N.D.A.G. Letter to Collins (Nov. 8, 1990)

November 8, 1990

Mr. Sparb Collins
Executive Director
Public Employees Retirement System
400 East Broadway, Suite 505
P.O. Box 1214
Bismarck, ND 58502

Dear Mr. Collins:

Thank you for your May 21, 1990, letter in which you request my opinion as to state and federal law with respect to credit for time spent in the military service under the Public Employees Retirement System (PERS). Specifically, you inquire whether the Public Employees Retirement System (hereafter PERS) is required to give credit to members for military service or allow for the purchase of credit under state and federal law.

In North Dakota laws protecting the civil rights of public employees who enter the armed forces are to be liberally construed in favor of the employees. Snell v. Mapleton Public School Dist. No. 7, 222 N.W.2d at 853, 856; Quam v. City of Fargo, 43 N.W.2d 292, 295 (N.D. 1950). This mirrors the view taken by the United States Supreme Court that reemployment right statutes are "to be liberally construed for the benefit of those who . . . serve their county." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946). Accord, Coffy v. Republic Steel Corp., 447 U.S. 191, 196 (1980); Alabama Power Co. v. Davis, 431 U.S. 581, 584 (1977).

Both state and federal law include provisions which require PERS to grant credit for time spent in military service. Certain provisions of North Dakota law conflict with the Veteran's Reemployment Rights Act, 38 U.S.C. §§ 2021-2026 (1988) (hereafter VRRA). To that extent North Dakota law is preempted and VRRA provisions control. Von Allmen v. State of Conn. Teachers Retirement Bd., 613 F.2d 356 at 360 (2d Cir. 1979); Daily v. Public School Retirement Sys. of Missouri, 707 F.Supp. 1087. 1089 (E.D. Mo. 1989).

VRRA provides, in essence, that any person who is inducted (enlists or is ordered or called to active duty) into the armed forces of the United States and who leaves an employment position with a state or political subdivision (other than a temporary position) and who makes application for reemployment within 90 days of honorable discharge, is entitled "if still qualified to perform the duties of such position, [to] be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status and pay." 38 U.S.C. § 2021(a)(B)(i) (1988). The person is also "entitled to participate in insurance or other benefits offered by the employer pursuant to established rules. 38 U.S.C. § 2021(b)(1) (1988). VRRA grants similar rights and benefits to members of the reserve component of the armed forces and the national guard. In 1974

VRRA was extended to employees of states and political subdivisions and in 1977 judicially applied to retirement benefits. Alabama Power Co. v. Davis, 431 U.S. 581 (1977). The Supreme Court held that a retirement benefit is a "perquisite of seniority" secured to a veteran under the statute (1) if it is not subject to a significant contingency and would have accrued, with reasonable certainty, had the veteran been continuously employed by the employer, and (2) if it is in the nature of a reward for length of service rather than short-term compensation for service rendered. 431 U.S. at 589.

The first criterion of the Alabama Power test requires a determination by PERS in view of the contingencies which can occur under the retirement system. The Court in Alabama Power found that the employee's work history showed that if he had not entered the military the employee almost certainly would have accumulated accredited service. Unpredictable occurrences or possibilities do not defeat the veteran's rights. Id. at 591-92.

With respect to the second criterion of the Alabama Power test, retirement benefits under PERS most likely would be found to be in the nature of a reward for length of service.

The Court's characterization of pension plans is comparable to the legislature's description of PERS. N.D.C.C. § 54-52-02 (PERS to "improve and reward state employment"); § 54-52-17 (five year period of vesting, benefits calculated based upon length of service).

Under VRRA a veteran restored to an employment position is "entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on . . . leave of absence in effect . . . at the time the person [entered the armed forces]." 38 U.S.C. § 2021(b)(1) (1988). (Emphasis added.) Although the Court has not construed the "other benefits" provision, it has held that the language was intended to add to the protections afforded a veteran's seniority rights, not to lessen them. Accardi v. Pennsylvania R. Co., 383 U.S. 225 (1966). See Alabama Power, 431 U.S. at 588 n.10.

Thus, upon reemployment a veteran is entitled to the same status as "if [the veteran] had continued in such employment continuously from the time of . . . entering the Armed Forces until the time of The veteran's] . . . reemployment." 38 U.S.C. § 2021(b) (1988). This is the escalator principle first enunciated in Fishgold, later incorporated in amendments to 38 U.S.C. § 2021(b) as "the sense of Congress", and reiterated in Alabama Power.

