1983 WL 181997 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
September 9, 1983

***1** Kenneth E. Allen
Chairman

Sally J. Scott
Commissioner

Elliott D. Thompson
Commissioner
Alcoholic Beverage Control Commission
Edgar Brown Office Building
1205 Pendleton Street
Columbia, South Carolina 29201

Dear Mr. Chairman, Commissioner Scott and Commissioner Thompson:
You have asked whether as a matter of Federal law any employee of the ABC Commission who is a member of a reserve component of the armed services is entitled to a leave of absence to enter into a period of active duty with that branch of the armed services. You have further inquired as a matter of Federal law what, if any, reemployment rights would the employee have with the Commission at the conclusion of his tour of active duty should he desire to return to the Commission's employ?

Section 2021, Veterans Reemployment Rights Act (hereafter 'VRRA'), codified as 38 U.S.C. § 2021 et seq., provides in pertinent part.
(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year-

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(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall-
(i) if still qualified to perform the duties of such position, 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; or

(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of such employer or the employer's successor in interest, be offered employment and, if such person so requests, be employed by such employer or the employer's successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case. unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Nothing in this chapter shall excuse noncompliance with

any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter.

***2** (b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed 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 or reemployment.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

(3) Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall 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 of the Armed Forces.

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Section 2024 of Title 38 of the United States Code provides, in pertinent part:
(b)(1) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enters upon active duty (other than for the purpose of determining physical fitness and other than for training), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon such person's relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided for by this chapter in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such active duty performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which such person was unable to obtain orders relieving such person from active duty).

(2) Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under subsection (b)(1) of this section extended by such member's period of such active duty, but not to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve component. With respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended, the provisions of this subsection shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

***3** I am advised by the Atlanta Regional Office of the United States Department of Labor, Office of Veterans' Reemployment Rights, the federal agency designated to administer the Act (see 38 U.S.C. § 2025), that 38 U.S.C. § 2024(b)(1) and (2)

are construed to apply to any period of active duty for which an employee volunteers, regardless of whether the active duty obligation is a necessary consequence of the employee's initial entry into the military or is, instead, simply additional active duty —beyond any prescribed minimum—for which the employee volunteers. This interpretation is consistent with the Supreme Court's frequent observation that the VRRA is to be liberally construed in favor of the veteran, see, e.g., Coffy v. Republic Steel Corp., 447 U.S. 191, 196, 100 S.Ct. 2100, 65 L.Ed.2d 53 (1980), and is also consistent with the case law interpreting a related provision of the VRRA. Peel v. Florida Department of Transportation, 443 F.Supp. 451 (N.D.Fla. 1977), aff'd. 600 F.2d 1070 (5th Cir. 1979) (construing 38 U.S.C. § 2024(d) relating to leaves of absence to perform active duty for training). Under this interpretation of 38 U.S.C. § 2024(b)(1) and (2), your employee would be entitled to reemployment with the Commission, assuming he otherwise satisfies the criteria prescribed by 38 U.S.C. § 2021(a), provided that the total period of active duty actually served by him while in the employ of the State does not exceed four years plus any additional period in which he is either unable to obtain orders releasing him from active duty or during which he is extended on active duty pursuant to the request of and for the convenience of the Federal Government. See Smith v. Missouri Pacific Transportation Co., 208 F.Supp. 767, 770 (E.D.Ark. 1961), aff'd. 313 F.2d 676 (8th Cir. 1963), where the court, construing the statutory predecessor to § 2024(b), which was identical in all material respects to the present § 2024(b), wrote:

Those sections plainly mean that persons affected thereby are, in general, entitled to the reemployment benefits of the Act if they are released from military service within four years of their entry into such service; and they are still entitled to such benefits if they serve beyond four years and such additional time is involuntary. To put the matter another way, the serviceman is entitled to reemployment benefits during his first four years of service or duty, regardless of whether such service or duty is voluntary or involuntary; however, if he voluntarily remains in the service for more than four years, he is not entitled to reemployment benefits.

