Weight**

[It is a] well known rule of statutory interpretation that the construction placed upon a statute by an administrative agency charged with its administration and enforcement, while not absolutely controlling, should be given great weight in determining Legislative intent...<sup>75</sup>

The Department has developed over thirty-three years of expertise in administering the complexities of retirement law. At every stage in the development of RCW 41.40.170, the Department has been in the best position to ascertain the Legislature's intent and implement the statute accordingly. The Court should accord deference to the Department's consistent interpretation of RCW 41.40.170(3) as requiring active federal service for retirement service credit for non-interruptive military service.

**d. The Legislature Has Acquiesced In  
The Department's Interpretation Of  
RCW 41.40.170(3)**

The legislature has acquiesced in the Department's application of the statute. This increases the deference to which the court should accord to the Department's administrative interpretation.

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<sup>75</sup> *Dep't of Transportation*, 97 Wn.2d at 461-462. See also *Chancellor*, 103 Wn. App. at 343 (substantial weight given to the Department of Retirement Systems' interpretation because the retirement statute was technical and fell within the special expertise of the Department).

The courts presume that the legislature is aware of the prior construction and administration of a statute by an agency.<sup>76</sup> With regard to the agency's construction, the Washington Supreme Court has said, “[i]n interpreting a statute, we accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement, especially when the Legislature has silently acquiesced<sup>77</sup> in that construction over a long period.”<sup>78</sup>

In 1972, the Legislature amended RCW 41.40.170 allowing service credit for non-interruptive military service. Since 1972, the Department has applied the “active federal service” requirement consistently. The statute was amended several times since 1972 and as recently as 2005 without the Legislature having made any change to the Department's interpretation of RCW 41.40.170. The Legislature was presumed to know the interpretation the Department gave to the 1972 version of the statute. The Legislature did not repudiate the Department's interpretation, and thereby evinced its acquiescence in that interpretation.

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<sup>76</sup> *Dep't of Transportation*, 97 Wn.2d at 462.

<sup>77</sup> When this case arose, the Department had had approximately thirty-three years of experience with the statute in question and with the specific words at issue.

<sup>78</sup> *Sehome v. State*, 127 Wn.2d 774, 780, 903 P.2d 443 (citing *Bennett v. Hardy*, 113 Wn.2d 912, 928, 784 P.2d 1258 (1990)). *Grabicki*, 81 Wn. App. at 752; *Chancellor*, 103 Wn. App. at 343.

**2. Federal Law Supports The Department’s Conclusion That “Active Federal Service” Under RCW 41.40.170 Does Not Apply To Any Of The Military Service For Which Mr. Densley Seeks Retirement Service Credit**

RCW 41.40.170 provides that retirement service credit for military service is awardable only for service that is “active federal” military service. The Department correctly concluded that Mr. Densley’s military service provided pursuant to Title 32 USC is *not* “active federal service,” and that only military service performed pursuant to orders under authority of Title 10 USC could be “active federal” military service.

The term “active federal service” in RCW 41.40.170 is not a defined term in the retirement statutes. However, federal code provisions dealing with military service are instructive in determining that term’s meaning. Specifically, Title 10 USC *et seq.* is titled “Armed Forces.”<sup>79</sup> Title 10 sets forth the federal code provisions which relate to federal service.<sup>80</sup> By contrast, Title 32 USC § 101 *et seq.* is titled “National Guard.”<sup>81</sup> Title 32 sets forth the federal code provisions which relate to reserve components of the military which are “part of the organized militia of the several states.”<sup>82</sup>

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<sup>79</sup> 10 USC § 101.

<sup>80</sup> 10 USC § 101 *et seq.*

<sup>81</sup> 32 USC § 101.

<sup>82</sup> 32 USC § 101(3) & (4).

The general policy of Title 10 and Title 32 is very similar. 32 USC

§ 102 provides:

[w]henever Congress determines that more units and organizations are needed for the national security than are in the regular components of the ground and air forces, the Army National Guard . . . , or such parts of them as are needed, together with such units of other reserve components as are necessary for a balanced force, shall be ordered to *active Federal duty* . . . .

(emphasis added). 10 USC § 10103 is very similar to Title 32's provisions. It is entitled "Basic policy for *order into Federal service* and it provides:

[w]henever Congress determines that more units and organizations are needed for the national security than are in the regular components of the ground and air forces, the Army National Guard . . . , or such parts of them as are needed, together with units of other reserve components necessary for a balanced force, shall *be ordered to active duty* and retained as long as so needed.

(emphasis added). Both of these provisions require that a person must be ordered into active federal service before the person is performing active federal service. The law governing the National Guard, 32 USC § 102 makes it clear that such an order is an order to "active federal duty." This implies that National Guard members are not in "active federal duty" unless they are ordered to such under the circumstances outlined in the code provision. In contrast, 10 USC § 10103 merely states that a member is "ordered to active duty." That provision does not need to designate that

duty as federal because the only kind of military duty that an individual can be ordered to under Title 10 is federal military duty.

Because of the unique nature of National Guard service, it can be difficult to discern which “hat” the service member wears at any given time. The Supreme Court in *Perpich v. Dep’t of Defense* noted that the members of the state Guard unit must keep three hats in their closet; a civilian hat, a state militia hat, and an army hat.<sup>83</sup> This requirement stems from the duality of service entered into as a member of a state Guard unit. The National Guard consists of two overlapping but legally distinct organizations; the state militia (under the control of the governor) and the United States National Guard (under the control of the President). Under Title 32 USC § 325, “each member of the Army National Guard of the United States . . . who is ordered to active duty is relieved from duty in the National Guard of his state or territory.” The converse is also true, that when a member has not been ordered to active federal duty under Title 10 USC, the member remains in the service of the state National Guard. Such service is not “active federal service.” In fact, Title 10 USC § 101(1) specifically states that “the term ‘active duty’ means full-time duty in the active military service of the United States...Such term does not include full-time National Guard duty.” Additionally 10 USC § 101(d)(5) states:

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<sup>83</sup> 496 U.S. at 348, 110 S. Ct. at 2427 (1990).

The term “full-time National Guard duty” means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or from which the member has waived pay from the United States.<sup>84</sup>

(emphasis added).

The precise classification of service is further complicated by the fact that an individual can serve on “active duty” and still not be on “active federal duty.” In a recent case the Federal Circuit Court of Appeals noted, “[a] tour of duty with the Active Guard and Reserve (“AGR”), [is] a full-time military program in which National Guard members support the National Guard and reserve components. AGR duty can be served in either a federal or a state capacity.”<sup>85</sup> The Court went on to conclude that “[u]nder these two sections [Title 10 and Title 32] the definition of ‘active duty’ specifically excludes full-time National Guard Duty.”<sup>86</sup>

The Department’s position that Mr. Densley’s three two-week summer trainings were not active federal service is supported by the

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<sup>84</sup> Relevant U.S. Code provisions are found at AR 131-151.

<sup>85</sup> *Bowen v. United States*, 292 F.3d 1383, 1384 (C.A. Fed., 2002).

<sup>86</sup> *Id.* at 1386. *See also* 10 USC § 101(d)(1) (2000) (“term [active duty] does not include full-time National Guard duty.”); 32 USC § 101(12) (2000) (“It [active duty] does not include full-time National Guard duty.”)

provisions of Title 32 as well as case law. For example, 32 USC § 325(b) states that “training of the National Guard shall be conducted by the several states . . . .” 10 USC § 12602(a) states that:

For the purpose of laws providing benefits for members of the Army National Guard . . .

(3) *inactive-duty training* performed by a member of the Army National Guard in accordance with regulations prescribed under section 502 of title 32 or other express provision of law *shall be considered inactive duty training in Federal service as a Reserve of the Army.*

(emphasis added). 32 USC § 502 specifically addresses Mr. Densley’s three two-week summer trainings which were conducted in 1973, 1974, and 1975. Specifically, 32 USC § 502 lists the following training:

- (1) must assemble for drill and instruction . . . at least 48 times each year; and
- (2) participate in *training at encampments, maneuvers, outdoor target practice or other exercises, at least 15 days each calendar year.*

Mr. Densley performed three fifteen-day trainings which were the same or similar to those described in 32 USC § 502(2) above. Under these federal code provisions, it is clear that Mr. Densley’s weekend drills and his three two-week summer trainings are not active federal service.

**D. RCW 41.40.170 Does Not Conflict With Any Other State Or Federal Law**

Mr. Densley makes various arguments based on other statutes that are not relevant to the issue in this case. Because all of the service for

which Mr. Densley is seeking credit is non-interruptive service, USERRA, Chapter 38.40 RCW, and Chapter 73.16 RCW do not apply. With regard to Mr. Densley's claim of constitutional violations, he has provided no authority to support these allegations.

**1. USERRA Does Not Apply To Mr. Densley's 1972-1976 Military Service**

In 1994, USERRA<sup>87</sup> was enacted to provide clearer protections for National Guard members, in particular, whose lives were interrupted by a call to federal service.<sup>88</sup> Typically, a National Guard member will serve one weekend per month for drill duty and one two-week period per year for training.<sup>89</sup> National Guard members are usually employed while serving with the National Guard, and being called into active federal service has a disruptive effect on that employment.<sup>90</sup> USERRA protects National Guard members from loss of employment when called away from their jobs for active federal service.<sup>91</sup>

**a. USERRA Does Not Apply Because It Was Not In Effect At The Time Mr. Densley Performed The Military Service In Question**

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<sup>87</sup> Uniformed Services Employment and Reemployment Rights Act, 38 USC § 4301 *et seq.*

<sup>88</sup> 38 USC § 4301.

<sup>89</sup> 32 USC § 502.

<sup>90</sup> 38 USC § 4301.

<sup>91</sup> 38 USC § 4301 *et seq.*

Regardless of whether Mr. Densley's military service was interruptive or non-interruptive, USERRA was not enacted until 1994 and does not apply to military service performed in 1972. In *Fernandez v. Dept. of the Army*,<sup>92</sup> the court held that substantive provisions of USERRA are not retroactive. As such, USERRA does not apply to Mr. Densley. The Veterans Reemployment Rights Act (VRRRA) was a predecessor to USERRA. However, it only provided protection for reservists and national guardsman whose employment was interrupted by a call to active duty. Because Mr. Densley's service did not interrupt his employment, VRRRA does not apply to Mr. Densley either.

**b. USERRA Applies Only To Military Service That Interrupts Employment. It Does Not Apply To Military Service Like Mr. Densley's That Pre-Dates And Therefore Does Not Interrupt His Employment**

The service for which Mr. Densley seeks credit occurred between 1972 and 1976. Mr. Densley did not begin PERS employment until 1977. As a result, his service cannot be considered interruptive. Mr. Densley seeks non-interruptive military service credit. He is not requesting interruptive service credit. As such, USERRA does not apply and adds nothing to this Court's analysis of the issue before it. Specifically, 38

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<sup>92</sup>234 F.3d 553, 557 (Fed. Cir. 2001).

USC § 4312 is entitled “*Reemployment rights of persons who serve in the uniformed services*” and it states:

. . . any person whose absence from a position of employment 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 . . . .

(emphasis added). Because Mr. Densley’s military service was non-interruptive (i.e., served prior to his PERS Plan 1 employment), USERRA has no bearing on the issue in this appeal.

**2. Neither RCW 38.24 Nor RCW 38.40 Applies To Mr. Densley’s Request For Retirement Service Credit Under RCW 41.40.170 For His Military Service Between 1972 And 1976**

RCW 38.24.060 applies to state active military duty. There is no issue in this case that involves state active duty. In the first place, Mr. Densley did not raise the issue of whether his service was state active duty at the administrative level. Because he did not raise it at the administrative level, he cannot raise it for the first time on appeal.

Even if Mr. Densley had timely raised this issue, RCW 38.24.060 does not apply. The statute provides:

[a]ll members of the organized militia who are called to state active duty shall, **upon return from such active duty, have the same rights of employment or reemployment as they would have if called to active duty in the United states Army.**

(emphasis added). The non-interruptive military service under RCW 41.40.170(3) for which Mr. Densley is seeking credit is not a benefit of employment or reemployment, which is what RCW 38.24.060 is dealing with. As such, RCW 38.24.060 is not relevant in deciding whether Mr. Densley qualifies for retirement service credit under RCW 41.40.170.

Furthermore, Chapter 38.24 RCW is entitled “Claims and Compensation,” under the broader category of Title 38 RCW entitled “Militia and Military Affairs.” It does not relate in any way to PERS or whether Mr. Densley is entitled to a benefit under PERS.

Mr. Densley also argues that the Department and the Presiding Officer engaged in unlawful discrimination in violation of RCW 38.40.040 and RCW 38.40.110.<sup>93</sup> However, neither of these statutes relates to whether, under PERS, a PERS Plan 1 member is entitled to retirement service credit for military service performed prior to PERS employment. RCW 38.40.040 deals only with “[i]nterference with employment.” It states:

[a] person who either alone, or with another, willfully deprives a member of the organized militia of Washington of his or her employment or prevents such member being employed, . . . is guilty of a gross misdemeanor . . . .

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<sup>93</sup> See *Appellant’s Brief* at pg. 31-32.

Because Mr. Densley was not employed by a PERS employer between 1972 and 1976, neither the Department nor the Presiding Officer could be found to have violated this statute. Moreover, neither the Department nor its presiding officer has deprived Mr. Densley of his employment or prevented him from being employed.

RCW 38.40.110 states that “[n]o . . . employer . . . shall . . . discriminate against or refuse to *hire, employ, or reemploy* any member of the organized militia of Washington because of his or her membership in said organized militia.” (emphasis added). Neither the Department nor the Presiding Officer has engaged in this conduct. Instead, both made a determination the Mr. Densley was not entitled to a benefit.<sup>94</sup>

In short, nothing in Chapter 38 RCW is relevant or helpful in deciding the issue of whether Mr. Densley is entitled to retirement service credit for military service he performed prior to his PERS-covered employment under RCW 41.40.170.

**3. RCW 73.16 Does Not Apply To Mr. Densley’s Request For Retirement Service Credit Under RCW 41.40.170 For His Military Service Between 1972 And 1976**

Chapter 73.16 RCW provides the following employment rights to members of the uniformed services:

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<sup>94</sup> Even if this court were to conclude that the Department reached an erroneous conclusion with respect to a member’s retirement benefits, that would not be actionable under RCW 38.40.100 and RCW 38.40.110.

[a] member of the uniformed services] shall not be denied initial employment, retention in employment, promotion, or any benefit of employment by an employer on the basis of the membership . . .

