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ND PERS

July 12, 2002

Mr. Sparb Collins
Executive Director
North Dakota Public Employees
Retirement Systems
PO Box 1657
Bismarck, ND 58502-1657

Dear Mr. Collins:

Enclosed is the Attorney General's opinion you requested from this office.

Sincerely,

Wayne Stenehjem
Attorney General

vkk
Enclosure

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FORMAL OPINION
2002-F-08

Date Issued: July 12, 2002

Requested by: Mr. Sparb Collins, Executive Director, NDPERS

QUESTIONS PRESENTED

I.

Whether the current statutory provisions governing the Public Employees Retirement System (PERS) comply with the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)?

II.

Whether a member returning from active duty may make a lump sum contribution to their Internal Revenue Code section 457 deferred compensation account and retroactively vest in the employer contribution under North Dakota Century Code (N.D.C.C.) § 54-52-11.1.

ATTORNEY GENERAL'S OPINIONS

I.

It is my opinion that the lack of a requirement in N.D.C.C. § 54-52-17.4(5) that an employer, in certain circumstances, submit the employer's contribution to the retirement plan upon the reemployment of a member who had been on military leave does not comply with USERRA. It is my further opinion that the provisions in N.D.C.C. § 54-52-17.4(5) relating to a member's salary to be used in computing the contribution amount and the requirement that the member submit "interest at a rate determined by the board" also conflict with USERRA.

II.

It is my opinion that if a returning member makes a lump sum contribution to their deferred compensation account to make up any amounts missed as a result of the

member's military service, the member would retroactively vest in the employer contribution pursuant to N.D.C.C. § 54-52-11.1

ANALYSES

I.

The USERRA, codified at 38 U.S.C. §§ 4301-4333, gives individuals who serve their country in the armed forces certain rights upon their return to civilian employment. For example, if an individual meets certain requirements, on return to civilian employment the individual is entitled to the same job, or a similar job, as the employee left. 38 U.S.C. § 4312. In interpreting the applicable provisions relating to protecting the rights of members of the armed services, years of precedent require liberal construction of these statutes in favor of the employee. See, e.g., Quam v. City of Fargo, 43 N.W.2d 292, 295 (N.D. 1950); Alabama Power Company v. Davis, 431 U.S. 581, 584 (1977). Further, the USERRA provisions specifically preempt any state law that is less beneficial to the returning member than is provided in USERRA. 38 U.S.C. § 4302(b).

USERRA was intended to "restructure, clarify, and improve chapter 43 of title 38, United States Code, commonly referred to as the Veterans' Reemployment Rights Act [VRRA]." S. Rep. No. 103-158, at 29 (1993). Although the VRRA did not specifically address pensions, several courts had interpreted the VRRA to apply to pension benefits, including the United States Supreme Court in Alabama Power Co. v. Davis, 431 U.S. 561 (1977). Id. at 56. In enacting USERRA, Congress intended to codify some of those decisions, including that of Alabama Power, and make them applicable to both defined benefit and defined contribution plans.[1] Id. at 57. The pension provisions in USERRA are found at 38 U.S.C. § 4318.

In 1990, this office issued an opinion to PERS specifically dealing with employee and employer contributions to the defined benefit retirement plan under the VRRA. Letter from Attorney General Nicholas Spaeth to Sparb Collins (Nov. 8. 1990). That opinion analyzed the applicable statutory and case law and concluded that the employee was responsible to pay the employee contribution to the retirement plan, regardless of whether the employer had picked up the employee contribution, but that the employee was not responsible to pay the employer contribution.

The 1990 opinion discussed the decision in Raypole v. Chemi-Trol Chemical Co., Inc., 754 F.2d 169 (6th Cir. 1985), which Congress specifically declined to follow in enacting

[1] Thus, although the defined contribution retirement plan in N.D.C.C. chapter 54-52.6 does not contain any provisions for members returning from military service, PERS and the affected employers are nonetheless required to comply with USERRA.

USERRA, S. Rep. No. 103-158, at 57 (1993). However, the 1990 opinion did not appear to base its conclusions on Raypole. Letter from Attorney General Nicholas Spaeth to Sparb Collins (Nov. 8. 1990). Further, the remaining analysis was not affected by USERRA, nor has there been any statutory or case law affecting the analysis. As such, the 1990 opinion's conclusions regarding a returning employee's responsibility for employee and employer contributions are still valid.

One statement within the 1990 opinion that USERRA did affect, however, is the proposition that "the employer contributions must either be assumed and paid by the employer or be absorbed by PERS." Presumably as a result of that statement, N.D.C.C. § 54-52-17.4(5) does not require an employer contribution to be made to the pension plan for a returning member. However, 38 U.S.C. § 4318(b)(1) states that an

> employer reemploying a person under this chapter shall . . . be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service.

The only caveat to this requirement is when the employee does not make a contribution that is required for the benefit to accrue. 38 U.S.C. § 4318(b)(2). In that event, the employee is not entitled to the benefit. Since there would be no benefit to fund, the employer would not be required to make its contribution to the retirement plan. However, that does not remedy the blanket non-requirement of an employer contribution found in N.D.C.C. § 54-52-17.4(5); the provision merely clarifies when an employer contribution is not required. Since N.D.C.C. § 54-52-17.4 does not require an employer contribution to the retirement plan under any circumstances, it is my opinion N.D.C.C. § 54-52-17.4(5) does not comply with 38 U.S.C. § 4318(b)(1).

