

1980 WL 121225 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 14, 1980

**\*1 Re: Vesteran's Reemployment Rights**

Jack S. Mullins  
Director  
Budget and Control Board  
Personnel Division  
1205 Pendleton Street  
Columbia, South Carolina 29211

Dear Dr. Mullins:

You have recently asked this Office for its opinion concerning the reemployment rights of veterans who offer to return to employment by a state agency following extended periods of military service. You specifically inquired about the continued vitality of an opinion of this Office dated February 8, 1973, in the face of an amendment to the Military Selective Service Act of 1967 (hereafter 'MSS Act') referred to in that opinion. It is the opinion of this Office that time spent in military duty should be credited as state service when determining an employee's entitlement to benefits which vest automatically because of continuous service, or when determining the size of a benefit which is based upon the length of continuous service. This opinion is based upon case law and the statutory amendments to the MSS Act, which are embodied in the Veteran's Reemployment Rights Act of 1974, [38 U.S.C. § 2021](#) (hereafter 'VRR Act').

The VRR Act preempts state law and Congress has clearly expressed its intention that the Act be uniformly applied by state and local governments. [Jennings v. Illinois Office of Education](#), 589 F.2d 935, 937-38 (7th Cir.) cert. denied, 441 U.S. 967 (1979), [Peel v. Florida Department of Transportation](#), 600 F.2d 1070, 1083 (5th Cir. 1979), and [Camacho v. Public Service Comm'n](#), 450 F. Supp. 231, 233 (D.P.R. 1978). The VRR Act provides reemployment rights to veterans who were employed by a state or political subdivision of a state in a position that was not a temporary position, prior to their military service. [38 U.S.C. § 2021\(a\)\(B\)](#). Upon timely application for reemployment a veteran is entitled to be restored either to his or her former position or to 'a position of like seniority, status, and pay . . . unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.' *Ibid.* Veterans who are covered by the Act are entitled to be reemployed 'without loss of seniority' and with the right

'to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on . . . leave (sic) of absence in effect with the employer at the time such person was inducted into such forces . . .' [38 U.S.C. § 2021\(b\)\(1\)](#).

A reemployed veteran is required to be restored in a manner that would give that 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. [38 U.S.C. § 2021\(b\)\(2\)](#).

Federal reemployment laws are not intended to place returning veterans in a better position than employees who were employed continuously. Rather the intent of the VRR Act and the statutes which preceded it, is to minimize the disruption in individual's lives by guaranteeing to veterans that the jobs which they left in order to serve in the armed forces would be available to them

upon their return to civilian life. [Foster v. Dravo Corp.](#), 420 U.S. 92, 93 (1975) and [Schaller v. Board of Education](#), 449 F.Supp. 30, 32 (N.D. Ohio 1978).

\*2 In general, seniority benefits are those which reward longevity and are not those which compensate employees for work actually performed. [Smith v. Industrial Employers & Distributors Ass'n](#), 546 F.2d 314 (9th Cir.), cert. denied, 431 U.S. 965 (1977) (cites as still authoritative pre-amendment cases including [Foster v. Dravo Corp.](#), cited above). In [Foster](#) the United States Supreme Court held that a veteran was not entitled under the MSS Act to vacation benefits because such benefits did not accrue automatically but were 'a reward for and respite from a lengthy period of labor.' 402 U.S. at 101. The Court said that the MSS Act would entitle veterans to receive vacation benefits if they accrued automatically as a function of continued employment. [Ibid.](#) In a footnote the Court noted that if the length of vacation increases with the length of continuous service 'employee's time in the service must be counted in determining the length of the vacation that is earned.' [Ibid.](#), fn 9. Other courts have held that returned employees were not automatically entitled to vacation and sick leave under the MSS Act because an employee became entitled to them by actual work. See e.g., [Aiello v. Detroit Free Press, Inc.](#), 570 F.2d 145, 148 (6th Cir. 1978) (vacation benefits) and [LiPani v. Bonack Corp.](#), 546 F.2d 487, 491 (2nd Cir. 1976) (vacation and sick leave benefits).

In conclusion, a veteran would not be entitled to annual or sick leave covering a period of extended military leave because these benefits do not arise automatically but are earned when an employee is in pay status at least one-half of a month. Section 3.08(B) and 3.09(F)(1), State Budget and Control Board, State Employee Personnel Rules Manual. When determining an employee's entitlement to benefits which are measured by years of continuous service, credit must be given to military service time. Thus military service time should be credited in determining, for example, bonus annual leave.

Sincerely yours,

Barbara J. Hamilton  
State Attorney

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