RCW 73.16.055 does not apply here. In this first place, the statute did not go into effect until 2001. This is well after Mr. Densley's 1972 through 1976 service. Subsequent changes to this statute are applied prospectively only.<sup>95</sup>

In any event, none of the rights in RCW 73.16 relates to Mr. Densley's request for retirement service credit that pre-dates his employment. This is especially clear under RCW 73.16.055, the statute specifically relating to "pension benefits and liabilities of *reemployed* persons" (emphasis added). RCW 73.16.055 does not require or contemplate the crediting of non-interruptive military service. RCW 73.16.055 states:

[i]n the case of a right provided under any state law governing pension benefits for state employees, the right to pension benefits of a person *reemployed under this chapter* shall be determined under this section.

(emphasis added). Mr. Densley's pension benefits with regard to his 1972-1976 military service are not governed by this section or even this chapter. Mr. Densley's military service did not interrupt his PERS

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<sup>95</sup> *State v. T.K.*, 139 Wn.2d at 329-330.

employment and therefore he was not a person “reemployed,” which is a prerequisite to application of RCW 73.16.

**E. Mr. Densley Has Failed To Establish That Any Alleged Procedural Irregularities Should Result In Granting Him Retirement Service Credit Under RCW 41.40.170**

**1. Mr. Densley Is Not Entitled To A Default Judgment Based On His Allegations Of Misconduct Of The Petition Examiner**

Mr. Densley claims that the Petition Examiner engaged in “ex-parte contact” by communicating with the Department’s attorneys and other members of the Department staff. However, ex-parte contact can only occur between a presiding officer (or multi-member board presiding over an adjudication) and a party.<sup>96</sup> The Petition Examiner is neither. The Petition Examiner is **not** the Presiding Officer, who presided over the APA adjudicative proceeding and issued the Department’s Final Order in this matter. In contrast to the Presiding Officer, the Petition Examiner merely conducts an internal agency review prior to the matter going to a formal APA proceeding.

When a member of the retirement system has an issue with regard to his pension and contacts the Department, the member will receive an initial determination from the plan administrator (here, the PERS Administrator). When the PERS plan administrator denied Mr. Densley’s

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<sup>96</sup> RCW 34.05.455.

request for retirement service credit for his military service, Mr. Densley requested a decision by the Petition Examiner under WAC 415-04. The Petition Examiner engages in a broad internal agency review of the disputed issue. The petition process provides a second opportunity (after the Plan Administrator) for the Department to re-examine an issue and before any formal adjudicative proceedings under the APA are begun. The petition process is an “administrative review of an administrative decision.” WAC 415-04-020. It is not an adversarial process such as an adjudicative proceeding.

Mr. Densley refers to a letter written by him to the Petition Examiner to show that an improper ex-parte communication occurred between the Petition Examiner and the Department or the Attorney General’s Office. AR 305. However, WAC 415-04-040 does not prohibit the Petition Examiner from seeking input from other Department staff or the Department’s assigned Assistant Attorney General.<sup>97</sup> To allege that the Petition Examiner is violating an appearance of fairness by relying on her own experience with the Department or conducting her own investigation is without merit. Nor is there any prohibition against seeking legal advice if that is what she chose to do. Mr. Densley’s reliance on RCW 42.36.060

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<sup>97</sup> The Department’s legal counsel cannot be said to be an interested party as contemplated by WAC 415-04-040(b)(ii).

and RCW 34.05.455 is irrelevant, as the Petition Examiner review is not part of the APA process.

Finally, Mr. Densley cannot establish any prejudice to him regarding the Petition Examiner's work. Contrary to Mr. Densley's contradiction, the Petition Examiner does not make a record. The Petition Decision had no role in Mr. Densley's administrative hearing. The Department's Final Order did not review or rely on the Department's Petition Decision. The Petition Decision was included in the record for jurisdictional purposes *only*, as the Presiding Officer made clear.<sup>98</sup> Therefore, Mr. Densley is not entitled to a default judgment based on any alleged irregularities by the Petition Examiner.

**2. Mr. Densley Is Not Entitled To The Relief He Seeks Based On GR 31 Or GR 15**

Mr. Densley argues that the Department failed to protect and published his personal identifying information in violation of GR 15 and GR 31. However, GR 15 creates no provision requiring a quasi-judicial hearings examiner to redact such information from the record. In fact, neither does GR 31. GR 31 is the court rule most closely on point in this matter. GR 31(e) states:

(1) [e]xcept as otherwise provided in GR 22, *parties* shall not include, and if present shall redact, the following

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<sup>98</sup> AR at 277.

personal identifiers from all documents filed with the court, whether filed electronically or in paper, unless necessary or otherwise ordered by the Court.

(emphasis added) Because GR 31 puts the burden on the “parties” to not include personal identifiers, Mr. Densley had a responsibility to make sure the record was redacted before requesting that it be certified to superior court inasmuch as he was the party who ordered it. GR 31 does not require presiding officers or quasi-judicial agencies to redact entire records. In fact, GR 31(e)(2) states: “*[t]he responsibility for redacting these personal identifiers rests solely with counsel.*” (emphasis added) The Department did not appeal its own final order. It did not request that the record be certified to superior court. As the party seeking judicial review of agency action, it was Mr. Densley’s responsibility to make sure there were no personal identifiers—not the Department’s.

Finally, even if this Court were to decide that the Department was responsible for redacting personal identifiers from the administrative record, Mr. Densley would still not be entitled to reversal or remand of the Court’s decision. GR 31 states that the Court may award the prevailing party “reasonable expenses, including attorney fees and court costs” for a violation of the rule. It does not state that violation of GR 31 is grounds for reversal on the administrative or Superior Court decision. As such,

even if GR 31 was violated by the Department, it is not grounds for reversal or remand, and Mr. Densley is not entitled to the relief he seeks.

## VI. CONCLUSION

For the reasons set forth above, Mr. Densley is not entitled to retirement service credit under RCW 41.40.170 for the military service in question and the Court should affirm the Department's final order.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of February, 2007.

ROB M. MCKENNA  
Attorney General

*Spencer W. Daniels #6831, for*  
\_\_\_\_\_  
JOHNNA S. CRAIG, WSBA#35559  
Assistant Attorney General

**PROOF OF SERVICE**

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

Certified/Return Receipt US Mail Postage Prepaid via Consolidated Mail Service to James A. Densley, P.O. Box 272, Fox Island, WA 98333.

ABC/Legal Messenger to

State Campus Delivery

Hand delivered

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15<sup>th</sup> day of February, 2007, at Olympia, WA.



KRISTINE HARPER  
Legal Assistant

FILED  
COURT OF APPEALS  
DIVISION II  
07 FEB 16 PM 1:27  
STATE OF WASHINGTON  
BY CHM  
DEPUTY

**CERTIFICATION OF MAILING:**

I hereby certify that I have this day served a copy of this document upon the parties of record in this proceeding by mailing each of them a copy thereof, properly addressed and postage prepaid.

Dated at Olympia, Washington, this 6th day of September, 2005.

  
Patti Lee, Appeals Coordinator  
Department of Retirement Systems  
Olympia, Washington

**WASHINGTON STATE DEPARTMENT OF RETIREMENT SYSTEMS  
BEFORE THE PRESIDING OFFICER**

In re the Appeal of	)	<b>Docket No. 05-P-004</b>
	)	
JAMES A. DENSLEY	)	<b>CORRECTED</b>
	)	<b>DECISION AND</b>
<i>for additional (non-interruptive) PERS</i>	)	<b>ORDER ON MOTIONS</b>
<i>Plan 1 military service credit</i>	)	<b>FOR SUMMARY JUDGMENT</b>

**STATEMENT OF THE CASE**

Appellant James A. Densley, a member of the Public Employees' Retirement System (PERS) Plan 1, requested a hearing before the Washington State Department of Retirement Systems to contest its denial of additional military service credit for Washington Army National Guard service he completed before he began civilian employment covered by PERS.

On May 20, 2005, Mr. Densley filed a Motion for Summary Judgment, seeking a determination that he is entitled to the additional military service credit as a matter of law.

On June 10, 2005, within the time for response extended by order of May 31, 2005, the Department of Retirement Systems (DRS or the Department) filed a cross-Motion for Summary Judgment, seeking denial of the Appellant's claim for additional military service credit as a matter of law.

Mr. Densley filed a Response to the Department's Motion for Summary Judgment and Reply Memorandum on July 7, 2005, within the extended time allowed by order of June 21, 2005.

## SUMMARY OF THE MOTIONS

### Appellant's Motion for Summary Judgment

Mr. Densley's Motion for Summary Judgment incorporated his Notice of Appeal, focusing his arguments on the term "service in the armed forces" in RCW 41.40.170(3). He notes that this term differs from the term "active federal service" in subsection (1). He asserts that "service in the armed forces" in subsection (3) is meant to be read more broadly than "active federal service" in subsection (1), and does permit military service credit in PERS for non-interruptive National Guard training and drill activities performed under authority of Title 32 U.S.C. rather than Title 10 U.S.C.

### DRS Motion for Summary Judgment

The Department of Retirement Systems' motion argues that Mr. Densley is not entitled to any additional PERS service credit for National Guard training and drill activities performed between 1972 and 1976 under authority of Title 32 U.S.C. rather than Title 10 U.S.C. The Department asserts that these activities do not meet the RCW 41.40.170 requirement of "active federal service in the military or naval forces of the United States," and additionally that the weekend drills did not require enough days in any one month to earn service credit as the PERS statutes defined "service" before 1977.

## RULINGS

### Summary Judgment:

- A. It is appropriate to dispose of the issues presented in this appeal by means of summary procedure.
- B. There is no genuine issue as to any material fact as DRS applies RCW 41.40.170. The Department's motion for summary judgment aligns with the standard for crediting non-interruptive military service with the National Guard under RCW 41.40.170(3), as set out in *In re Appeal of Simko*.<sup>1</sup> The Department is entitled to summary judgment.

**Issue:** Whether Mr. Densley is entitled to additional military service credit in Public Employees' Retirement System (PERS) Plan 1, RCW 41.40.170(3), for 41 weekend drill sessions, three 15-day annual training sessions, and one day of inactive duty for medical examination between November 1972 and September 1976?

**Result:** Mr. Densley is not entitled to additional military service credit in PERS Plan 1 for any of these activities.

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<sup>1</sup> DRS Docket No. 04-P-005 (October 14, 2004).

## ORDER

- (1) The Department's Motion for Summary Judgment is granted.
- (2) The Appellant's claim for additional service credit is denied.

## DISCUSSION

### I. Facts for Decision

1. In June 1972, after successful completion of training in the Reserve Officer Training Corps (ROTC) as an undergraduate at the University of Washington, James A. Densley received his commission as a Reserve officer (second lieutenant) with the U.S. Army. The letter notifying him of his commission recites that the appointment is made under authority of Title 10, United States Code, sections 591, 593, 2104, 2106, and 2107. He was assigned to the Transportation Corps of the Army Reserve.
2. Between August 7 and November 7, 1972, Mr. Densley attended and completed the Transportation Officer Basic Training Course at Ft. Eustis, VA. The DD 214 form documenting his release from this active duty for training shows a total service for the course of 3 months and one day.
3. Effective November 14, 1972, the Adjutant General of the Washington Army National Guard assigned Mr. Densley to the 144<sup>th</sup> Transportation Battalion in Tacoma, WA.
4. In fulfillment of his obligations as a Reserve officer, Mr. Densley attended two days of weekend drill each month from November 1972 through March 1976 (a total of 41 weekend drill sessions). He also completed 15 days of required annual training in each of the summers of 1973, 1974 and 1975. On April 6, 1976, the Adjutant General of the Washington Army National Guard signed orders separating then-First Lieutenant Densley honorably from the Army National Guard effective April 1, 1976. In early September 1976 he reported for one day of inactive duty for a medical examination as ordered.
5. Mr. Densley began work for the Pierce County Prosecuting Attorney in May 1977. Although the County did not originally report him as a member of the Public Employees' Retirement System (PERS), he later did establish PERS membership retroactive to May of 1977. He then became a contributing employee-member of PERS Plan 1, the plan for public employees who established system membership before October 1, 1977. He has continued in employment with Pierce County to the present time.

6. On August 30, 1990, by order of the Secretary of the U.S. Army, Mr. Densley was called to 90 days of active duty, which he served at the Southern California Outport in Compton, California. Then-Major Densley returned to his civilian employment with Pierce County after completing this period of active duty.
7. In 1998, DRS added three months of military service credit to Mr. Densley's PERS service credit record, for the three months of active duty in 1990.
8. By 2002 Mr. Densley had completed 25 years of service credit in PERS, including the three months of military service credit added in 1998.
9. DRS then added another 3 months of military service credit to Mr. Densley's PERS credit record for his 1972 active duty for training (August, September, and October 1972).
10. DRS denied any additional military service credit in PERS for Mr. Densley's pre-1977 service with the National Guard, for drill, training and inactive duty.
11. Mr. Densley petitioned for internal DRS review, and on March 25, 2005, the Petitions Examiner also denied any further PERS Plan 1 military service credit for Mr. Densley's pre-1977 National Guard service.
12. Mr. Densley requested a hearing on April 27, 2005. After the hearing was scheduled, both parties filed motions for summary judgment as detailed above.

## **II. Analysis**

### **A. Summary Judgment**

1. A legislatively created agency, when acting in a quasi-judicial capacity, may employ summary procedure to pass on the issue of law presented, if there is no genuine issue of material fact. *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 697 (1979). After review of the materials and arguments submitted by the parties, the undersigned concludes that there is no genuine issue of material fact and the Department is entitled to judgment as a matter of law.
2. The parties have not disputed any facts about preconditions to military service credit in PERS Plan 1, such as veteran status (including honorable discharge) and sufficient service credit in PERS. RCW 41.40.170(3). The Department also does not deny that Mr. Densley performed the service for which he claims additional service credit here at the times that he claimed he performed it, though it declines to agree to those facts expressly, citing lack of definitive evidence. Those facts and inferences, like other material facts in this matter, are taken in the light most favorable to Mr. Densley.