Subsection 54-52-17.4(5), N.D.C.C., requires an employee to submit to the retirement plan not only the employee's contribution, but also "interest at a rate determined by the board." However, 38 U.S.C. § 4318(b)(2) states that no employee "payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer." Since the employee contribution would not have included interest had it been made while the employee was on military leave, it is my opinion that provision of N.D.C.C. § 54-52-17.4(5) does not comply with 38 U.S.C. § 4318(b)(2).

Finally, N.D.C.C. § 54-52-17.4(5) uses the "member's most recent monthly salary" to determine the appropriate retirement plan contribution amount, and the "member's present monthly salary" to determine the contribution amount required for the retiree health benefits fund. Again, those provisions are contrary to USERRA. Subdivision

4318(b)(3), 38 U.S.C., requires an employer to use either "the rate the employee would have received but for the period of service" or, "in the case that the determination of such rate is not reasonably certain, . . . the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period)." Accordingly, it is my opinion the requirements in N.D.C.C. § 54-52-17.4(5) that only allow the use of the member's "most recent monthly salary" or "present monthly salary" are in direct conflict with USERRA.

As mentioned above, USERRA specifically preempts state law that does not provide protections as beneficial as those granted by USERRA. 38 U.S.C. § 4302(b). The above North Dakota Century Code provisions do not provide protections up to the level required by USERRA. As such, they are preempted. The PERS Board should use the savings clause provided in N.D.C.C. § 54-52-23 to "adopt appropriate terminology with respect to [those provisions] as will comply with" USERRA. Further, PERS should bring these issues before the next legislative assembly to correct the conflicts with USERRA.

II.

Under the provisions of the PERS defined benefit plan, a member's "account balance," or that amount the member could take if the member left covered employment and withdrew from the plan, includes both the contributions made on behalf of the employee to the defined benefit plan and "vested employer contributions under section 54-52-11.1." N.D.C.C. § 54-52-01(1). "[V]ested employer contributions" under section 54-52-11.1 equal the amount a member contributes "to the deferred compensation plan for public employees under chapter 54-52.2, or member contributions to other participating employer supplemental Internal Revenue Code section 457 or 403(b) retirement programs" up to a specified maximum amount. N.D.C.C. § 54-52-11.1.

Thus, to the extent a member contributes to a participating deferred compensation plan, N.D.C.C. § 54-52-11.1 entitles a member to have a certain amount of the employer's contribution to the defined benefit plan included in the member's account balance. There is no other way for an employee to gain access to the employer contribution other than through the provisions of N.D.C.C. § 54-52-11.1.

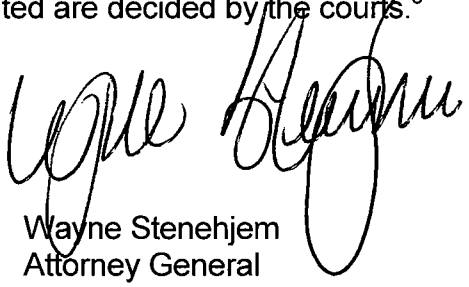
The act itself does not address supplemental retirement programs like the state's Internal Revenue Code section 457 deferred compensation program. However, Title 26 of the United States Code does provide certain requirements for these programs. Specifically, 26 U.S.C. § 414(u) contains "[s]pecial rules relating to veterans' reemployment rights under USERRA" for employee contributions to individual accounts or defined benefit plans. Employers are required to allow returning employees to make up any elective deferrals the employees would have been allowed to make had they remained continuously employed. 26 U.S.C. § 414(u)(2)(A)(i). Further, employers are required to make "a matching contribution with respect to any additional elective deferral

made pursuant to clause (i) which would have been required had such deferral actually been made during the period of such qualified military service." 26 U.S.C. § 414(u)(2)(A)(ii).

Based on the above provisions, it is my opinion that if a returning member makes a lump sum contribution[2] to a deferred compensation account to make up any amounts missed as a result of the member's military service, the member would retroactively vest in the employer contribution pursuant to N.D.C.C. § 54-52-11.1. As you mention in your request letter, the member's retroactive vesting would, by necessity, depend on the employee and employer contributions to the defined benefit plan actually being made; without the employer contributions, there is nothing in which the employee may vest.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.[3]



Wayne Stenehjem
Attorney General

Assisted by: Scott A. Miller
Assistant Attorney General

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[2] Note that the member is not required to make a lump sum contribution, but may instead make payments over a time period equal to three times the duration of the member's active duty or five years, whichever is shorter. 26 U.S.C. § 414(u)(2)(A)(i). If the member made periodic contributions instead of a lump sum contribution, the member would still retroactively vest in the employer contribution pursuant to N.D.C.C. § 54-52-11.1.

[3] See State ex rel. Johnson v. Baker, 21 N.W.2d 355, 364 (1946).