Because VRRA was only made applicable to state and political subdivision employees in 1974, a question arises as to whether VRRA applies retroactively to veterans discharged before December 3, 1974. Most courts that have addressed the issue have applied VRRA retroactively. Bunnell v. New England Teamsters & Trucking Ind. Pension Fund, 655 F.2d 451 (1st Cir. 1981) (pension fund was primarily liable to pay retroactive pension benefits for an employee's military service); Von Allmen v. State of Connecticut Teachers Ret. Bd., 613 F.2d 356, 357 (2d Cir. 1979) (1974 amendments applying VRRA to states should be applied retroactively to grant state employed veterans the right to purchase credit for

military service); Witter v. Pennsylvania Nat. Guard, 462 F.Supp. 299 (D.C. 1979) (argument that VRRA should not be applied retroactively to state employee and Vietnam veteran who sought reemployment before amendments to VRRA was rejected); Hirschner v. Branniff Airways, Inc., 404 F.Supp. 869 (E.D.N.Y. 1975) (legislative history does not require prospective application only). But see, Jennings v. Illinois Office of Ed., 83 C.C.H.L.C. ¶ 10,408 (1978) (VRRA not retroactively applied); aff'd on other grounds, 589 F.2d 935 (6th Cir. 1979).

Any argument that VRRA applies only with respect to veterans discharged after December 3, 1974, when the act was made applicable to the states is dispelled by N.D.C.C. § 54-52-17.4(1) which provides a "member is entitled to purchase additional credit [for active employment in the armed services] . . . for the following service [after July 1, 1966] or prior service [before July 1, 1966]."

In my opinion the provision in N.D.C.C. § 54-52-17.4 limiting the time within which a PERS member may purchase credit for service in the armed forces to "180 days of beginning eligible employment or by December 31, 1989, whichever is later" is superseded by VRRA. Beckley v. Lipe-Rollaway Corp., 448 F.Supp. 563 (D.C. N.Y. 1978) (veteran claiming pension benefits under 38 U.S.C. § 2021 is not bound by time limitations in pension plan prescribing period within which objection to pension status is required). A claim for pension benefits under VRRA accrues upon the veteran's retirement date when that participant seeks to require the time spent in the military be credited to compute pension benefits. Gall v. United States Steel Corp., 598 F.Supp. 769, 773 (W.D. Pa. 1984); Troiani v. Bethlehem Steel Corp., 570 F. Supp. 1140, 1143 (E.D. Pa. 1983); Letson v. Liberty Mut. Ins. Co., 523, F.Supp. 1221, 1225 (N.D. Ga. 1981). Furthermore, 38 U.S.C. § 2022 provides that "[n]o State statute of limitations shall apply to any proceeding under [VRRA]." Consequently, a veteran's request to repurchase credit need not be made within the 180 days prescribed by N.D.C.C. § 54-52-17.2.

It is also my opinion that the four year limit on credit for service in the armed forces provides for in N.D.C.C. § 54-52-17.4(1)(a) conflicts with VRRA. Under VRRA a veteran is entitled to reemployment rights and other benefits for four years of service from June 24, 1948, to August 1, 1961, and for up to five years after August 1, 1961, plus any time greater than four years served at the request of the federal government or imposed pursuant to law. 38 U.S.C. § 2024(a) and (b) (1988). These federal provisions are controlling.

Although time spent in the military counts in determining PERS benefits, N.D.C.C. § 54-52-17(4)(a), it is not a factor in determining the final average salary. N.D.C.C. § 54-52-17(2). VRRA requires that a veteran receive credit for benefits that accrue by virtue of the passage of time, but VRRA "does not grant veterans the right to compensation for work they have not performed . . . ." Alabama Power, 431 U.S. at 592. Projection of a salary for the time spent in the service to compute an average would amount to giving a veteran credit for compensation for work not performed and is otherwise in the nature of short-term compensation.

A more troublesome issue is how the veteran's pension benefit should be funded. Few cases addressing VRRA consider the funding source directly. That may be because contributions to pension funds are often made by deductions from salary. Thus, the cost of benefits to the veteran would be the same cost whether deducted from salary or paid out of pocket when purchasing military service credit.

There are implicit rulings that veterans are entitled to purchase pension credit for military service. Quam, 43 N.W.2d at 2, Von Allmen, 613 F2d at 8. Moreover, a purchase requirement for a veteran for military service credit is not prohibited if the requirement also applies to non-veteran employees. 38 U.S.C. § 2021(b)(1) (1988).

Although not directly deciding an issue regarding funding of the cost of pension benefits, the Alabama Power Court concluded that "pension plans like the one established by [Alabama Power] suggest that the true nature of the pension payment is a reward for length of service." Alabama Power, 431 U.S. at 593. Alabama Power suggests that where the plan is wholly funded by the employer, the veteran is entitled to pension benefits at the employer's expense. Alabama Power, 431 U.S. at 593 n.18 (discussion of the difference between defined contribution plans (profit sharing plans) and defined benefit plans where "the employer's contribution is adjusted to whatever level is necessary to provide those benefits.") Alabama Power specifically reserved decision on whether profit sharing plans would be treated differently than defined benefit plans. Id.