3. The DRS Final Order in *In re Appeal of Simko* articulated the requirement that DRS, when applying RCW 41.40.170(3) to military service with the National Guard, may credit that military service in PERS only when the claimant shows that the military service was performed under authority of orders citing Title 10 U.S.C. (that is, shows that the service was active federal service). In Mr. Densley's appeal the undersigned finds no genuine issue of material fact related to this requirement. The Appellant bears the burden of proof at hearing under WAC 415-08-420(2); in light of this burden, he has effectively conceded that the drills, annual trainings and inactive duty for which he claims credit here were not performed under orders citing federal authority. He does not claim, and proposed no evidence to show, that the military service for which he seeks credit here was performed under Title 10 U.S.C. orders.
4. In his Motion for Summary Judgment, Mr. Densley argues that DRS errs in equating "service in the armed forces" in subsection (3) of RCW 41.40.170 with "active federal service" in subsection (1). This disagreement about the meaning of the statute is a question of law rather than fact.
5. *In re Appeal of Simko* was this agency's first Final Order addressing the question when a PERS Plan 1 member who has also been a member of the National Guard may receive credit in PERS for performance of National Guard duties. Mr. Densley's appeal presents the question a second time, challenging the basis of the Department's ruling in the *Simko* decision. Mr. Densley's arguments have not persuaded the Presiding Officer that the standard set out in *Simko* should be changed, and summary judgment for the Department is the result. Part II.B of this Order discusses the bases for the standard stated in *Simko*, and as appropriate repeats pertinent portions of that decision.

## ***B. Crediting military service with the National Guard under RCW 41.40.170***

### *1. Nature of National Guard Service*

6. The Washington National Guard is the organized militia of the state, under the command of the governor. RCW 38.08.020-060. The governor, through an Adjutant General, is responsible for the organization, administration, maintenance, discipline, training and mobilization of the militia. RCW 38.08.090. The state's active organized militia is in two divisions, the Army National Guard and the Air National Guard, each headed by one or more Assistant Adjutants General. RCW 38.12.015. In Washington, the Adjutant General and the Assistant Adjutants General serve at the pleasure of the governor. *Hupe v. Coates*, 95 Wn.2d 56, 621 P.2d 726 (1980).
7. Members of the state's organized militia, and their units, are also subject to command by the President and the armed forces of the United States.

Since 1933, all persons who have enlisted in a state National Guard unit have simultaneously enlisted in the National Guard of the United States. In the latter

capacity they became a part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they retained their status as members of a separate state Guard unit . . . Upon being relieved from active duty in the military service of the United States all individuals and [Guard] units revert to their National Guard status . . . Under the dual enlistment provisions, a member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the state Guard for the entire period of federal service.

*Perpich v. Dept. of Defense*, 496 U.S. 334, 345 (1990).

8. The dual nature of National Guard service appears in the definitions in Title 10 United States Code (U.S.C.), which provides the authority for federal organization and direction of the nation's armed forces.

(c) Reserve components. The following definitions relating to the reserve components apply in this title:

(1) The term "**National Guard**" means the **Army National Guard** and the Air National Guard.

(2) The term "**Army National Guard**" means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that--

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(3) The term "**Army National Guard of the United States**" means the reserve component of the Army all of whose members are members of the Army National Guard. . . .

10 U.S.C. §101(c) (1)-(3). (Bold emphasis added.)

9. Responsibility for National Guard training is reserved to the states, but "according to the discipline prescribed by Congress . . ." U.S. Const., Art. I, §8, cl. 15, 16; *Perpich*, supra; *Emsley v. Army National Guard*, 106 Wn.2d 474, 477, 722 P.2d 1299 (1986).
10. National Guard service performed under federal authority is referred to as "federalized" service. Unless performing "federalized" service, the Washington National Guard serves as the state militia. *Emsley*, at 478, and cases there cited; *Perpich*, supra; RCW 38.04.020-.040. Annual training under Title 32 U.S.C. is state service rather than federal. An individual Guard member or organizational unit wears only one "hat" at any given time. *Perpich*, at 348.

2. *Military Service Credit in PERS Plan 1--  
Requirements of RCW 41.40.170*

11. One statute, RCW 41.40.170, sets out the terms for military service credit for members of PERS Plan 1. In its 2004 version,<sup>2</sup> this statute stated:

- (1) A member who has served or shall serve on **active federal service in the military or naval forces of the United States** and who left or shall leave an employer to enter such service shall be deemed to be on military leave of absence if he or she has resumed or shall resume employment as an employee within one year from termination thereof.
- (2) If he or she has applied or shall apply for reinstatement of employment, within one year from termination of the military service, and is refused employment for reasons beyond his or her control, he or she shall, upon resumption of service within ten years have such service credited to him or her.
- (3) In any event, after completing twenty-five years of creditable service, any member may have **service in the armed forces** credited to him or her as a member whether or not he or she left the employ of an employer to enter the armed service: PROVIDED, That in no instance, described in this section, shall military service in excess of five years be credited: AND PROVIDED FURTHER, That in each instance the member must restore all withdrawn accumulated contributions, which restoration must be completed within five years of membership service following the first resumption of employment or complete twenty-five years of creditable service: AND PROVIDED FURTHER, That this section will not apply to any individual, not a veteran within the meaning of RCW 41.04.005.

(Bold emphasis added.)

*(a) Provisos*

12. The language of subsection (3) presents several issues, some of which will be discussed later. For this overview section, the string of provisos is the first consideration. The provisos set out two conditions for, and one limitation on, military service credit in PERS Plan 1.
13. A PERS Plan 1 member must meet two conditions to receive military service credit in addition to PERS service credit: (1) that he or she have restored any employee contributions previously withdrawn,<sup>3</sup> and (2) that he or she be a veteran as defined in RCW 41.04.005 at the time of applying for military service credit.

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<sup>2</sup> 2005 legislative amendments to RCW 41.40.170 are disregarded as not relevant to the issues presented here.

<sup>3</sup> Restoration of withdrawn employee contributions is not a concern in this case.

14. RCW 41.04.005 defines "veteran" as follows:

(1) **As used in RCW . . . 41.40.170 . . . "veteran" includes every person, who at the time he or she seeks the benefits of RCW . . . 41.40.170 . . . has received an honorable discharge or received a discharge for physical reasons with an honorable record and who meets at least one of the following criteria:**

**(a) The person has served between World War I and World War II or during any period of war, as defined in subsection (2) of this section, as either:**

**(i) A member in any branch of the armed forces of the United States;**

(ii) A member of the women's air forces service pilots;

(iii) A U.S. documented merchant mariner with service aboard an oceangoing vessel operated by the war shipping administration, the office of defense transportation, or their agents, from December 7, 1941, through December 31, 1946; or

(iv) A civil service crewmember with service aboard a U.S. army transport service or U.S. naval transportation service vessel in oceangoing service from December 7, 1941, through December 31, 1946; or

**(b) The person has received the armed forces expeditionary medal, or marine corps and navy expeditionary medal, for opposed action on foreign soil, for service:**

(i) In any branch of the armed forces of the United States; or

(ii) As a member of the women's air forces service pilots.

**(2) A "period of war" includes:**

(a) World War I;

(b) World War II;

(c) The Korean conflict;

**(d) The Vietnam era[, which] means:**

(i) The period beginning on February 28, 1961, and ending on May 7, 1975, in the case of a veteran who served in the Republic of Vietnam during that period;

**(ii) The period beginning August 5, 1964, and ending on May 7, 1975;**

**(e) The Persian Gulf War, which was the period beginning August 2, 1990, and ending on the date prescribed by presidential proclamation or law;**

(f) The period beginning on the date of any future declaration of war by the congress and ending on the date prescribed by presidential proclamation or concurrent resolution of the congress; and

(g) The following armed conflicts, if the participant was awarded the respective campaign badge or medal: The crisis in Lebanon; the invasion of Grenada; Panama, Operation Just Cause; Somalia, Operation Restore Hope; Haiti, Operation Uphold Democracy; and Bosnia, Operation Joint Endeavor.

(Bold emphasis added).

15. RCW 41.40.170(3) also imposes a limitation. Once a PERS Plan 1 member has qualified to receive military service credit under this subsection, the first proviso caps the amount creditable at five years (60 months). This is the only express limitation in the statute on the amount of military service that may be credited.

(b) *“Active federal service” required for non-interruptive military service credit*

16. Subsection (1) of RCW 41.40.170 allows credit for “interruptive” military service (a PERS Plan 1 member interrupts his or her PERS-covered employment to perform military service, later returning to PERS-covered employment) and subsection (3) allows credit for “non-interruptive” military service (a PERS Plan 1 member performs military service without interrupting and resuming PERS-covered employment).
17. Moving beyond the provisos to the primary terms for this military service credit, a PERS Plan 1 member can receive interruptive credit for “active federal service in the military or naval forces of the United States” (RCW 41.40.170(1)), while a PERS Plan 1 member who has attained 25 years of service credit in PERS may receive credit also for non-interruptive “service in the armed forces” (RCW 41.40.170(3)). Neither “active federal service” nor “service in the armed forces” is defined in chapter 41.40 RCW.
18. National Guard members perform their duties under orders issued under state authority unless they receive orders to duty under federal authority. Thus National Guard service raises the question whether non-interruptive “service in the armed forces” must also be “active federal service” to be creditable under RCW 41.40.170, which uses both terms. Nothing in chapter 41.40 RCW expressly addresses military service in the National Guard, and there is no direct indication how DRS should characterize National Guard service when applying the term “service in the armed forces” in this subsection.
19. The Appellant argues that “service in the armed forces” in subsection (3) means all National Guard service, state and federal. If this meaning were adopted here, he could receive military service credit under subsection (3) for his pre-1977 state-ordered annual training sessions, in addition to the service credit DRS has already granted him for service under federal orders. (The weekend drill activities are subject to an additional limitation, see paragraphs 37 and 38 following.) The narrow legal question to be resolved is whether RCW 41.40.170(3) authorizes military service credit in PERS for National Guard service performed under state authority.
20. DRS grants non-interruptive military service credit for only those times when Guard members perform a minimum amount of “federalized” service under Title 10 of the United States Code. Despite the difference in terminology between subsections (1) and (3), when DRS applies RCW 41.40.170(3) to add military service credit to a PERS member’s service credit record, DRS equates “service in the armed forces” in subsection (3) with “active federal service” in subsection (1).
21. This decision adopts the DRS position as the one most firmly based in the whole statute. “Service in the armed forces” in subsection (3) should be applied as though it means the same as “active federal service in the military or naval forces of the United States” in subsection (1). As explained in more detail in the

paragraphs that follow, DRS limits the grant of military service credit in this way to recognize the “active federal service” restriction in subsection (1), according to the agency’s understanding of the intent of the Washington State Legislature, in light of the history of amendments to the statute as well as federal statutory and case law.

22. To ascertain and give effect to the legislature's intent and purpose, courts consider a statute as a whole, giving effect to all that the legislature has said, and may use related statutes to help identify the legislative intent embodied in the provision in question. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-11 (2002). DRS considers subsections (1) and (3) of RCW 41.40.170 as parts of the same statute. In attempting to ascertain the intent of the legislature, it also considers the development of the current version of RCW 41.40.170, which indicates that the terms used in these two subsections are more closely related than they might at first appear. Paragraphs 23 through 28 detail this development.
23. The Washington State Legislature amended RCW 41.40.170 in 1963, and after amendment the statute stated:

A member of the retirement system who has served or shall serve on **active federal service** in the military or naval forces of the United States and who left or shall leave an employer to enter **such service** shall be deemed to be on military leave of absence if he has resumed or shall resume employment as an employee within one year from termination thereof, or if he has applied or shall apply for reinstatement of employment and is refused employment for reasons beyond his control within one year from termination of the military service shall upon resumption of service within ten years from termination of military service have his **service in such armed forces** credited to him as a member of the retirement system: *Provided*, That no such military service in excess of five years shall be credited ~~unless such service was actually rendered during time of war or emergency~~: *And provided further*, That he restore all withdrawn accumulated contributions, which restoration must be completed within three years of membership service following his first resumption of employment.

Laws of 1963, ch. 174, § 10 (bold emphasis added; deletions shown by strike-through). In this version, “active federal service” is the consistent prerequisite for military service credit in PERS (then SERS). As previously noted, interruption of PERS-covered employment was then also a requirement for military service credit.

24. In 1967, the Legislature again amended RCW 41.40.170 to allow military service credit in a new circumstance, the attainment of 25 years of service in PERS. As amended, the statute stated:

A member of the retirement system who has served or shall serve on **active federal service** in the military or naval forces of the United States and who left or shall leave an employer to enter **such service** shall be deemed to be on military leave of absence if he has resumed or shall resume employment as an employee

within one year from termination thereof, or if he has applied or shall apply for reinstatement of employment and is refused employment for reasons beyond his control within one year from termination of the military service shall upon resumption of service within ten years from termination of military service or shall in all events after completing 25 years of creditable service have his service **in such armed forces** credited to him as a member of the retirement system: *Provided*, That no such military service in excess of five years shall be credited: *And provided further*, That he restore all withdrawn accumulated contributions, which restoration must be completed within three years of membership service following his first resumption of employment.

Laws of 1967, ch. 127, § 8 (bold emphasis added; legislative addition shown by underlining).

25. "Active federal service" continued to be the consistent prerequisite for military service credit in PERS, and the statute also continued the requirement of interrupted PERS-covered employment.
26. After a minor addition in 1969 to limit the time period for restoration of withdrawn contributions to 5 years, the Legislature in 1972 substantially reworked RCW 41.40.170 and expanded its scope. The statute then stated:

(1) ~~A member of the retirement system who has served or shall serve on **active federal service** in the military or naval forces of the United States and who left or shall leave an employer to enter **such service** shall be deemed to be on military leave of absence if he has resumed or shall resume employment as an employee within one year from termination thereof, or if he has applied or shall apply for reinstatement of employment and is refused employment for reasons beyond his control within one year from termination of the military service shall upon resumption of service within ten years from termination of military service or shall in all events after completing 25 years of creditable service have his service in such armed forces credited to him as a member of the retirement system: *Provided*, That no such military service in excess of five years shall be credited: *And provided further*, That he restore all withdrawn accumulated contributions, which restoration must be completed within three five years of membership service following his first resumption of employment.~~

(2) If he has applied or shall apply for reinstatement of employment, within one year from termination of the military service, and is refused employment for reasons beyond his control, he shall, upon resumption of service within ten years have such service credited to him.

(3) In any event, after completing twenty-five years of creditable service, any member may have his **service in the armed forces** credited to him as a member whether or not he left the employ of an employer to enter **such armed service**: *Provided*, That in no instance, described in subsection (1), (2) and (3) of this section, shall military service in excess of five years be credited; *And Provided Further*, That in each instance the member must restore all withdrawn accumulated contributions, which restoration must be completed within five years of membership service following his first resumption of employment: *And Provided*

Further, That this section will not apply to any individual, not a veteran within the meaning of RCW 41.06.150, as now or hereafter amended: And Provided Further, That in no instance, described in subsection (1), (2) and (3) of this section, shall military service be credited to any member who is receiving full military retirement benefits pursuant to 10 U.S.C. § 3911 or § 3914, as now or hereafter amended.

