October 11, 2001

Mr. Sparb Collins
Executive Director
North Dakota Public Employees
Retirement System
400 East Broadway, Suite 505
P.O. Box 1657
Bismarck, ND 58502-1214

RE: USERRA Requirements for Group Insurance Plan

Dear Mr. Collins:

Thank you for your request that I review the USERRA requirements for the Group Insurance Plan and, in light of that review, whether a state employer may pay for insurance coverage for its employees that are called up for active duty.

38 U.S.C. § 4316(b)(1) states that an employee that is called for active duty is to be "deemed to be on furlough or leave of absence while performing such service" and shall be "entitled to such other rights and benefits not determined by seniority as are generally provided by the employer . . . to employees having similar seniority, status, and pay who are on furlough or leave of absence." 38 U.S.C. § 4316(b)(4) further states that an employee called for active duty "may be required to pay the employee cost, if any, of any funded benefit continued . . . to the extent other employees on furlough or leave of absence are so required." These provisions do not apply to health insurance, but do apply to the other group insurance programs. See 38 U.S.C. § 4316(b)(5).

Thus, USERRA requires the state to pay for group insurance benefits, other than health insurance, only to the extent the state would pay for those benefits for an employee on a leave of absence. In contrast, N.D.C.C. § 37-01-25 requires the state to consider the first thirty days of military service to be paid leave, and therefore the state would be required under state statute to pay for benefits to the same extent it would if the employee were on paid leave. However, I can find no other provision in state law either requiring or allowing the state to pay for those benefits for an employee on a leave of absence longer than thirty days. As such, the state's payment of those costs would most likely violate the anti-gift clause of Article X, section 18 of the North Dakota Constitution.

38 U.S.C. § 4317 provides the guidelines for health insurance for called-up employees, and requires the employer to allow the employee to remain in the health insurance plan for a maximum of eighteen months. The employer may require the employee to pay "not more than 102 percent of the full premium under the plan" for this coverage. 38 U.S.C. § 4317(a)(2). If the employee is absent for less than thirty-one days, the employee "may not be required to pay more than the employee share, if any, for such coverage." Id. This is consistent with N.D.C.C. § 37-01-25.

Thus, the state is not required to pay for the employee's coverage if the employee is absent for more than thirty days. Again, since there is no state or federal requirement for the state to do so, the state's payment of those costs would most likely violate the anti-gift clause of Article X, section 18 of the North Dakota Constitution.

Please do not hesitate to call if you have any further questions or concerns.

Sincerely,

Scott A. Miller
Assistant Attorney General