

1978 S.C. Op. Atty. Gen. 66 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-41, 1978 WL 22524

Office of the Attorney General

State of South Carolina

Opinion No. 78-41

March 7, 1978

***1 SUBJECT: Employee, Public; Leaves of Absence; Armed Forces**

(1) A permanent State employee who is a member of a Reserve Component of the United States Armed Forces may be entitled to the same job he previously held upon return from military leave or service, or to a position of 'like seniority, status and pay', as though the employee had not been absent, depending upon the type and duration of active duty for training or inactive duty training.

(2) [S.C. Code Ann § 8-7-90 \(1976\)](#) which provides leave with pay for military duty for a maximum of 15 working days applies only to those work days of leave needed for military duty to fulfil the minimum requirements imposed by Federal law for annual training, and would not apply to 'supplemental' military duty.

TO: Jack S. Mullins
Director
Personnel Division
Budget & Control Board

QUESTIONS:

1. When a State employee in a Reserve Component of the Armed Forces of the United States is ordered to active duty for training, what job position is the employee entitled to upon his or her return from such training?
2. Is [S.C. Code Ann. § 8-7-90 \(1976\)](#) applicable under these circumstances authorizing leaves of absence for members of Reserve Components?

STATUTES AND CASES:

[38 U.S.C.A. §§ 2021](#), et. seq. (1977 Cum.Supp.); [S.C. Code Ann. § 8-7-90 \(1976\)](#); 1975-76 Ops.Atty.Gen., No. 4479, p. 228.

DISCUSSION:

1. A State employee is a member of the United States Air Force Reserve. This employee was ordered to attend the Air Command and Staff College for military training for approximately ten (10) months. Must this employee be restored to the same job as the employee was assigned prior to service on active duty, or to a similar position of like status and pay?

The United States Congress has enacted a comprehensive law relating to veteran's and reservist's reemployment rights found in [38 U.S.C.A. §§ 2021](#), et.seq. (1977 Cum.Supp.). These laws are specifically applicable to persons holding positions 'in the employ of a state, or political subdivision thereof'. [38 U.S.C.A. § 2021](#). The restoration or reemployment rights of a reservist may be dependent upon several circumstances, including the amount of time previously served on active duty 'other than for the purpose of determining physical fitness and other than for training'. [38 U.S.C.A. § 2024](#).

These circumstances should be examined in each case where questions arise, and assistance in this regard can be obtained through the Office of Veteran's Reemployment Rights administered by the Secretary of Labor. [38 U.S.C.A. § 2025](#).

Generally speaking, a State employee who is a member of a Reserve Component who is ordered to an 'initial period of active duty for training of not less than three consecutive months' is entitled to be restored to the same position held before entering upon active duty or 'to a position of like seniority, status, and pay'. (Qualifications to this rule attach if the person has sustained a disability during the course of service and is no longer qualified to perform the same duties.) Reemployment is not required if 'the employer's circumstances have so changed as to make [employment] impossible or unreasonable.' In any case, the employee must make 'application for reemployment' within 31 days after (1) the employee's release from active duty for training after 'satisfactory' service, or (2) the employee's discharge from hospitalization incident to such active duty or training, or one year after the employee's release from training, which ever is earlier. [38 U.S.C.A. § 2024\(c\)](#). These provisions would be applicable to the case in question if the employee was serving an 'initial' period of active duty for training.