Laws of 1972, ex. sess., ch. 151, § 3 (bold emphasis added; legislative additions and deletions shown by strike-through and underlining).<sup>4</sup>

27. The statute, divided into subsections in 1972, additionally provided for military service credit in PERS regardless whether the PERS member had left PERS-covered employment to serve in the military, so long as the member completed 25 years of service credit in PERS, restored all withdrawn contributions, and met the specified definition of veteran. The Legislature retained the "active federal service" language as well as its subsequent references. Though now located in other subsections, these terms still refer to and mean "active federal service," as has been consistently the case in subsection (1).
28. Thus, although the Legislature did not repeat the subsection (1) phrase "active federal service in the military or naval forces of the United States" in subsection (3), for the purpose of determining what type of military service qualifies for service credit in PERS under subsection (3), the term "service in the armed forces" is given an equivalent meaning.
29. Mr. Densley argues from the difference in terminology, and has not put forward any policy or other reason why the Department should read the non-interruptive subsection (3) more broadly than the interruptive subsection (1) when crediting military service with the National Guard in PERS Plan 1, to include drill, training and inactive duty service time.

*(c) Meaning of "active federal service"*

30. "Active federal service" in RCW 41.40.170, when applied to service in the National Guard, is restricted to service rendered pursuant to orders issued under Title 10 U.S.C. "Active federal service" also is not defined within chapter 41.40 RCW. Since the question directly involves federal law, however, we may look to federal law for assistance. Consistent with other authorities already cited, Title 10 contains the following provision:

§ 12401. Army and Air National Guard of the United States: status

Members of the Army National Guard of the United States and the Air National Guard of the United States are not in **active Federal service** except when ordered thereto under law.

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<sup>4</sup> The exclusion for the receipt of military retirement benefits was later removed.

(Bold emphasis added.)

(Similar provisions existed before 1994; see *Emsley* at 478.) The implication is unmistakable that “active federal service” is not the ordinary status of National Guard personnel, but must be specifically ordered. It is not the same as “active duty” service in the National Guard, which encompasses both state and federal duty. For the application of RCW 41.40.170(3), “active federal service” means service designated as active duty training or other action pursuant to orders under authority of Title 10 U.S.C.

### ***C. Mr. Densley’s Claim***

31. For the reasons just discussed, the Department gives PERS Plan 1 military service credit to only that National Guard service performed under Title 10 U.S.C. The undersigned does not find persuasive Mr. Densley’s assertions that the agency errs in equating “service in the armed forces” in subsection (3) with “active federal service in the military or naval forces of the United States” in subsection (1).

#### *1. Service Credit at Issue*

32. DRS has already added credit to Mr. Densley’s PERS record under subsection (1) for his “interruptive” Army National Guard military service in 1990 and under subsection (3) for his “non-interruptive” 1972 active duty for training. The remaining issue is whether Mr. Densley’s 1972-1976 Washington Army National Guard training and drill activities, and one day of inactive duty, completed after the conclusion of his active duty for training in 1972 but before he became a PERS employee in 1977, are eligible for non-interruptive military service credit under subsection (3).

#### *2. Provisos*

33. Only the proviso requiring veteran status under RCW 41.04.005 is of concern here. The Department has not questioned Mr. Densley’s status as a veteran for purposes of PERS Plan 1 military service credit in this proceeding. The Department has effectively conceded his veteran status since it is a prerequisite to its grant of military service credit for September through November 1972 and August through October 1990. The 1972 credit coincides with the Vietnam War era (1964-1975, RCW 41.04.005(2)(d); the 1990 credit coincides with the Persian Gulf War period (RCW 41.04.005(2)(e)).

#### *3. Primary terms of RCW 41.40.170(3)*

34. Mr. Densley attained 25 years of service credit in PERS in 2002, so the only remaining term to be addressed is “service in the armed forces” in RCW 41.40.170(3).

35. For reasons already discussed, where military service with the National Guard is concerned, only that service shown to have been performed under Title 10 U.S.C. orders is creditable in PERS Plan 1 as "active federal service." Mr. Densley has not asserted or attempted to prove that any of his 1972-1976 orders for weekend drill, annual training or inactive duty were issued under the superseding federal authority of Title 10 U.S.C.
36. Mr. Densley points out that he was a Reserve officer as opposed to an enlisted person. His status as a Reserve officer, commissioned under Title 10 U.S.C., does not make a difference here. The materials supporting the motions for summary judgment indicate no question that Mr. Densley was a member of the National Guard, which is the state's organized militia; his December 1972 and April 1976 orders show that the Adjutant General of the Washington Army National Guard assigned Mr. Densley to his duties and separated him from active Guard service. DRS' ability to credit National Guard service in PERS Plan 1 under RCW 41.40.170 depends upon the nature of the military service itself, not the individual member's rank or the source of the commission or obligation. DRS thus examines the orders under which National Guard service was performed to determine whether a Guard member was serving in a state or federal capacity. The absence in this record of any orders citing federal authority for the service at issue precludes PERS service credit.

#### 4. *Pre-1977 military service not "service" under PERS*

37. As *In re Appeal of Simko* illustrated, when DRS adds service credit in PERS for military service completed before PERS-covered employment, it uses the standards for service credit in PERS that were in effect at the time the military service was performed. Mr. Densley has not demonstrated that any other standard should be applied. In his case, this means that even if the nature of his 1972-1976 training and drill activities made them potentially creditable in PERS, he would still have to show that he was engaged in military duty a minimum of ten days in a given month during those years to receive credit for that month. Former RCW 41.40.010(9). He has not shown that this occurred in any of the months for which service credit is sought here.
38. The monthly weekend drills and the inactive duty day did not meet the standard at the time of a minimum of 10 days per month for a month's credit in PERS. Partial month credit did not become available until 1992, well after the military service at issue was performed.

## **D. Application of law other than PERS**

### **1. Chapter 73.16 RCW**

39. In his Motion and Reply to the Department's Motion for Summary Judgment, Mr. Densley also urges that law other than PERS statutes should apply to authorize the service credit at issue. This decision does not adopt these arguments or apply these other provisions because there has not been a convincing showing that they affect or supersede the analysis already set out. All of the extra-PERS statutes cited by Mr. Densley in his filings address employment and reemployment rights of National Guard and reserve members, *as between the members and their employers*. These rights are a matter separate from any rights to have DRS credit National Guard service as military service in PERS, under PERS statutes. In particular, there is no sound legal basis for applying any of these provisions to military service that occurred before PERS-covered employment.
40. Mr. Densley points ultimately to RCW 73.16.055(1)(c) as authority against RCW 41.40.170 as DRS applies it. Neither this statute nor any other provisions of chapter 73.16 RCW apply in this case.
41. Title 73 RCW, Veterans and Veterans' Affairs, includes a chapter, 73.16, titled "Employment and reemployment." In 2001, the Washington State Legislature substantially revised this chapter (some of the statutes in this chapter have been in effect for many years, a few even predating the creation of PERS in 1947), recognizing employment protections for federal personnel codified in the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

The legislature expressed its intent as follows:

(1) It is the intent of the legislature to guarantee employment rights of members of the reserve and national guard forces who are called to active duty. The federal uniformed services employment and reemployment rights act of 1994 protects all such federal personnel. The legislature intends that similar provisions should apply to all such state personnel. Therefore, the legislature intends for chapter 133, Laws of 2001 to ensure protections for state-activated personnel similar to those provided by federal law for federal-activated personnel.

(2) The purposes of this chapter are to:

(a) Encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment that can result from such service;

(b) Minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon

their completion of such service; and

(c) Prohibit discrimination against persons because of their service in the uniformed services.

(3) Therefore, the legislature intends that the governmental agencies of the state of Washington, and all the political subdivisions thereof, should be model employers in carrying out the provisions of this chapter

RCW 73.16.005.<sup>5</sup>

42. Chapter 73.16 RCW regulates military service aspects of the relationship between an employee and his or her employer. RCW 73.16.032 contains the fundamental statements for employment and reemployment rights protected at the state level under this chapter:

1) 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, 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.

(2) **An employer** may not discriminate in employment against or take any adverse employment action against any person because such person (a) has taken an action to enforce a protection afforded any person under this chapter, (b) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (c) has assisted or otherwise participated in an investigation under this chapter, or (d) has exercised a right provided for in this chapter. The prohibition in this subsection (2) applies with respect to a person regardless of whether that person has performed service in the uniformed services.

(Bold emphasis added.)

43. The scope of the chapter depends upon some of its definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise. . . .

(2) "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

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<sup>5</sup> The legislature did not intend an exact replica of USERRA at the state level, but "similar provisions." Some provisions of chapter 73.16 in its current form mirror USERRA provisions, and some do not.

employment.

(3) "Employee" means a person in a position of employment.

(4) **"Employer" means the person, firm, or corporation, the state, or any elected or appointed public official currently having control over the position that has been vacated. . . .**

(7) "Position of employment" means any position (other than temporary) wherein a person is engaged for a private employer, company, corporation, or the state. . .

(13) "State" means the state of Washington, including the agencies and political subdivisions thereof.

RCW 73.16.031. (Bold emphasis added.)

44. Under RCW 73.16.031(4), employers are only those entities "having control over the position that has been vacated".<sup>6</sup> DRS, the administrator of public employee retirement systems (including PERS), is an employer by this definition only with respect to its own employees. Beginning in May 1977, Mr. Densley's employer was Pierce County. DRS, which is not an employer with regard to Mr. Densley under chapter 73.16, would apply relevant PERS statutes to credit military service rather than statutes in chapter 73.16.
45. The same is true of RCW 73.16.055, more specifically covering pension issues. RCW 73.16.055(1)(c) does expressly address "a right provided under any state law governing pension benefits for state employees."<sup>7</sup> But DRS is not subject to chapter 73.16 when it is considering service credit in PERS Plan 1 for non-interruptive military service. RCW 73.16.055, first enacted in 2001, occurs within the chapter and must be given its place in that context.

(1)(a) In the case of a right provided under any state law governing pension benefits for state employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.

(b) A person reemployed under this chapter shall be treated as not having incurred a break in service with the state because of the person's period of service in the uniformed services.

(c) Each period served by a person in the uniformed services shall, upon

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<sup>6</sup> USERRA and chapter 73.16 RCW diverge in some important definitions. Contrast the definition of "employer" under USERRA, which encompasses public retirement plan administrators to a limited extent. *In re Appeal of Hergert*, DRS Docket No. 04-P-010 (March 28, 2005) at CoL 32-36.

<sup>7</sup> Mr. Densley could be considered a state employee for purposes of chapter 73.16 RCW. Under the definition in RCW 73.16.031(13), "[s]tate" means the state of Washington, including the agencies and political subdivisions thereof," presumably including Pierce County.

reemployment under this chapter, be deemed to constitute service with the state 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.

(2) When the state is reemploying a person under this chapter, the state is liable to an employee pension benefit plan for funding any obligation of the plan to provide the pension benefits described in this section and shall allocate the amounts 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. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and purposes of a state law governing pension benefits for state employees, service in the uniformed services that is deemed under subsection (1) of this section to be service with the state shall be deemed to be service with the state under the terms of the plan or any applicable collective bargaining agreement.

(3) A person reemployed by the state under this chapter is entitled to accrued benefits pursuant to subsection (1)(a) of this section that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the internal revenue code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the state throughout the period of uniformed service. Any payment to the plan described in this subsection shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's services, such payment period in the uniformed services, not to exceed five years.

(4) For purposes of computing an employer's liability of the employee's contributions under subsection (2) of this section, the employee's compensation during the period of service shall be computed:

(a) At the rate the employee would have received but for the period of service in subsection (1)(b) of this section; or

(b) In the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the twelve-month period immediately preceding such period or if shorter, the period of employment immediately preceding such period.

RCW 73.16.055.

46. In addition, the terms of RCW 73.15.055 limit its scope; each individual subsection expressly applies only to "reemployed" persons. Logically, "reemployed" persons must have been employed with an employer at some time in the past. Employees who return, or attempt to return, to their former employment after performing military service may invoke the protections of RCW 73.16.055 at the time of their return. In other words, the reach of this statute is limited to what DRS refers to as

“interruptive” military service. It could not have any bearing on PERS credit for periods of military service completed before the employment subject to chapter 73.16.

47. Still, in the end Mr. Densley has received the same benefit that he could have expected under RCW 73.16.055(1)(c), even though DRS was not Mr. Densley’s employer and there is no basis for using RCW 73.16.055(1)(c) in setting service credit for Mr. Densley’s pre-1977 military service under PERS law. In 1998, using RCW 41.40.170(1), DRS added three months of military service credit to Mr. Densley’s PERS service credit record for his active duty military service in 1990. That was the only time he interrupted his civilian employment for military service of any kind, and thus became “reemployed.” In granting service credit in PERS for Mr. Densley’s 1990 interruptive military service, DRS indirectly satisfied the requirement that RCW 73.16.055(1)(c) imposed upon Mr. Densley’s employer that “each period served by a person in the armed forces shall, **upon reemployment** under this chapter, be deemed to constitute service with the state . . . for the purpose of determining the accrual of benefits under the plan.” Mr. Densley has received the three months of interruptive military service credit to which RCW 41.40.170(1) entitles him for the purpose of the eventual calculation of his PERS Plan 1 retirement benefit under RCW 41.40.185. It is the same amount to which RCW 73.16.055(1)(c) would entitle him. Both statutes are concerned with crediting military service in the employee’s retirement plan, after the employee returns to civilian employment, as though the interruptive service had been earned in the plan.
48. Nothing in these statutes appears to support Mr. Densley’s position that under RCW 73.16.055(1)(c) one period of interruptive military service in 1990 automatically makes any other period of his military service eligible for service credit in PERS. This position is not supported by the language or structure of this statute and is not consistent with the terms of either chapter 73.16 RCW or chapter 41.40 RCW, as already discussed.

## 2. RCW 38.24.060

49. Mr. Densley also cites RCW 38.24.060 as an expression of the Legislature’s intent to equate active duty state National Guard service with active duty federal service. Title 38 RCW governs the affairs of Washington State’s militia, and does not purport to deal with public employee retirement system rights. RCW 38.24.060 is an anomalous provision codified at the end of a short chapter authorizing payment of the militia expenses from the state treasury (including compensation for personnel when federal payment is not authorized):

All members of the organized militia of Washington who are called to active state service or inactive duty shall, upon return from such duty, have those rights accorded under RCW 73.16.031, 73.16.035, 73.16.041, 73.16.051, and 73.16.061.

