

1980 WL 120982 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

November 25, 1980

\*1 Purvis W. Collins

Director

South Carolina Retirement System

Sol Blatt Building

Second Floor

Columbia, South Carolina 29201

Dear Mr. Collins:

You have requested an opinion as to the constitutionality of [S.C. Code § 9-1-1140 \(1976\)](#). For the following reasons, it is the opinion of this Office that this statute would most likely be declared unconstitutional.

The issue here is whether or not the last sentence of [S.C. Code § 9-1-1140 \(1976\)](#), '[p]rovided, further, that active military duty performed subsequent to July 1, 1974, shall not be considered creditable service.' is unconstitutional according to the objectives of the federal Veterans Reemployment Rights Act codified in [38 U.S.C.A. § 2021 et seq.](#), (1958).

The Veterans' Reemployment Rights Act, 39 U.S.C.A. § 2021(a)(B)(i), guarantees that right of a person who has served in the Armed Forces to return to such an employment 'position of like seniority, status and pay.' [38 U.S.C.A. § 2021\(b\)\(2\) \(1958\)](#) provides that such person 'should be so restored or reemployed in such manner as to give [him] . . . such status in . . . employment as the person would have enjoyed if such person had continued in . . . employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration . . . or reemployment.' [38 U.S.C.A. § 2021\(b\)\(3\)](#) provides that such person '[should] not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component . . .'. Further, '[a]ny member of a Reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than three consecutive months shall, upon application for reemployment . . . be entitled to all reemployment right and benefits . . .' [38 U.S.C.A. § 2024\(c\) \(1958\)](#).

The purpose of this federal statute governing employment rights of returning veterans is to protect veterans returning to civilian jobs from being disadvantaged for having served in the Armed Forces. In effect, the statute requires that a veteran receive those benefits which would have been his had he been continuously employed in such job or position. [Camancho v. Public Service Commission of Commonwealth Puerto Rico](#), 450 F.Supp. 231 (D.P.R. 1978). The general consensus appears to be that veterans' benefits statutes are to be given a broad, liberal construction. 77 Am.Jur.2d VETERANS § 96 (1975); 6 C.J.S. ARMED SERVICES § 268 (1975). In [Fishgold v. Sullivan Drydock and Repair Corp.](#), 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946) the Supreme Court said that the predecessor of [38 U.S.C.A. § 2021 et seq.](#), entitled the Selective Training and Service Act of 1940, should be liberally construed in order to carry out the broad congressional intent.

The last sentence of [S.C. Code § 9-1-1140 \(1976\)](#) precluding creditable service after July 1, 1974, appears to be in direct conflict with the general principle of liberal construction of veterans' benefits statutes. In [Peel v. Florida Department of Transportation](#), 443 F.Supp. 451 (D.Fla. 1977) the court said that a state is free to establish additional rights or protections for state employees than those provided by the corresponding federal statute, but that it is not free to impose limitations on state employees' reemployment rights. In enacting the Federal Veterans Reemployment Rights Act Congress was simply extending its plenary power under [U.S. Constitution Article 1, § 8, cl. 12, 16](#) 'to make war and to raise armies.' This supreme, exclusive power delegated to Congress has traditionally been jealously protected from abridgement by the states. [Peel v. Florida Dept. of](#)

Transportation, 443 Supp. at 457; see also Camacho v. Public Service Commission, 450 F.Supp. 234 (1978). The last sentence of S.C. Code § 9-1-1140, precluding creditable service after July 1, 1974, appears to be inconsistent with the federal statute which contains no such peacetime exception. Thus if this provision were enforced, it would impair federal superintendence of the field. Therefore, by the Supremacy Clause, Article VI, § 2 of the U.S. Constitution, the Veterans Reemployment Rights Act provided for under 38 U.S.C.A. § 2021 et seq., Preempts S.C. Code § 9-1-1140.

\*2 In Alabama Power Company v. Davis, 431 U.S. 581, 52 L.Ed.2d 595, 97 S.Ct. 2002 (1977) the U.S. Supreme Court established two axes of analysis for determining whether a benefit is a right of seniority secured to a veteran by 38 U.S.C.A. § 2021 et seq. The Court said that the first tenet was whether the benefit would have accrued with reasonable certainty, had the veteran been continuously employed by the employer. Further, if the benefit was also in the nature of a reward for length of service as compared to short-term compensation, then it was an aspect of seniority within 38 U.S.C.A. § 2021 et seq., (1958). The Court in Alabama Power Company v. Davis, in its two-tenet analysis as to whether crediting under a pension plan was a seniority benefit within the meaning of 38 U.S.C.A. § 2021 et seq., makes no distinction between periods of peacetime and wartime service.

Thus the federal statute by its terms and as construed by the courts makes no distinction between wartime and peacetime service. Title 38 U.S.C.A. § 101(2) (1958) defines the word 'veteran' as meaning a person who served in the active military, naval, or air service, and who was discharged and released therefrom under conditions other than dishonorable.' This definition does not differentiate between wartime and peacetime service. To the contrary the terms of this federal statute appear broad enough to cover ordered service during peacetime as well as wartime.

In conclusion the legislative intent behind 38 U.S.C.A. § 2021 et seq., is to expedite and encourage service by public employees in the U.S. Armed Forces. The purpose of this chapter is to insure that a person who performs his duty of military service is not required to forfeit civilian seniority, status, and pay benefits following his period of active duty. The general principle is that during the period of the veteran's leave, without regard to peacetime or wartime service his occupancy of his employment position is merely suspended until he separates from military duty. Thus it is the opinion of this Office that if S.C. Code § 9-1-1140 (1976) were challenged in court, whether by a declaratory judgment action or otherwise, it would most likely be declared unconstitutional.

Sincerely yours,

Kenneth P. Woodington  
Assistant Attorney General

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