In order to determine the maximum duration of any leave of absence or furlough to which your employee may be entitled under the VRRA, it is necessary that you first determine whether the employee has served any time on active duty, other than for training purposes or for determining physical fitness, since being employed by the State of South Carolina. If he has not served any active duty, other than for training purposes or for determining physical fitness, while in the employ of the State, the employee would be entitled to a leave of absence or furlough not to exceed four years plus any applicable extensions as provided in subsections (b)(1) and (b)(2) of 38 U.S.C. § 2024. Conversely, if the employee has already served an extended period of active duty, other than for training purposes or for determining physical fitness, while in the employ of the State, any such period of active duty would have to be deducted from the four year service limitation prescribed by 38 U.S.C. § 2024(b)(1) and (2), to compute the maximum duration of any leave of absence to which he is entitled. Of course, if the employee has previously exhausted his entitlement under 38 U.S.C. § 2024(b)(1) and (2) while in the employ of the State of South Carolina, he would not be eligible for a leave of absence with reemployment rights of any duration under the VRRA. [1]

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***4** From the discussion of 38 U.S.C. §§ 2021 and 2024(b)(1) and (2) above, it is apparent that, an other than temporary employee who applies for reinstatement within ninety days from his release from active duty is entitled to reinstatement provided: (1) he has not surpassed the time limitations prescribed by 38 U.S.C. § 2024(b); (2) he was released from active duty under honorable conditions; (3) he is qualified to perform the duties of his former position; and (4) the employers' circumstances have not so changed as to make it unreasonable or impossible to reinstate or rehire him. Little discussion is required concerning conditions (1) and (2). One who voluntarily remains on active duty past the limit allowed by 38 U.S.C. § 2024(b)(1) and (2) need not be rehired at all, regardless of whether he applies for reinstatement within ninety days of his release from active duty. Smith v. Missouri Pacific Transportation Co., supra. Furthermore, an employer is clearly not required to reinstate an employee who was separated from the military service under other than honorable conditions. Browning v. General Motors Corporation, Fisher Body Division, 387 F.Supp. 985, 986-987 (S.D. Ohio 1974); 38 U.S.C. § 2024(b)(1). As to the third condition, a returning veteran enjoys the benefit of a presumption of law that, upon his release from active duty, he remains qualified for the position he held prior to his entry into active duty. McCoy v. Olin Matheson Chemical Corp., 360 F.Supp. 1336, 1339 (S.D.Ill. 1973); accord, Greathouse v. Babcock & Wilcox, 387 F.Supp. 156, 161 (N.D.Ohio 1974); see also Burke v. Boston Edison Co., 279

F.Supp. 853, 856 (D.Mass. 1968). An employer who refuses to reemploy one who has been released from active duty has the burden of proving the former employee's disqualification for employment. McCoy v. Olin Matheson Chemical Corp., supra. [2]

The fourth condition is, in reality, an exceptionally narrow exception to the employer's general obligation to reemploy or reinstate the returning veteran. As the District Court explained in Davis v. Halifax County School System, 508 F.Supp. 966 (E.D.N.C. 1981):

The statutory exception excusing a refusal to re-employ a veteran where reinstatement would be unreasonable is a very limited exception to be applied only where reinstatement would require creation of a useless job or where there has been a reduction in the work force that would reasonably have included the veteran. [citations omitted] It is not sufficient excuse that another person has been hired to fill the position vacated by the veteran nor that no opening exists at the time of re-application. [citations omitted]

Id., at 968 (emphasis added). Accord, Green v. Oktibbhea County Hospital, 526 F.Supp. 49, 55 (N.D.Miss. 1981) (that no vacancies exist; that another person has been hired, promoted or transferred into veteran's former job; and that employer is reluctant to demote veteran's successor do not qualify as a change of circumstances that would make reemployment of the veteran impossible or unreasonable).