RCW 38.24.060.

50. In 1974, when this statute was first enacted, it spoke only of state active duty and employment and reemployment rights:

All members of the organized militia who are called to state active duty shall, upon return from such active duty, have the same rights of employment or reemployment as they would have if called to active duty in the United States Army.

Laws 1974, 1<sup>st</sup> ex. sess., ch. 46 §2.

51. The 1974 version of RCW 38.24.060 would have been in effect for about ten years, during part of the period for which Mr. Densley seeks additional credit here. Mr. Densley points to the 1974 form of this statute as "controlling and clear." The 1974 version of RCW 38.24.060 does not affect DRS' application of RCW 41.40.170.
52. The 1974 version of RCW 38.24.060 is a general statement of the legislature's intention to protect civilian employment rights of the state's militia members. Those rights are a matter between the affected militia member and his or her employer or potential employer, like those in the discussion of chapter 73.16 above.<sup>8</sup>
53. In contrast, the PERS statute RCW 41.40.170 predates RCW 38.24.060 (the elements relevant here were in place by 1972), and governs the specifics of crediting military service in PERS. In 1974, RCW 41.40.170 already stated what military service is creditable in PERS, and DRS applies RCW 41.40.170 so that "active federal service" is required for military service credit in PERS Plan 1. DRS would not recognize chapter 38.24 RCW as a source of binding legal authority affecting how military service, particularly military service pre-dating PERS-covered employment, is credited in PERS.
54. Even the 1974 version of RCW 38.24.060 does not "equate" state-ordered National Guard service with active duty federal service in any sense broader than rights to reemployment. Chapter 38 RCW itself has long recognized a distinction in militia service between "in service of United States" and "not in service of United States," *see, for example*, Laws 1943, ch. 130 §§ 5, 12, now RCW 38.08.010 and 38.04.010.
55. The later amendments to RCW 38.24.060 suggest that any original intent there may have been to "equate" state and federal National Guard service gave way over time. Those later amendments removed the reference to "active duty in the United States Army," strictly limited the referenced provisions of 73.16, and applied them only to periods of "active state service or inactive duty."

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<sup>8</sup> RCW 38.24.060 in its earlier form appears to have been superimposed on the existing RCW 38.40.040 and 050, which had criminalized interference with employment and discharge by an employer during or as a result of militia service since the World War II era.

56. In 1984, the Legislature specified which rights it meant to grant:

All members of the organized militia who are called to state active duty shall, upon return from such active duty, have ~~the same rights of employment or reemployment as they would have if called to active duty in the United States Army~~ those rights accorded under RCW 73.16.031, 73.16.035, 73.16.041, 73.16.051, and 73.16.061.

Laws 1984, ch. 198 §4.

57. In 1989, new amendments specified the type of duty it addressed, as part of rather extensive legislation making similar changes:

All members of the organized militia of Washington who are called to active state active-duty service or inactive duty shall, upon return from such duty, have those rights accorded under RCW 73.16.031, 73.16.035, 73.16.041, 73.16.051, and 73.16.061.

Laws 1989, ch. 19, §38. (This is the form of the statute today.)

58. Since 1984, RCW 38.24.060 has provided quite limited references to other statutes in chapter 73.16 in place of broader statements of employment rights. Several of the chapter 73.16 statutes "according rights" under that chapter do not appear in this statute. Perhaps significantly, the list does not include RCW 73.16.055. In short, RCW 38.24.060 does not control or define anything pertinent to the issue in this case.

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### ***Discussion Conclusion***

DRS accepts that Mr. Densley's training and drill activities 1972-1976 were types of military service considered active duty for some other purposes, and does not question the quality, importance or necessity for those activities. DRS denies military service credit for them only because in the agency's view the Legislature did not intend that these kinds of activities be eligible for military service credit in PERS Plan 1.

***Reconsideration:*** Any party to this action may file a petition for reconsideration. See RCW 34.05.470. The petition must state the specific grounds upon which the request for reconsideration is based and must be filed with the Department of Retirement Systems, PO Box 48380, WA 98504-8380, within ten days of the mailing of this order.

***Judicial Review:*** A petition for judicial review may be filed within 30 days after the mailing of this order. See RCW 34.05.542. Any party wishing to perfect a Superior Court appeal should carefully read the requirements for seeking judicial review in the Administrative Procedures Act (Chapter 34.05 RCW). It is not necessary to file a petition for reconsideration prior to seeking judicial review. See RCW 34.05.470.

Dated this 6<sup>th</sup> day of September, 2005.



ELLEN G. ANDERSON  
Presiding Officer  
Department of Retirement Systems

THIS IS AN IMPORTANT RECORD.  
SAFEGUARD IT.

ANY ALTERATIONS IN SHADDED  
AREAS RENDER FORM VOID

# CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY

1. NAME (Last, First, Middle Initial) <b>WALTER J. B. [REDACTED]</b>	2. DEPARTMENT COMPONENT AND BRANCH <b>ARMY/USAR/JC</b>	3. SOCIAL SECURITY NO. <b>[REDACTED]</b>
---	---	---

4.a. GRADE RATE OR RANK <b>WAJ</b>	4.b. PAY GRADE <b>04</b>	5. DATE OF BIRTH (YYMMDD) <b>[REDACTED]</b>	6. RESERVE OBLIG. TERM. DATE Year <b>00</b> Month <b>00</b> Day <b>00</b>
---------------------------------------	-----------------------------	--	--

7.a. PLACE OF ENTRY INTO ACTIVE DUTY <b>COMPTON CA</b>	7.b. HOME OF RECORD AT TIME OF ENTRY (City and state, or complete address if known) <b>1068 PALUTE TRAIL FOX ISLAND WA 98333</b>
---	---

8.a. LAST DUTY ASSIGNMENT AND MAJOR COMMAND <b>HQS 4TH AVN FORSCOM FC</b>	8.b. STATION WHERE SEPARATED <b>WTMC 8 COMPTON CA 98220-5118</b>
--	---

9. COMMAND TO WHICH TRANSFERRED <b>USAR GROUP (TMA) ARPERCEN, 0702 PAGE BLVD, ST LOUIS, MO 63133</b>	10. SGLI COVERAGE None <input type="checkbox"/> Amount: \$ <b>100,000.00</b>
---	--

11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years) <b>86000 MARINE AND TERMINAL OPERATIONS OFFICE- R--0 YRS-3 MOS//NOTHING FOLLOWS</b>	12. RECORD OF SERVICE		
	a. Date Entered AD This Period	Year(s)	Month(s)
	b. Separation Date This Period	Year(s)	Month(s)
	c. Net Active Service This Period	Year(s)	Month(s)
	d. Total Prior Active Service	Year(s)	Month(s)
	e. Total Prior Inactive Service	Year(s)	Month(s)
	f. Foreign Service	Year(s)	Month(s)
	g. Sea Service	Year(s)	Month(s)
	h. Effective Date of Pay Grade	Year(s)	Month(s)

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service)  
**NATIONAL DEFENSE SERVICE MEDAL 2ND AWD//ARMED FORCES RESERVE MEDAL//ARMY SERVICE RIBBON//JOINT SERVICE ACHIEVEMENT MEDAL//NOTHING FOLLOWS**

14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed)  
**NONE//NOTHING FOLLOWS**

## BAD ORIGINAL

15.a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM	Yes	No	15.b. HIGH SCHOOL GRADUATE OR EQUIVALENT	Yes	No	16. DAYS ACCRUED LEAVE PAID
				X		

17. MEMBER WAS PROVIDED COMPLETE DENTAL EXAMINATION AND ALL APPROPRIATE DENTAL SERVICES AND TREATMENT WITHIN 90 DAYS PRIOR TO SEPARATION

Yes	No
	X

18. REMARKS  
**SUBJECT TO ACTIVE DUTY RECALL AND/OR ANNUAL SCREENING//ITEM 12D ABOVE DOES NOT ACCOUNT FOR ACTIVE DUTY FOR TRAINING THIS SOLDIER MAY HAVE PRIOR TO DATE ENTERED IN ITEM 12A//ORDERED TO ACTIVE DUTY IN SUPPORT OF OPERATION DESERT SHIELD/DESERT STORM IAW 18 USC 673B//INDIVIDUAL COMPLETED PERIOD FOR WHICH ORDERED TO ACTIVE DUTY FOR PURPOSE OF POST-SERVICE BENEFITS AND ENTITLEMENTS//DD FORM 214 ADMINISTRATIVELY ISSUED/REISSUED ON 920212//NOTHING FOLLOWS**

19.a. MAILING ADDRESS AFTER SEPARATION (Include Zip Code) <b>1068 PALUTE TRAIL FOX ISLAND WA 98333</b>	19.b. NEAREST RELATIVE (Name and address - include Zip Code) <b>KATHLEEN R DENSLY SAME AS 19A</b>
---	--

20. MEMBER REQUESTS COPY 6 BE SENT TO <b>WA</b> DIR. OF VET AFFAIRS <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	22. OFFICIAL AUTHORIZED TO SIGN (Typed name, grade, title and signature) <b>JUDITH L. TILT, MAJ, AG, OIC TM A PADTF</b>
---	--

21. SIGNATURE OF MEMBER BEING SEPARATED  
**SOLDIER NOT AVAILABLE TO SIGN**

### SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)

23. TYPE OF SEPARATION <b>RELEASE FROM ACTIVE DUTY</b>	24. CHARACTER OF SERVICE (Include upgrades) <b>HONORABLE</b>
SEPARATION AUTHORITY <b>635-100, CHAP 3 SECTION XI</b>	26. SEPARATION CODE <b>LBK</b>
	27. REENTRY CODE <b>NA</b>

28. NARRATIVE REASON FOR SEPARATION  
**EXPIRATION TERM OF SERVICE**

## EXHIBIT 8

29. DATES OF TIME LOST DURING THIS PERIOD <b>NONE</b>	30. MEMBER REQUESTS COPY 4
--	----------------------------

HEADQUARTERS  
 144TH TRANSPORTATION BATTALION (TERMINAL)  
 WASHINGTON ARMY NATIONAL GUARD  
 11th & Yakima  
 Tacoma, Washington 98405

SPECIAL ORDERS  
 NUMBER 50

26 April 1973

1. TC 175. Following individual ORDERED TO ANNUAL TRAINING at MOTKI,  
 Kings Bay, GA.

DENSLEY, James A

2LT 0815 TC

Assigned to: HHC 144th Transportation Bn (TML)

Reporting date: 2 June 1972

Period: 15 days

Authority: 32 USC 503 and Para 8 GO 28 TAGO Wash dtd 16 March 1973

Accounting classification: Officer: 2132060 18-1045 P3111-11,12 S45-113

Enlisted: 2132060 18-1045 P3112-11,12 S45-113

Special instructions: Travel will be accomplished in Class "C" Fatigue &  
 Uniform. Auth wt allowance is 66 pounds per indiv.Special information: Travel will be by Government Chartered Aircraft and  
 transportation will be furnished from Tacoma, WA to  
 airport and from the airport to Tacoma, WA on the  
 return from AT.

FOR THE COMMANDER:

OFFICIAL:

SIGFRIED C. LARSON  
 CPT, TC, WashARNG  
 Adjutant

*Donald L. Dildine*  
 DONALD L. DILDINE  
 CW4, WashARNG  
 Acting Asst Adjutant

DISTRIBUTION:

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HEADQUARTERS  
 144TH TRANSPORTATION BATTALION (TERMINAL)  
 WASHINGTON ARMY NATIONAL GUARD  
 11th & Yakima  
 Tacoma, Washington 98405

SPECIAL ORDERS  
 Number 30AT

15 April 1975

1. TC 142. By authority of the Secretary of the Army and the Chief National Guard Bureau following individual is ordered to FULL TIME TRAINING DUTY for period indicated plus allowable travel time. Upon completion of period of FTTD unless sooner relieved or extended by proper authority individual will return to the place where he entered FTTD and be relieved from such duty. Travel of dependents and shipment of other than temporary change of station weight allowance is not authorized.

## ADMINISTRATIVE ACCOUNTING DATA

Authority: 32 USC 503; SA NGB Tng Auth WA-04 dtd 31 Dec 75 and Para 4  
 GO 237 AGO Wash dtd 30 Dec 75

Permanent address: NA

Accounting classification: Off: 2162060 18-1045 P3111-11,12 S45-113

Enl: 2162060 18-1045 P3112-11,12 S45-113

Movement data: Tvl by Govt auto or vessel auth. Any tvl by private auto will be at no expense to the govt

## FOR THE INDIVIDUAL

Attached to: Unis of assignment

Period (TDY): Fifteen (15) days

Purpose: To perform Annual Tng at Whidbey Island, WA

Reporting date: 19 July 1975

Special instructions: Weapons will not be transported incident to travel

Special information: NA

DENSLEY, James A

2LT, 506th Trans Co

## FOR THE COMMANDER:

OFFICIAL:

RICHARD L. SWEARINGEN

CPT, TC, WashARNG

S1

*Donald L. Dildine*  
 DONALD L. DILDINE  
 CW4, WashARNG  
 Act Asst Adjutant

Retirement Years: 10 Jun - 9 Jun

NATIONAL GUARD BUREAU  
RETIREMENT CREDITS RECORD

NAME (Last, first, middle initial)  
**DENSLIEF, JAMES A.**

SERIAL NO.

GRADE (in pencil)  
**2LT**

STATE  
**Washington**

159

(1) DRILL PERIOD OF EQUIVALENT INSTRUCTION OR APPROPRIATE DUTY INCLUDE DATE	POINTS	(2) MEMBER OF NATIONAL GUARD INCLUDE DATE	POINTS	(3) EXTENSION COURSES COMPLETED OR MISCELLANEOUS DUTIES PERFORMED			(4) TOTAL POINTS INACTIVE DUTY	(5) ACTIVE DUTY OR ACTIVE DUTY TRAINING INCLUDE DATE	POINTS	(6) TOTAL POINTS	(7) VERIFIED BY
				DATE	DATE PERFORMED	TOTAL HOURS					
10 Jun 72 - 24 Jun 73	12	10 Jun 72 - 24 Jun 73	15				27	25 Jun 73 - 25 Jun 73	8	55	15K
10 Jun 73 - 24 Jun 74	66	10 Jun 73 - 24 Jun 74	15				59	10 Jun 73 - 24 Jun 74	11	68	[Signature]
15 Aug 74 - 9 Jun 75	47	15 Aug 74 - 9 Jun 75	15				62	10 Jun 74 - 20 Jun 74	13	82	[Signature]
10 Jun 75 - 1 Apr 76	42	10 Jun 75 - 1 Apr 76	12				54	19 Jul 75 - 24 Jun 75	15	69	[Signature]
By to Departed and ref to USARL St Louis, MO 69192 PFF 1 Apr 76 Para 9											

DUPLICATE

DEPARTMENT OF THE ARMY  
OFFICE OF THE ADJUTANT GENERAL  
U.S. ARMY RESERVE COMPONENTS PERSONNEL AND ADMINISTRATION CENTER  
ST. LOUIS, MISSOURI 63132

24 JUN 76

AGUZ-PAD-M  
LETTER ORDERS NUMBER 06-215005

SUBJECT: INACTIVE DUTY TRAINING WITHOUT PAY

DENSLEY JAMES ALBERT  
8130 A MINONA SM  
TACOMA WA 98498

1LT 4200 TC  
ANNUAL TRAINING  
GLC-055050

TC 170. THE ABOVE NAMED INDIVIDUAL IS AUTHORIZED TO PERFORM RESERVE DUTY TRAINING WITHOUT PAY FOR PURPOSE INDICATED. UPON COMPLETION OF DUTY HE WILL RETURN TO HIS HOME.

