

Official Opinion No. 80-66, Veteran's Reemployment Rights to Retirement and Vacation

October 27, 1980

Mr. Glenn Green, Director  
Veterans Division  
Department of Military and Veterans' Affairs  
State Capitol  
Pierre, South Dakota 57501

Official Opinion No. 80-66

**Veteran's Reemployment Rights to Retirement and Vacation**

Dear Mr. Green:

You have requested an official opinion from this office in regard to the following factual situation:

**FACTS:**

Mr. X was employed by a department of the State of South Dakota and was a full-time employee. In 1973 he applied for, and received, an assignment with the Army in what is known as a Full Time Training Duty (FTTD) Tour. This tour was for a period of two years to commence in December of 1973 and terminate in November 1975. He gave notice to his employer, under the provisions of Chapter 3.2204 of the State of South Dakota Bureau of Personnel Career Service Personnel Manual Chapter 3-6-19, requesting a leave of absence with the right of reemployment. The Bureau of Personnel granted approval for leave of absence commencing in December 1973 and ending in November 1975 for Mr. X. In July of 1975, the Army extended Mr. X's active duty training (ADT) tour, which was to end in November 1975, for a period of two years. He was at that time scheduled to return from active duty in November 1977. The records indicate that on June 13, 1977, the Army extended Mr. X's tour until June of 1978 and he was officially released from active duty on July 2, 1979, according to his report of separation, which indicated character of service as honorable. On his return on September 11, 1978, Mr. X applied to the Bureau of Personnel for employment. He was not reappointed to that position but eight months later he was reemployed by another agency of the State of South Dakota.

Based on the above facts you have asked the following questions:

QUESTIONS:

1. What are Mr. X's rights with respect to the State Retirement System and coverage for the period of time he was on active duty?
2. What are Mr. X's rights with respect to accrual and accumulations of vacation leave under SDCL 3-6-6?

It should be noted at the time of the entry of this individual into the Army in 1973 that the only reemployment right and statute applicable to an employee of state government was SDCL 3-6-19. The reason for this was that Congress, in enacting the Military Selective Service Act of 1967, 50 U.S.C. 459, Section 9 provided with respect to persons in the employ of the state or any political subdivision, merely that it be declared the 'sense' of Congress that such person should be restored to his position, if qualified to perform the duties. Although it was the sense of Congress that that person should be provided like seniority status and pay or the nearest approximation thereof consistent with the circumstances in his case, there was no enforceable requirement, other than state law, that the state or any political subdivision take such action and the whole matter was left up to individual states. In 1974, however, P.L. 93-508 amended the Universal Military Training and Service Act and stated affirmatively (§ 9(b)(B)),

If such position was in the employ of a state, or political subdivision thereof or a private employer such person shall if still qualified to perform the duties of such position be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay.

This then made it mandatory with respect to employees of state and local governments, and the coverage previously extended to the private sector was broadened to include governmental agencies. This change was in effect at the time of the return of the individual in question in 1979, and for reasons which will be discussed in this opinion controlled the actions which the state could take with respect to persons returning after 1974.

IN RE QUESTION NO. 1:

The new act, Vietnam Era Veterans' Adjustment Assistance Act of 1974, 38 U.S.C. 2021(b)(1), requires that a person who leaves a permanent job to enter the military and who satisfactorily completes military service and applies for reemployment within 90 days of being discharged from the military must be \_reinstated to the former job 'without loss of seniority.' The Act also says that any person restored to a position 'shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces and shall not be discharged from such position without cause within one year after such restoration.' 50 U.S.C.A. 459(c)(1) (38 U.S.C. 2021(b)(1)). The Supreme Court interpreted this to mean that the individual does not step back on the seniority escalator at the point he stepped off. Stating in Fishgold v. Sullivan Drydock & Repair Corporation, 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946):

. . . he steps back on at the precise point he would have occupied had he kept his position continuously during the war.

They concluded:

. . . Congress incorporated this principle into the present statute by providing that any person reinstated under the act should be given 'such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously' during the period of military service.

The Supreme Court also noted that, '. . . this legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.' Fishgold v. Sullivan, supra. The Court also, in the cases cited by it, and particularly as announced in Alabama Power Company v. Davis, 431 U.S. 581, 52 L.Ed.2d 595 (1977), stated:

. . . Thus our cases have identified two axes of analysis for determining whether a benefit is a right of seniority secured to a veteran by § 9. If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a 'perquisite of seniority.' If, on the other hand, the veteran's right to the benefit at the time he entered the military was

subject to a significant contingency, or if the benefit is in the nature of short-term compensation for services rendered, it is not an aspect of seniority within the coverage of Section 9. . . .