***5** Since the 'changed circumstances' exception has been so narrowly construed, it is our opinion that, assuming that the employee timely applies for reinstatement and otherwise satisfies conditions (1)-(3) mentioned above, the Commission would be required to reemploy him in his former position or in a position of like seniority, status and pay, notwithstanding that no available position then exists. See Davis v. Halifax County School System, supra; Green v. Oktibbhea County Hospital, supra; Schaller v. Board of Education of Elmwood Local School District, 449 F.Supp. 30 (N.D. Ohio 1978); Witter v. Pennsylvania National Guard, 462 F.Supp. 299, 305 (E.D.Pa. 1978). Moreover, this obligation exists notwithstanding any state law or regulation to the contrary (including any limitation on the number of employees the Commission is authorized to employ), for the VRRA, enacted pursuant to Congress' War Powers, including its power to raise and support armies, [3] Peel v. Florida Department of Transportation, supra, 443 F.Supp. 451, 455-458, prevails over any inconsistent state law by virtue of the Supremacy Clause of the United States Constitution. [4] Id., 443 F.Supp. 459-460.

Furthermore, it should be noted that an employee who is entitled to reemployment or reinstatement under the VRRA must be treated, for seniority purposes, as if he had been continuously employed in the position which he held at the time of his departure for military service. 38 U.S.C. § 2021(b)(2); Coffy v. Republic Steel Corp., supra, 447 U.S. 196. In other words, the employee 'does not step back on the seniority escalator at the point he stepped off [to enter onto active duty] . . . [but instead] steps back on at the precise point he would have occupied had he kept his position continuously during [his period of active duty].' Fishgold v. Sullivan Drydock & Repair Co., 328 U.S. 275, 284-285, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946), quoted in Coffy, supra, 447 U.S. at 196 (emphasis added).

Conclusion

Depending upon how much, if any, of the active duty service limitation prescribed by 38 U.S.C. § 2024(b)(1) and (2), the employee has exhausted since being in the employ of the State of South Carolina, the employee may be entitled to a leave of absence or furlough of some duration by virtue of the federal VRRA. If the employee leaves the Commission's employ to enter onto active duty in the Army and, without having first exhausted the service limitation prescribed by 38 U.S.C. § 2024(b)(1) and (2), applies for reinstatement within ninety days of his release from active duty under honorable conditions, he is entitled to reinstatement to his former position or a position of like seniority, status and pay unless the Commission can prove that he is no longer qualified to perform the duties of his former position or unless the Commission can prove that circumstances have so changed as to make the employee's reemployment or reinstatement impossible or unreasonable. In this latter regard, however, the mere fact that the Commission has replaced the employee and has no positions available at like seniority, status, and pay available will be insufficient to defeat the employee's reemployment rights under the VRRA. [5]

Sincerely,

***6** Vance J. Bettis
Assistant Attorney General

Footnotes

1 It is important to note that the four year limitation prescribed by 38 U.S.C. § 2024(b)(1) and (2) applies only to active duty performed subsequent to employment of an employee by the employer (in this instance, the State of South Carolina), and does not include active duty performed prior to employment by the employee's current employer. Thus, any active duty that the employee might have performed prior to his employment by the State of South Carolina does not count toward the four year limitation prescribed by § 2024(b)(1) and (2). Hall v. Chicago and Eastern Illinois Railroad Co., 240 F.Supp. 797 (N.D.Ill. 1964).

2 In this regard, it has been held that the fact that a returning veteran will require a period of reorientation and readjustment to his former duties due to technological innovations that occurred during his absence in the military is an insufficient basis upon which to deny reemployment. Smith v. Missouri Pacific Transportation Co., supra, 208 F.Supp. 769.

3 U.S. Const., Art. I, § 8, d.12.

4 Id., Art. VI, § 2.

5 We express no opinion upon what rights, if any, an employee such as you have described might have under state law.

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