ADMINISTRATIVE ACCOUNTING DATA  
AUTH: AR 140-120. STANDARDS OF MEDICAL FITNESS PRESCRIBED IN CHAPTER 3, AR 40-501, APPLY.  
ACCT CLAS: NOT APPLICABLE  
VOCG DATE CFM: NOT APPLICABLE

FOR THE INDIVIDUAL  
REPORT TO: US ARMY DISPENSARY FORT LEWIS TACOMA WASH GLC-055050  
PERIOD: NOT TO EXCEED 1 DAY UNLESS DEEMED NECESSARY BY EXAMINING FACILITY.  
PURPOSE: QUADRENNIAL MEDICAL EXAMINATION.  
REPORTING DATE: NOT LATER THAN 07 SEP 76  
SPECIAL INSTRUCTIONS: COMPLY WITH THE FOLLOWING LETTERED ITEMS OF RCPAC SUPPLEMENTAL INSTRUCTIONS: DB, KU

\* \* \* \* \*  
\* TAG, RCPAC \*  
\* OFFICIAL \*  
\* \* \* \* \*

ROBERT S. YOUNG  
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COMMANDING

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110 S.Ct. 2418

Page 1

496 U.S. 334, 110 S.Ct. 2418, 110 L.Ed.2d 312, 58 USLW 4750  
(Cite as: 496 U.S. 334, 110 S.Ct. 2418)

▷

Briefs and Other Related Documents  
Perpich v. Department of Defense U.S. Minn., 1990.  
Supreme Court of the United States  
Rudy PERPICH, Governor of Minnesota, et al.,  
Petitioners  
v.  
DEPARTMENT OF DEFENSE, et al.  
No. 89-542.

Argued March 27, 1990.  
Decided June 11, 1990.

Governor and state of Minnesota brought action against federal defendants arising out of dispute over propriety of deploying state National Guard to Central America for training purposes. The United States District Court for the District of Minnesota, Donald D. Alsop, Chief Judge, 666 F.Supp. 1319, granted summary judgment for defendants. Sitting en banc, the Court of Appeals for the Eighth Circuit, McGill, Circuit Judge, 880 F.2d 11, affirmed. Certiorari was granted. The Supreme Court, Justice Stevens, held that plain language of Article I of United States Constitution, read as whole, established that Congress could authorize members of National Guard of United States to be ordered to active federal duty for purposes of training outside United States without either consent of state governor or declaration of national emergency.

Affirmed.

West Headnotes

**[1] Armed Services 34 ↪4**

34 Armed Services

34I In General

34k4 k. Establishment and Organization.

Most Cited Cases

(Formerly 34k5)

**Militia 259 ↪1**

259 Militia

259k1 k. Power to Maintain, Regulate, and Control. Most Cited Cases

Plain language of Article I of the United States Constitution, read as whole, establishes that Congress may authorize members of National Guard of the United States to be ordered to active federal duty for purposes of training outside the United States without either consent of state governor or declaration of national emergency. U.S.C.A. Const. Art. 1, § 1 et seq.

**[2] Armed Services 34 ↪5(2)**

34 Armed Services

34I In General

34k5 Persons in the Armed Services, and Militia Called Into Service of the United States

34k5(2) k. National Guard and Militia.

Most Cited Cases

(Formerly 34k5)

**Militia 259 ↪1**

259 Militia

259k1 k. Power to Maintain, Regulate, and Control. Most Cited Cases

Under dual enlistment system, National Guard members lose their state status when called to active federal duty, and if that duty is training mission, then training is performed by Army; during such periods, second Militia Clause is no longer applicable. 32 U.S.C.A. § 325(a); U.S.C.A. Const. Art. 1, § 8, cl. 16.

**[3] Armed Services 34 ↪4**

34 Armed Services

34I In General

34k4 k. Establishment and Organization.

Most Cited Cases

(Formerly 34k5)

**Militia 259 ↪1**

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APPENDIX E

110 S.Ct. 2418

Page 2

496 U.S. 334, 110 S.Ct. 2418, 110 L.Ed.2d 312, 58 USLW 4750  
 (Cite as: 496 U.S. 334, 110 S.Ct. 2418)

## 259 Militia

259k1 k. Power to Maintain, Regulate, and Control. Most Cited Cases

Militia Clauses of the United States Constitution do not constrain powers of Congress to provide for the common defense, raise and support armies, make rules for governance of Armed Forces, and enact necessary and proper laws for such purposes but in fact provide additional grants of power to Congress. U.S.C.A. Const. Art. 1, § 8, cls. 15, 16.

**[4] Armed Services 34 ↻4**

## 34 Armed Services

## 34I In General

34k4 k. Establishment and Organization.

Most Cited Cases

(Formerly 34k5)

**Militia 259 ↻1**

## 259 Militia

259k1 k. Power to Maintain, Regulate, and Control. Most Cited Cases

**States 360 ↻18.89**

## 360 States

## 360I Political Status and Relations

## 360I(B) Federal Supremacy; Preemption

360k18.89 k. War and National Emergency; Armed Services. Most Cited Cases  
 Interpretation of constitutional Militia Clauses as enhancing, rather than constraining, federal powers does not have practical effect of nullifying important state power expressly reserved in Constitution, but merely recognizes supremacy of federal power in area of military affairs; neither State's basic training responsibility nor its ability to rely on its own Guard in state emergency situations is significantly affected. U.S.C.A. Const. Art. 1, § 8, cls. 15, 16.

**[5] States 360 ↻18.89**

## 360 States

## 360I Political Status and Relations

## 360I(B) Federal Supremacy; Preemption

360k18.89 k. War and National

## Emergency; Armed Services. Most Cited Cases

In light of exclusivity of federal power over many aspects of foreign policy and military affairs, powers allowed to States by existing statutes are significant. U.S.C.A. Const. Art. 1, §§ 8, cl. 11, 10, cls. 1, 3; Art. 2, § 3.

**[6] Armed Services 34 ↻4**

## 34 Armed Services

## 34I In General

34k4 k. Establishment and Organization.

Most Cited Cases

(Formerly 34k5)

**Militia 259 ↻1**

## 259 Militia

259k1 k. Power to Maintain, Regulate, and Control. Most Cited Cases

Montgomery Amendment, partially repealing gubernatorial consent requirement for federal active duty service by National Guard members, is consistent with constitutional Militia Clauses. National Defense Authorization Act for Fiscal Year 1987, § 522, 100 Stat. 3816; U.S.C.A. Const. Art. 1, § 8, cls. 15, 16.

**\*334 \*\*2419 Syllabus** <sup>FN\*</sup>

FN\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Since 1933, federal law has provided that persons enlisting in a State National Guard unit simultaneously enlist in the National Guard of the United States, a part of the Army. The enlistees retain their status as State Guard members unless and until ordered to active federal duty and revert to state status upon being relieved from federal service. The authority to order the Guard to federal duty was limited to periods of national emergency until 1952, when Congress broadly authorized orders "to active duty or active duty for training" without any emergency requirement, but provided that such orders could not be issued without the

496 U.S. 334, 110 S.Ct. 2418, 110 L.Ed.2d 312, 58 USLW 4750  
(Cite as: 496 U.S. 334, 110 S.Ct. 2418)

consent of the governor of the State concerned. After two State Governors refused to consent to federal training missions abroad for their Guard units, the gubernatorial consent requirement was partially repealed in 1986 by the "Montgomery Amendment," which provides that a governor cannot withhold consent with regard to active duty outside the United States because of any objection to the location, purpose, type, or schedule of such duty. The Governor of Minnesota and the State of Minnesota (hereinafter collectively referred to as the Governor) filed a complaint for injunctive relief, alleging, *inter alia*, that the Montgomery Amendment had prevented him from withholding his consent to a 1987 federal training mission in Central America \*\*2420 for certain members of the State Guard, and that the Amendment violates the Militia Clauses of Article I, § 8, of the Constitution, which authorize Congress to provide for (1) calling forth the militia to execute federal law, suppress insurrections, and repel invasions, and (2) organizing, arming, disciplining, and governing such part of the militia as may be employed in the federal service, reserving to the States the appointment of officers and the power to train the militia according to the discipline prescribed by Congress. The District Court rejected the Governor's challenge, holding that the Federal Guard was created pursuant to Congress' Article I, § 8, power to raise and support armies; that the fact that Guard units also have an identity as part of the state militia does not limit Congress' plenary authority to train the units as it sees fit when the Guard is called to active federal service; and that, accordingly, the Constitution neither required the gubernatorial veto nor prohibited its withdrawal. The Court of Appeals affirmed.

\*335 *Held*: Article I's plain language, read as a whole, establishes that Congress may authorize members of the National Guard of the United States to be ordered to active federal duty for purposes of training outside the United States without either the consent of a State Governor or the declaration of a national emergency. Pp. 2426-2430.

(a) The unchallenged validity of the dual enlistment system means that Guard members lose their state status when called to active federal duty, and, if that

duty is a training mission, the training is performed by the Army. During such periods, the second Militia Clause is no longer applicable. Pp. 2426-2427.

(b) This view of the constitutional issue was presupposed by the *Selective Draft Law Cases*, 245 U.S. 366, 375, 377, 381-384, 38 S.Ct. 159, 160, 161, 162-163, 62 L.Ed. 349, which held that the Militia Clauses do not constrain Congress' Article I, § 8, powers to provide for the common defense, raise and support armies, make rules for the governance of the Armed Forces, and enact necessary and proper laws for such purposes, but in fact provide additional grants of power to Congress. Pp. 2427-2428.

(c) This interpretation merely recognizes the supremacy of federal power in the military affairs area and does not significantly affect either the State's basic training responsibility or its ability to rely on its own Guard in state emergency situations. Pp. 2428-2429.

(d) In light of the exclusivity of federal power over many aspects of military affairs, see *Tarble's Case*, 80 U.S. (13 Wall.) 397, 20 L.Ed. 597, the powers allowed to the States by existing statutes are significant. Pp. 2429-2430.

(e) Thus, the Montgomery Amendment is not inconsistent with the Militia Clauses. Since the original gubernatorial veto was not constitutionally compelled, its partial repeal by the Amendment is constitutionally valid. P. 2430.

880 F.2d 11 (CA 8 1989), affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

*John R. Tunheim*, Chief Deputy Attorney General of Minnesota, argued the cause for petitioners. With him on the briefs were *Hubert H. Humphrey III*, Attorney General, and *Peter M. Ackerberg*, Special Assistant Attorney General. *Solicitor General Starr* argued the cause for respondents. With him on the brief were *Assistant*

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*Attorney General Gerson, Deputy Solicitor General Merrill, James A. Feldman, and Anthony J. Steinmeyer.\**

\* *James M. Shannon*, Attorney General of Massachusetts, and *Douglas H. Wilkins* and *Eric Mogilnicki*, Assistant Attorneys General, *Thomas J. Miller*, Attorney General of Iowa, *James E. Tierney*, Attorney General of Maine, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, and *Jeffrey Amestoy*, Attorney General of Vermont, filed a brief for the State of Iowa et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the National Guard Association of the United States et al. by *Stephen M. Shapiro* and *Michael K. Kellogg*, and by the Attorneys General for their respective States as follows: *Don Siegelman* of Alabama, *Douglas B. Baily* of Alaska, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida; *Michael J. Bowers* of Georgia, *Jim Jones* of Idaho, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Mike Moore* of Mississippi, *William L. Webster* of Missouri, *Brian McKay* of Nevada, *Hal Stratton* of New Mexico, *Lacy H. Thornburg* of North Carolina, *Robert H. Henry* of Oklahoma, *T. Travis Medlock* of South Carolina, *Roger A. Tellinghuisen* of South Dakota, *Charles W. Burson* of Tennessee, *R. Paul Van Dam* of Utah, *Mary Sue Terry* of Virginia, *Donald J. Hanaway* of Wisconsin, and *Joseph B. Meyer* of Wyoming; for the Firearms Civil Rights Legal Defense Fund by *Stephan P. Halbrook* and *Robert Dowlut*; and for the Washington Legal Foundation et al. by *Daniel J. Popeo*, *Paul D. Kamenar*, and *John C. Scully*.

\*336 Justice STEVENS delivered the opinion of the Court.

The question presented is whether the Congress may authorize the President to order members of the National Guard to active duty for purposes of training outside the United States during peacetime without either the consent of a State Governor or the declaration of a national emergency.

A gubernatorial consent requirement that had been enacted in 1952<sup>FN1</sup> was partially repealed\*\*2421 in 1986 by the "Montgomery Amendment," which provides:

FN1. The Armed Forces Reserve Act of 1952, provided in part:

"Sec. 101. When used in this Act-

.....

"(c) 'Active duty for training' means full-time duty in the active military service of the United States for training purposes." 66 Stat. 481.

"[Section 233] (c) At any time, any unit and the members thereof, or any member not assigned to a unit organized for the purpose of serving as such, in an active status in any reserve component may, by competent authority, be ordered to and required to perform active duty or active duty for training, without his consent, for not to exceed fifteen days annually: *Provided*, That units and members of the National Guard of the United States or the Air National Guard of the United States shall not be ordered to or required to serve on active duty in the service of the United States pursuant to this subsection without the consent of the Governor of the State or Territory concerned, or the Commanding General of the District of Columbia National Guard.