Although the South Dakota Retirement System, SDCL 3-12 is dissimilar to the system in Alabama Power, supra, in that there the employer contributed the full amount of the fund, the principle announced in that case is applicable here as stated by the Court:

We conclude, therefore, that pension payments are predominantly rewards for continuous employment with the same employer. Protecting veterans from the loss of such rewards when the break in their employment resulted from their response to the country's military needs is the purpose of Section 9. That purpose is fulfilled in this case by requiring (Alabama Power) to pay (Davis) the pension to which he would have been entitled by virtue of his lengthy service if he had not been called to the colors.

The South Dakota Act is similar in one respect in that SDCL 3-12-86 recognizes service credit for military leave of absence and authorizes the granting of credited service for leave of absence due to military services without contribution by the employee or employer if the member returns within one year from the date of his discharge. This extended credit should not apply to any voluntary extension of military service at the instance of the member beyond the initial period of enlistment, induction or call to active duty. Having thus recognized the principle of granting nonfunded credit for persons on active duty, the limitation of that benefit to the initial period may not stand in view of the Veterans' Adjustment Assistance Act. That Act, made mandatory for political subdivisions, fixes its own limitations for the benefits which it directs so far as a time frame of service is concerned. 38 U.S.C. 2024(a) provides that benefits shall be applicable if the total of such service does not exceed five years and if the service in excess of four years is at the request and for the convenience of the federal government.

The only question from the facts you have presented is whether or not the extension of the active duty tour from June of 1978 until July of 1979 was for the convenience of the federal government. This is a factual question and if it is determined that it was, then the veteran is, in my opinion, entitled to be granted the extended service credit for this leave of absence and for the whole period thereof without any requirement to pay into the system. As it is noted in 38 U.S.C.A. 2021(c) the ' . . . rights granted . . . to persons who left the employ of a state or political subdivision thereof and were inducted into the armed forces shall not

diminish any rights such persons may have pursuant to any statute or ordinance of such state or political subdivision establishing greater or additional rights or protection.' SDCL 3-12-86 in that it grants a greater benefit is available to the veteran and may not be diminished by the term of years specified in such section when the same is contrary to 38 U.S.C.A. 2021.

IN RE QUESTION NO. 2:

The United States Supreme Court in the case of Foster v. Dravo Corporation, 420 U.S. 92, 43 L.Ed.2d 44, 95 S.Ct. 879 (1975) determined that the Act, 50 U.S.C. App. Section 459, insures that the:

. . . right to be restored to his job with the same levels of seniority, status, and pay that he would have enjoyed if he had held his job during military service, should be applied with respect to employee vacation benefits only where it clearly appears that vacations were intended to accrue automatically as a function of continued association with the company.

This is contrasted in some cases with the necessity for a work requirement, that is, where the right to receive longer vacations with pay depends on having had certain minimum amounts of working time or earnings in each of certain numbers of previous years. The Supreme Court held that, 'generally the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation.' The wording of the statute in South Dakota is critical to a determination of this question. This is contained in SDCL 3-6-6 and reads as follows:

Each state employee shall earn fifteen working days vacation time per full year of employment. Any employee with more than fifteen years employment shall receive twenty working days vacation with pay for each year of employment. Such leave shall be accrued on an hourly, bi-weekly or monthly basis as determined by the commissioner of personnel. Vacation hours earned shall not be used until the employee has served the initial six-month period, and are cumulative only to the extent of that which may be earned in a period of time not exceeding two years of regular and continuous state employment. No advanced leave of absence for vacation with pay may be granted at any time.

It can be seen from this section that there is no work requirement as such. Rather, the accrual is based upon fifteen working days per year of employment and twenty working days vacation per year with pay for any employee with more than fifteen years

employment. The vacations thus are intended to accrue automatically as a function of continued association with 'the company.' The Supreme Court has had occasion to confirm these determinations in the more recent case of Coffy v. Republic Steel Corporation decided June 10, 1980, No. 79-81.

I conclude therefore that the South Dakota statute comes within that category announced in Foster and that the serviceman must be treated as if he had kept his job continuously throughout the period of his military service. However, since he is, by statute, in a condition as having been on furlough or leave of absence during his period of training in service, and since it was in fact status without pay, it is my opinion that ARSD 55:01:22:06 would prevail so far as the nonaccrual of leave during the time of such military service since all persons similarly situated, i.e., in a leave without pay status, are similarly treated. He would not therefore accrue leave, but the time spent in military service would count toward the fifteen year period required for an enhancement of leave.

Respectfully submitted,

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Attorney General