***2** Otherwise, although the language of the statute is not clear, it appears that a State employee who is a member of a Reserve Component who is required to perform active duty for training or inactive duty training for a period of time other than the 'initial' period of active duty for training, or for an initial period of active duty for training of less than three consecutive months, must be granted a leave of absence upon request by the employee. Upon release from this period of active duty for training or inactive duty training, the employee 'shall be permitted to return to such employee's position. . . as such employee would have had if such employee had not been absent for [training duty]'. [38 U.S.C.A. § 2024\(d\)](#). Again, separate disability provisions are included. In this case, the employee does not make 'application for reemployment' but must 'report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar date necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control.' [38 U.S.C.A. 2024\(d\)](#). If the employee fails to report to work in such fashion, the employee is subject to the 'conduct rules of the employer pertaining to explanations and discipline with respect to absences from scheduled work.' If the employee is hospitalized incident to training duty, the time period for reporting is extended up to one year after release from active duty for training or inactive duty training. These provisions would be applicable to the case in question, assuming that the employee was performing active duty for training or inactive duty training other than an 'initial' period of active duty, and would require that the employee be restored to the same position held, as though the employee had not been absent.

2. [S.C. Code Ann. § 8-7-90 \(1976\)](#) provides in part:

All . . . employees of this state or any political subdivision thereof, who are either enlisted or commissioned members of the South Carolina National Guard, the United States Naval Reserve, the Officers Reserve Corps, the Enlisted Reserve Corps, the Reserve Corps of the Marines, the Coast Guard Reserve and the United States Air Force Reserve shall be entitled to leave of absence from their respective duties without loss of pay, time or efficiency rating, for a period not exceeding 15 days in any one year during which they may be engaged in training or other such duties . . .

This Office has earlier stated that this law provides for military leave without loss of pay for 15 working days within one year. However, this earlier opinion also noted that the legislative history of this statute showed that it was intended to cover only 'minimum military obligations'. [Section 8-7-90](#) would not entitle a public employee to take the full 15 work days leave 'if it is to include training which is supplemental to this minimal requirement of the Federal law.' [See 1975-76 Ops.Atty.Gen., No. 4479, p. 338.](#)

***3** The Federal laws cited above found in 38 U.S.C.A. §§ 2121, et.seq. do not require that the employer grant any leave of absence with pay. Therefore, [§ 8-7-90](#) provides an additional benefit beyond those found under Federal law, and is not superseded or changed in any way by the Federal legislation. Therefore, under State law, a State employee who is a member of a reserve component of the armed forces who is required to serve active duty for training may receive leave

without loss of pay for only those number of work days required to fulfil the minimum requirements imposed by Federal law for annual training up to a maximum of 15 work days of military leave during each year. Any extra non-emergency days of military duty in excess of these minimum Federal requirements would constitute days of leave without pay. As noted in the 1976 opinion, earlier cited:

[I]f a public employee is called to duty for a 15 calendar day period, which starts on a Saturday and ends on a Saturday, he would only be entitled to 10 work days of military leave within that year no matter how many extra non-emergency days of military duty that he was called to serve.

If any or all of the ten month period for active duty for training here in question constituted 'extra' days of military service over and above the annual minimum requirements needed to maintain the employee's position in the Reserves, the leave with pay provisions of § 8-7-90 would not be applicable for such 'supplemental' military service.

CONCLUSION:

1. A permanent State employee who is a member of a Reserve Component of the United States Armed Forces may be entitled to the same job he previously held upon return from military leave or service, or to a position of 'like seniority, status and pay', as though the employee had not been absent, depending upon the type and duration of active duty for training or inactive duty training.

2. S.C. Code Ann. § 8-7-90 (1976) which provides leave with pay for military duty for a maximum of 15 working days applies only to those work days of leave needed for military duty to fulfil the minimum requirements imposed by Federal law for annual training, and would not apply to 'supplemental' military duty.

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Footnotes

Note

1. The language of the statute appears to contemplate that a reservist on active duty under these circumstances may be considered as separated from State government except for the purpose of continuing to participate in insurance and other benefits offered to any employee on leave of absence. 38 U.S.C.A. § 2021(b)(1). However, if the reservist makes application for reemployment pursuant to the law, then the person should be 'considered as having been on furlough or leave of absence' and should be 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' as through he had not been absent for military duty. 38 U.S.C.A. § 2021(b)(2).

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