"(d) A member of a reserve component may, by competent authority, be ordered to active duty or active duty for training at any time with his consent: *Provided*, That no member of the National Guard of the United States or Air National Guard of the United States shall be so ordered without the consent of the Governor or other appropriate authority of the State, Territory, or District of Columbia concerned." *Id.*, at 490.

These provisions, as amended, are now codified at 10 U.S.C. §§ 672(b) and 672(d).

\*337 "The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty." FN2

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FN2. The Montgomery Amendment was enacted as § 522 of the National Defense Authorization Act for Fiscal Year 1987, Pub.L. 99-661, § 522, 100 Stat. 3871.

In this litigation the Governor of Minnesota and the State of Minnesota (hereinafter collectively referred to as the Governor), challenge the constitutionality of that amendment. The Governor contends that it violates the Militia Clauses of the Constitution.<sup>FN3</sup>

FN3. Two clauses of Article I—clauses 15 and 16 of § 8—are commonly described as “the Militia Clause” or “the Militia Clauses.” They provide:

“The Congress shall have Power ...

.....

“To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

“To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”

\*338 In his complaint the Governor alleged that pursuant to a state statute the Minnesota National Guard is the organized militia of the State of Minnesota and that pursuant to a federal statute members of that militia “are also members of either the Minnesota unit of the Air National Guard of the United States or the Minnesota unit of the Army National Guard of the United States (hereinafter collectively referred to as the ‘National Guard of the United States’).” App. 5. The complaint further alleged that the Montgomery Amendment had prevented the Governor from withholding his consent to a training mission in Central America for certain members of the Minnesota National Guard in January 1987, and prayed for an injunction against the implementation of any similar orders without his consent.

The District Judge rejected the Governor's

challenge. He explained that the National Guard consists of “two overlapping, but legally distinct, organizations. Congress, under its constitutional authority to ‘raise and support armies’ has created the National Guard of the United States, a federal organization comprised of state national guard units and their members.” 666 F.Supp. 1319, 1320 (Minn.1987).<sup>FN4</sup> The fact that these units also \*\*2422 maintain an identity as \*339 State National Guards, part of the militia described in Art. I, § 8, of the Constitution, does not limit Congress’ plenary authority to train the Guard “as it sees fit when the Guard is called to active federal service.” *Id.*, at 1324. He therefore concluded that “the gubernatorial veto found in §§ 672(b) and 672(d) is not constitutionally required. Having created the gubernatorial veto as an accommodation to the states, rather than pursuant to a constitutional mandate, the Congress may withdraw the veto without violating the Constitution.” *Ibid.*

FN4. In addition to the powers granted by the Militia Clauses, n. 3, *supra*, Congress possesses the following powers conferred by Art. I, § 8:

“The Congress shall have Power ... to pay the Debts and provide for the common Defence and general Welfare of the United States; ...

.....

“To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

“To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

“To provide and maintain a Navy;

“To make Rules for the Government and Regulation of the land and naval Forces;

.....

“To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

Moreover, Art. IV, § 4, provides:

“The United States shall guarantee to

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every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”

A divided panel of the Court of Appeals for the Eighth Circuit reached a contrary conclusion. It read the Militia Clauses as preserving state authority over the training of the National Guard and its membership unless and until Congress “determined that there was some sort of exigency or extraordinary need to exert federal power.” App. to Pet. for Cert. A92. Only in that event could the army power dissipate the authority reserved to the States under the Militia Clauses.

In response to a petition for rehearing en banc, the Court of Appeals vacated the panel decision and affirmed the judgment of the District Court. Over the dissent of two judges, the en banc court agreed with the District Court's conclusion that “Congress' army power is plenary and exclusive” and that the State's authority to train the militia did not conflict with congressional power to raise armies for the common defense and to control the training of federal reserve forces. 880 F.2d 11, 17-18 (1989).

[1] Because of the manifest importance of the issue, we granted the Governor's petition for certiorari. 493 U.S. 1017, 110 S.Ct. 715, 107 L.Ed.2d 735 (1990). In the end, we conclude that the plain language \*340 of Article I of the Constitution, read as whole, requires affirmance of the Court of Appeals' judgment. We believe, however, that a brief description of the evolution of the present statutory scheme will help to explain that holding.

## I

Two conflicting themes, developed at the Constitutional Convention and repeated in debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments. On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and

to the sovereignty of the separate States,<sup>FN5</sup> while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense.<sup>FN6</sup> \*\*2423 Thus, Congress was authorized both to raise and support a national Army and also to organize “the Militia.”

FN5. At the Virginia ratification convention, Edmund Randolph stated that “there was not a member in the federal Convention, who did not feel indignation” at the idea of a standing Army. 3 J. Elliot, Debates on the Federal Constitution 401 (1863).

FN6. As Alexander Hamilton argued in the Federalist Papers:

“Here I expect we shall be told that the militia of the country is its natural bulwark, and would be at all times equal to the national defence. This doctrine, in substance, had like to have lost us our independence. It cost millions to the United States that might have been saved. The facts which, from our own experience, forbid a reliance of this kind, are too recent to permit us to be the dupes of such a suggestion. The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind. Considerations of economy, not less than of stability and vigor, confirm this position. The American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them feel and know that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance, by time, and by practice.” The Federalist No. 25, pp. 156-157 (E. Earle ed. 1938).

\*341 In the early years of the Republic, Congress

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did neither. In 1792, it did pass a statute that purported to establish “an Uniform Militia throughout the United States,” but its detailed command that every able-bodied male citizen between the ages of 18 and 45 be enrolled therein and equip himself with appropriate weaponry<sup>FN7</sup> was virtually ignored for more than a century, during which time the militia proved to be a decidedly unreliable fighting force.<sup>FN8</sup> The statute was finally repealed in 1901.<sup>FN9</sup> It was in that year that President Theodore Roosevelt declared: “Our militia law is obsolete and worthless.”<sup>FN10</sup> The process of transforming “the National \*342 Guard of the several States” into an effective fighting force then began.

FN7. “That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutred and provided, when called out to exercise, or into service, except, that when called out on company days to exercise only, he may appear without a knapsack.” 1 Stat. 271.

FN8. Wiener, *The Militia Clause of the Constitution*, 54 *Harv.L.Rev.* 181, 187-194 (1940).

FN9. See 31 Stat. 748, 758.

FN10. “Action should be taken in reference to the militia and to the raising of volunteer forces. Our militia law is obsolete and worthless. The organization and armament of the National Guard of the several States, which are treated as militia in the appropriations by the Congress,

should be made identical with those provided for the regular forces. The obligations and duties of the Guard in time of war should be carefully defined, and a system established by law under which the method of procedure of raising volunteer forces should be prescribed in advance. It is utterly impossible in the excitement and haste of impending war to do this satisfactorily if the arrangements have not been made long beforehand. Provision should be made for utilizing in the first volunteer organizations called out the training of those citizens who have already had experience under arms, and especially for the selection in advance of the officers of any force which may be raised; for careful selection of the kind necessary is impossible after the outbreak of war.”  
First Annual Message to Congress, Dec. 3, 1901, 14 Messages and Papers of the Presidents 6672.

The Dick Act divided the class of able-bodied male citizens between 18 and 45 years of age into an “organized militia” to be known as the National Guard of the several States, and the remainder of which was then described as the “reserve militia,” and which later statutes have termed the “unorganized militia.” The statute created a table of organization for the National Guard conforming to that of the Regular Army, and provided that federal funds and Regular Army instructors should be used to train its members.<sup>FN11</sup> \*\*2424 It is undisputed that Congress was acting pursuant to the Militia Clauses of the Constitution in passing the Dick Act. Moreover, the legislative history of that Act indicates that Congress contemplated that the services of the organized militia would “be rendered only upon the soil of the United States or of its Territories.” H. R. Rep. No. 1094, 57th Cong., 1st Sess., 22 (1902). In 1908, however, the statute was amended to provide\*343 expressly that the Organized Militia should be available for service “either within or without the territory of the United States.”<sup>FN12</sup>

FN11. The Act of January 21, 1903, 32

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Stat. 775, provided in part:

“That the militia shall consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes—the organized militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the laws of the respective States or Territories, and the remainder to be known as the Reserve Militia.”

Section 3 of the 1903 Act provided in part:

“That the regularly enlisted, organized, and uniformed active militia in the several States and Territories and the District of Columbia who have heretofore participated or shall hereafter participate in the apportionment of the annual appropriation provided by section sixteen hundred and sixty-one of the Revised Statutes of the United States, as amended, whether known and designated as National Guard, militia, or otherwise, shall constitute the organized militia.” *Ibid.*

Section 4 of the 1903 Act authorized the President to call forth the militia for a period not exceeding nine months. *Id.*, at 776.

FN12. Section 4, 35 Stat. 400.

When the Army made plans to invoke that authority by using National Guard units south of the Mexican border, Attorney General Wickersham expressed the opinion that the Militia Clauses precluded such use outside the Nation's borders.<sup>FN13</sup> In response to that opinion and to the widening conflict in Europe, in 1916 Congress decided to “federalize” the National Guard.<sup>FN14</sup> In addition to providing for greater federal control and federal funding of the Guard, the statute required every guardsman to take a dual oath—to support the Nation as well as the States and to obey the President as well as the Governor—and authorized the President to draft

members of the Guard into federal service. The statute expressly provided that the Army of the United States should include not only “the Regular Army,” but also “the National \*344 Guard while in the service of the United States,”<sup>FN15</sup> and that when drafted into federal service by the President, members of the Guard so drafted should “from the date of their draft, stand discharged from the militia, and shall from said date be subject to” the rules and regulations governing the Regular Army. § 111, 39 Stat. 211.

FN13. “It is certain that it is only upon one or more of these three occasions—when it is necessary to suppress insurrections, repel invasions, or to execute the laws of the United States—that even Congress can call this militia into the service of the United States, or authorize it to be done.” 29 Op.Atty.Gen. 322, 323-324 (1912).

“The plain and certain meaning and effect of this constitutional provision is to confer upon Congress the power to call out the militia ‘to execute the laws of the Union’ within our own borders where, and where only, they exist, have any force, or can be executed by any one. This confers no power to send the militia into a foreign country to execute our laws which have no existence or force there and can not be there executed.” *Id.*, at 327.

Under Attorney General Wickersham's analysis, it would apparently be unconstitutional to call forth the militia for training duty outside the United States, even with the consent of the appropriate Governor. Of course, his opinion assumed that the militia units so called forth would retain their separate status in the state militia during their period of federal service.

FN14. See Wiener, 54 Harv.L.Rev., at 199-203.

FN15. The National Defense Act of June 3, 1916, 39 Stat. 166, provided in part: “That the Army of the United States shall

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consist of the Regular Army, the Volunteer Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now or may hereafter be authorized by law.”

During World War I, the President exercised the power to draft members of the National Guard into the Regular Army. That power, as well as the power to compel civilians to render military service, was upheld in the *Selective Draft Law Cases*, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918).<sup>FN16</sup> Specifically, in those cases, and in **\*2425***Cox v. Wood*, 247 U.S. 3, 38 S.Ct. 421, 62 L.Ed. 947 (1918), the Court held that the plenary power to raise armies was “not qualified or restricted by the provisions of the militia clause.”<sup>FN17</sup>

FN16. “The possession of authority to enact the statute must be found in the clauses of the Constitution giving Congress power ‘to declare war; ... to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; ... to make rules for the government and regulation of the land and naval forces.’ Article I, § 8. And of course the powers conferred by these provisions like all other powers given carry with them as provided by the Constitution the authority ‘to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.’ Article I, § 8.” 245 U.S., at 377, 38 S.Ct., at 161.

FN17. “This result is apparent since on the face of the opinion delivered in those cases the constitutional power of Congress to compel the military service which the assailed law commanded was based on the following propositions: (a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution to

declare war and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause, and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause. And (c) that from these principles it also follows that the power to call for military duty under the authority to declare war and raise armies and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate, and for the purpose of the war power, wholly incidental, if not irrelevant and subordinate, provision concerning the militia, found in the Constitution. Our duty to affirm is therefore made clear.” 247 U.S., at 6, 38 S.Ct., at 422.

**\*345** The draft of the individual members of the National Guard into the Army during World War I virtually destroyed the Guard as an effective organization. The draft terminated the members' status as militiamen, and the statute did not provide for a restoration of their prewar status as members of the Guard when they were mustered out of the Army. This problem was ultimately remedied by the 1933 amendments to the 1916 Act. Those amendments created the “two overlapping but distinct organizations” described by the District Court—the National Guard of the various States and the National Guard of the United States.

Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States. In the latter capacity they became a part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they retained their status as members of a separate State Guard unit. Under the 1933 Act, they could be ordered into active service whenever Congress declared a national emergency and authorized the use of troops in excess of those in the Regular Army. The statute plainly described the effect of such an order:

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“All persons so ordered into the active military service of the United States shall from the date of such order stand relieved from duty in the National Guard of their respective States, Territories, and the District of Columbia so long as they shall remain in the active military service of the United States, and during such time shall be subject \*346 to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Army whose permanent retention in active military service is not contemplated by law. The organization of said units existing at the date of the order into active Federal service shall be maintained intact insofar as practicable.” § 18, 48 Stat. 160-161.

“Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status.” *Id.*, at 161.

Thus, under the “dual enlistment” provisions of the statute that have been in effect since 1933, a member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the State Guard for the entire period of federal service.

Until 1952 the statutory authority to order National Guard units to active duty was limited to periods of national emergency. In that year, Congress broadly authorized orders to “active duty or active duty for training” without any emergency requirement, but provided that such orders could not be issued without gubernatorial consent. The National Guard units have under this plan become a sizable portion of the Nation's military forces; for example, “the Army National \*\*2426 Guard provides 46 percent of the combat units and 28 percent of the support forces of the Total Army.”<sup>FN18</sup> Apparently gubernatorial consents to training missions were routinely obtained until 1985, when the Governor of California refused to consent to a training mission for 450 members of the California National Guard in Honduras, and the Governor of Maine shortly thereafter refused to consent to a similar mission. Those incidents led to the enactment of the Montgomery Amendment and this litigation ensued.

FN18. App. 12 (testimony of James H. Webb, Assistant Secretary of Defense for Reserve Affairs, before a subcommittee of the Senate Armed Services Committee on July 15, 1986).

### \*347 II

The Governor's attack on the Montgomery Amendment relies in part on the traditional understanding that “the Militia” can only be called forth for three limited purposes that do not encompass either foreign service or nonemergency conditions, and in part on the express language in the second Militia Clause reserving to the States “the Authority of training the Militia.” The Governor does not, however, challenge the authority of Congress to create a dual enlistment program.<sup>FN19</sup> Nor does the Governor claim that membership in a State Guard unit-or any type of state militia-creates any sort of constitutional immunity from being drafted into the Federal Armed Forces. Indeed, it would be ironic to claim such immunity when every member of the Minnesota National Guard has voluntarily enlisted, or accepted a commission as an officer, in the National Guard of the United States and thereby become a member of the Reserve Corps of the Army.