In contrast, the employer was not required to make profit sharing contributions on behalf of veterans in Raypole v. Chemi-Trol Chemical Co., Inc., 754 F.2d 169 (6th Cir. 1985) although the veterans were credited with seniority based on time in the service, restored to a level of pay based on seniority and credited with service time for purposes of determining the vesting percentage. The Raypole court found the nature of the profit sharing plan was in fact short-term compensation and that veterans' rights to contributions were not certain but subject to a significant contingency.

The Raypole court distinguished the profit sharing plan from the defined benefit plan which was fully funded by the employer in Alabama Power. In Raypole individual accounts were maintained for each employee whereas in Alabama Power a single fund was maintained for all its employees. Id. at 173. Alabama Power was required to make contributions at a fixed amount in good times and bad, Id. at 173, whereas contributions to the Raypole profit sharing plan in Raypole were discretionary and thus subject to a significant contingency. Id. at 176.

The Raypole court held that VRRA only required that the veterans be credited with years of service for purposes of determining vesting. Id. at 174. Viewed as a whole the "true nature" of the plan in Raypole was short-term compensation for work performed. Id. at 175.

In North Dakota before June 30, 1983, an employee made a contribution of four percent of salary and the state contributed 5.12 percent of the employee's salary to PERS. N.D.C.C. §§ 54-52-05, 54-52-06 (1981). In 1983, the state was given and exercised the

option of paying the four percent employee contributions. N.D.C.C. § 54-52-03(3); (1983 Sess. Laws ch. 573, §§ 2 and 4). Payment by the state of the employee contribution was in lieu of a salary increase. PERS North Dakota Public Employees Retirement System, Group Retirement Plan Effective July 1, 1989, at 7; A Message from Governor Allen I. Olson, General Overview of the State Budget for the 1983-85 Biennium, at 8-9. The state has continued to make the employee contributions to PERS since 1983.

To purchase military service credit N.D.C.C. § 54-52-17.4(2) requires that a veteran PERS member pay 9.12 percent of the member's monthly salary (total of the employee's and the employer's contribution) on the date of the member's election to purchase times the number of months of credit being purchased.

Because the employee's contribution was originally assumed by the state in lieu of a salary increase such contribution is in the nature of short-term compensation. This is underscored by the fact that the employee's contribution to PERS vests in the employee immediately. Upon withdrawal from the system the employee contributions, even though paid by the state, may at the employee's election, be returned to the employee with interest. Message from Governor Allen I. Olson at 8-9; N.D.C.C. § 54-52-17(7). Thus, to the extent retirement benefits paid by the state are attributable to the employee contribution portion, they are not a perquisite of seniority under the second criterion of the Alabama Power test. Veterans therefore may be required to purchase credit for military service with respect to the employee contributions to PERS paid by the employee and employer since 1983. (The state paid 2% beginning July 1, 1983, and a total of 4% beginning July 1, 1984. Memo from Robert B. Melland, to All State Agencies (May 19, 1983)). Thus a veteran may be required to pay the amount of the employee contributions paid to PERS with interest under N.D.C.C. § 54-52-17.4(2).

Where the employer, such as a political subdivision, is not paying the employee contributions, a veteran may be required to purchase credit by paying the amount of the employee contributions with interest. Veterans may also be required to pay the amount of the contribution that an employee would have paid with interest to purchase credit for service before 1983 under N.D.C.C. § 54-52-17.4(2).

The same conclusion cannot be reached with respect to the employer's portion of the contribution. The employer contributions to PERS "must be considered a retirement contribution and not an additional compensation." N.D.C.C. § 54-52-07. The employer's contribution is not payable to a PERS member upon withdrawal from the system. The benefits payable after vesting have no correlation to the amount of the employer's contribution as is the case with respect to the total of the employee's contributions paid upon withdrawal from PERS. N.D.C.C. § 54-52-17(5), (7).

Employer contributions are unlike the employee's contributions paid by an employer in lieu of a salary increase (short-term compensation) and more like the expense incurred by Alabama Power to fund its non-contributory defined benefit plan. Because the employer's contribution does not vest immediately and directly in the PERS member and is "considered a retirement contribution" rather than "additional compensation" it is my

opinion that a veteran may not be required to pay that portion of the purchase price for military service credit attributable to the employer's contribution or 5.12% of the salary under N.D.C.C. § 54-52-17.4(2).

Thus it is my opinion that the cost of benefits to veterans with respect to the employer contributions must either be assumed and paid by the employer or be absorbed by PERS.

To alleviate any adverse actuarial impact on PERS in the future it is suggested that the statutes regarding purchase of credit for military service be amended to comport with 38 U.S.C. §§ 2021-2026. My office will be pleased to assist PERS in drafting legislation to bring state law into compliance with federal laws concerning the purchase of credit for military service and to address the problem of funding. Please contact Rosellen Sand of my office if you require assistance.

Sincerely,

Nicholas J. Spaeth

vkk