FN19. “The dual enlistment system requires state National Guard members to simultaneously enroll in the National Guard of the United States (NGUS), a reserve component of the national armed forces. 10 U.S.C. §§ 101(11) and (13), 591(a), 3261, 8261; 32 U.S.C. §§ 101(5) and (7). It is an essential aspect of traditional military policy of the United States. 32 U.S.C. § 102. The State of Minnesota fully supports dual enlistment and has not challenged the concept in any respect.” Reply Brief for Petitioners 9 (footnote omitted).

[2] The unchallenged validity of the dual enlistment system means that the members of the National Guard of Minnesota who are ordered into federal

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service with the National Guard of the United States lose their status as members of the state militia during their period of active duty. If that duty is a training mission, the training is performed by the Army in which the trainee is serving, not by the militia from which the member has been temporarily disassociated. "Each member of the Army National Guard of the United States or the Air National Guard of the United States who is ordered to active duty is relieved from duty in the National Guard of his State or Territory, or of Puerto Rico or the District of Columbia, as \*348 the case may be, from the effective date of his order to active duty until he is relieved from that duty." 32 U.S.C. § 325(a).

This change in status is unremarkable in light of the traditional understanding of the militia as a part-time, nonprofessional fighting force. In *Dunne v. People*, 94 Ill. 120 (1879), the Illinois Supreme Court expressed its understanding of the term "militia" as follows:

"Lexicographers and others define militia, and so the common understanding is, to be 'a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace.' That is the case as to the active militia of this State. The men comprising it come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it." *Id.*, at 138.

Notwithstanding the brief periods of federal service, the members of the State Guard unit \*\*2427 continue to satisfy this description of a militia. In a sense, all of them now must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time. When the state militia hat is being worn, the "drilling and other exercises" referred to by the Illinois Supreme Court are performed pursuant to "the Authority of training the Militia according to the discipline prescribed by Congress," but when that hat is replaced by the federal hat, the second Militia Clause is no longer applicable.

This conclusion is unaffected by the fact that prior to 1952 Guard members were traditionally not ordered into active service in peacetime or for duty abroad. That tradition is at least partially the product of political debate and political \*349 compromise, but even if the tradition were compelled by the text of the Constitution, its constitutional aspect is related only to service by State Guard personnel who retain their state affiliation during their periods of service. There now exists a wholly different situation, in which the state affiliation is suspended in favor of an entirely federal affiliation during the period of active duty.

[3] This view of the constitutional issue was presupposed by our decision in the *Selective Draft Law Cases*, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918). Although the Governor is correct in pointing out that those cases were decided in the context of an actual war, the reasoning in our opinion was not so limited. After expressly noting that the 1916 Act had incorporated members of the National Guard into the National Army, the Court held that the Militia Clauses do not constrain the powers of Congress "to provide for the common Defence," to "raise and support Armies," to "make Rules for the Government and Regulation of the land and naval Forces," or to enact such laws as "shall be necessary and proper" for executing those powers. *Id.*, at 375, 377, 381-384, 38 S.Ct., at 160, 161, 162-163. The Court instead held that, far from being a limitation on those powers, the Militia Clauses are—as the constitutional text plainly indicates—additional grants of power to Congress.

The first empowers Congress to call forth the militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions." We may assume that Attorney General Wickersham was entirely correct in reasoning that when a National Guard unit retains its status as a state militia, Congress could not "impress" the entire unit for any other purpose. Congress did, however, authorize the President to call forth the entire membership of the Guard into federal service during World War I, even though the soldiers who fought in France were not engaged in any of the three specified purposes. Membership in the Militia did not exempt \*350 them from a valid order to perform federal service,

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whether that service took the form of combat duty or training for such duty.<sup>FN20</sup> The congressional power to call forth the militia may in appropriate cases supplement its broader power to raise armies and provide for the common defense and general welfare, but it does not limit those powers.<sup>FN21</sup>

FN20. See *Selective Draft Law Cases*, 245 U.S. 366, 382-389, 38 S.Ct. 162-165, 163-165, 62 L.Ed. 349 (1918); *Cox v. Wood*, 247 U.S. 3, 6, 38 S.Ct. 421, 422, 62 L.Ed. 947 (1918).

FN21. Congress has by distinct statutes provided for activating the National Guard of the United States and for calling forth the militia, including the National Guards of the various States. See 10 U.S.C. §§ 672-675 (authorizing executive officials to order reserve forces, including the National Guard of the United States and the Air National Guard of the United States, to active duty); 10 U.S.C. §§ 331-333 (authorizing executive officials to call forth the militia of the States); 10 U.S.C. § 3500, 8500 (authorizing executive officials to call forth the National Guards of the various States). When the National Guard units of the States are called forth, the orders “shall be issued through the governors of the States.” § 3500.

The second Militia Clause enhances federal power in three additional ways. First, it authorizes Congress to provide for “organizing, arming and disciplining the Militia.” It is by congressional choice that the available pool of citizens has been formed into organized\*\*2428 units. Over the years, Congress has exercised this power in various ways, but its current choice of a dual enlistment system is just as permissible as the 1792 choice to have the members of the militia arm themselves. Second, the Clause authorizes Congress to provide for governing such part of the militia as may be employed in the service of the United States. Surely this authority encompasses continued training while on active duty. Finally, although the appointment of officers “and the Authority of

training the Militia” is reserved to the States respectively, that limitation is, in turn, limited by the words “according to the discipline prescribed by Congress.” If the discipline required for effective service in the Armed Forces of a global power requires training in distant lands, or distant skies, Congress has the authority to provide it. The subordinate \*351 authority to perform the actual training prior to active duty in the federal service does not include the right to edit the discipline that Congress may prescribe for Guard members after they are ordered into federal service.

[4] The Governor argues that this interpretation of the Militia Clauses has the practical effect of nullifying an important state power that is expressly reserved in the Constitution. We disagree. It merely recognizes the supremacy of federal power in the area of military affairs.<sup>FN22</sup> The Federal Government provides virtually all of the funding, the materiel, and the leadership for the State Guard units. The Minnesota unit, which includes about 13,000 members, is affected only slightly when a few dozen, or at most a few hundred, soldiers are ordered into active service for brief periods of time.<sup>FN23</sup> Neither the State's basic training responsibility, nor its ability to rely on its own Guard in state emergency situations, is significantly affected. Indeed, if the federal training mission were to interfere with the State Guard's capacity to respond to local emergencies, the Montgomery Amendment would permit the Governor to veto the proposed mission.<sup>FN24</sup> \*\*2429 Moreover,\*352 Congress has provided by statute that in addition to its National Guard, a State may provide and maintain at its own expense a defense force that is exempt from being drafted into the Armed Forces of the United States. See 32 U.S.C. § 109(c). As long as that provision remains in effect, there is no basis for an argument that the federal statutory scheme deprives Minnesota of any constitutional entitlement to a separate militia of its own.<sup>FN25</sup>

FN22. This supremacy is evidenced by several constitutional provisions, especially the prohibition in Art. I, § 10, of the Constitution, which states:  
 “No State shall, without the Consent of

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Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”

FN23. According to the Governor, at most “only several hundred” of Minnesota's National Guard members “will be in federal training at any one time.” Brief for Petitioners 41.

FN24. The Montgomery Amendment deprives the Governors of the power to veto participation in a National Guard of the United States training mission on the basis of any objection to “the location, purpose, type, or schedule of such active duty.” 10 U.S.C. § 672(f). Governors may withhold their consent on other grounds. The Governor and the United States agree that if the federalization of the Guard would interfere with the State Guard's ability to address a local emergency, that circumstance would be a valid basis for a gubernatorial veto. Brief for Petitioners 41; Brief for Respondents 9. The Governor contends that the residual veto power is of little use. He predicates this argument, however, on a claim that the federal training program has so minimal an impact upon the State Guard that the veto is never necessary:

“Minnesota has approximately 13,000 members of the National Guard. At most, only several hundred will be in federal training at any one time. To suggest that a governor will ever be able to withhold consent under the Montgomery Amendment assumes (1) local emergencies can be adequately predicted in advance, and (2) a governor can persuade federal authorities that National Guard members designated for training are needed for state purposes when the overwhelming majority of the National Guard remains at home.”

Brief for Petitioners 41.

Under the interpretation of the Montgomery Amendment advanced by the federal parties, it seems that a governor might also properly withhold consent to an active duty order if the order were so intrusive that it deprived the State of the power to train its forces effectively for local service:

“Under the current statutory scheme, the States are assured of the use of their National Guard units for any legitimate state purpose. They are simply forbidden to use their control over the state National Guard to thwart federal use of the NGUS for national security and foreign policy objectives with which they disagree.” Brief for Respondents 13.

FN25. The Governor contends that the state defense forces are irrelevant to this case because they are not subject to being called forth by the National Government and therefore cannot be militia within the meaning of the Constitution. We are not, however, satisfied that this argument is persuasive. First, the immunity of those forces from impressment into the national service appears—if indeed they have any such immunity—to be the consequence of a purely statutory choice, and it is not obvious why that choice should alter the constitutional status of the forces allowed the States. Second, although we do not believe it necessary to resolve the issue, the Governor's construction of the relevant statute is subject to question. It is true that the state defense forces “may not be called, ordered, or drafted into the armed forces.” 32 U.S.C. § 109(c). It is nonetheless possible that they are subject to call under 10 U.S.C. §§ 331-333, which distinguish the “militia” from the “armed forces,” and which appear to subject all portions of the “militia”—organized or not—to call if needed for the purposes specified in the Militia Clauses. See n. 21, *supra*.

\*353 [5] In light of the Constitution's more general

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plan for providing for the common defense, the powers allowed to the States by existing statutes are significant. As has already been mentioned, several constitutional provisions commit matters of foreign policy and military affairs to the exclusive control of the National Government.<sup>FN26</sup> This Court in *Tarble's Case*, 80 U.S. (13 Wall.) 397, 20 L.Ed. 597 (1872), had occasion to observe that the constitutional allocation of powers in this realm gave rise to a presumption that federal control over the Armed Forces was exclusive.<sup>FN27</sup> Were it not for the Militia Clauses, it might be \*354 possible to argue on like grounds that the constitutional allocation of powers precluded the formation of organized state militia.<sup>FN28</sup> The Militia Clauses, however, subordinate any such structural inferences\*\*2430 to an express permission while also subjecting state militia to express federal limitations.<sup>FN29</sup>

FN26. See, e.g., Art. I, § 8, cl. 11 (Congress' power to declare war); Art. I, § 10, cl. 1 (States forbidden to enter into treaties); Art. I, § 10, cl. 3 (States forbidden to keep troops in time of peace, enter into agreements with foreign powers, or engage in war absent imminent invasion); Art. II, § 3 (President shall receive ambassadors).

FN27. In the course of holding that a Wisconsin court had no jurisdiction to issue a writ of habeas corpus to inquire into the validity of a soldier's enlistment in the United States Army, we observed:

“Now, among the powers assigned to the National government, is the power ‘to raise and support armies,’ and the power ‘to provide for the government and regulation of the land and naval forces.’

The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which

he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.” 13 Wall., at 408.

FN28. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318, 57 S.Ct. 216, 220, 81 L.Ed. 255 (1936) (“The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality”); *The Federalist* No. 23, p. 143 (E. Earle ed. 1938) (“[I]t must be admitted ... that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy—that is, in any matter essential to the *formation, direction, or support* of the NATIONAL FORCES”); L. Henkin, *Foreign Affairs and the Constitution* 234-244 (1972) (discussing implied constitutional restrictions upon state policies related to foreign affairs); Comment, *The Legality of Nuclear Free Zones*, 55 U.Chi.L.Rev. 965, 991-997 (1988) (discussing implied constitutional restrictions upon state policies related to foreign affairs or the military).

FN29. The powers allowed by statute to the States make it unnecessary for us to examine that portion of the *Selective Draft Law Cases*, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918), in which we stated:

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“[The Constitution left] under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared.”  
*Id.*, at 383, 38 S.Ct., at 163.

[6] We thus conclude that the Montgomery Amendment is not inconsistent with the Militia Clauses. In so doing, we of course do not pass upon the relative virtues of the various political choices that have frequently altered the relationship between the Federal Government and the States in the field of military affairs. This case does not raise any question concerning the wisdom of the gubernatorial veto established \*355 in 1952 or of its partial repeal in 1986. We merely hold that because the former was not constitutionally compelled, the Montgomery Amendment is constitutionally valid.

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

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- 1990 WL 505676 (Appellate Brief) REPLY BRIEF OF PETITIONERS (Mar. 15, 1990)
- 1990 WL 505675 (Appellate Brief) BRIEF FOR THE RESPONDENTS (Mar. 06, 1990)
- 1990 WL 10012995 (Appellate Brief) Brief of Amici Curiae States of Iowa, Maine, Massachusetts, Montana Ohio and Vermont in Support of Petitioners (Feb. 08, 1990)

- 1990 WL 505674 (Appellate Brief) BRIEF OF PETITIONERS (Feb. 08, 1990)
- 1989 WL 1127211 (Appellate Brief) Brief of Petitioners (Oct. 01, 1989)
- 1989 WL 1127213 (Appellate Brief) Brief for the Respondents (Oct. 01, 1989)
- 1989 WL 1127215 (Appellate Brief) Brief of Amici Curiae Washington Legal Foundation, Senators Steven D. Symms and Jesse Helms, and Congressmen Robert K. Dornan, Herbert H. Bateman, C. Christopher Cox, Philip M. Crane, William E. Dannemeyer, Tom DeLay, Bill Frenzel, Elton Gallegly, John Paul Hammerschmidt, Duncan Hunter, Henry J. Hyde, Robert J. Lagomarsino, Norman F. Lent, Bob Livingston, Bill McCollum, Howard C. Nielson, Michael G. Oxley, Ron Packard, H. James Saxton, Norman D. Shumway, Denny Smith and Bob Stump In Support of R (Oct. 01, 1989)
- 1989 WL 1127216 (Appellate Brief) Brief for the National Guard Association of the United States, Nineteen Governors in Their Capacities as Commanders in Chief of Their State National Guard, and the States of Alabama, Alaska, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, Wisconsin, and Wyoming, as Amici Curiae Supporting Respondents (Oct. 01, 1989)

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