

1973 WL 27675 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 23, 1973

\*1 Major General Robert L. McCrady  
The Adjutant General  
State of South Carolina  
1225 Bluff Road  
Columbia, South Carolina 29201

Dear Sir:

In your letter of January 23, 1973, you requested answers to the following questions concerning the South Carolina National Guard Pension Act:

- (1) Does the language of § 44-230 imply uninterrupted service?
- (2) Do persons receiving retired pay from any regular component of the armed forces, but who are required to waive the receipt of these payments for the days of duty served in the National Guard, qualify for the pension?
- (3) Is it involuntary retirement when a person is asked to leave the Guard because he is holding up the promotion or reassignment of a more qualified person?
- (4) Is it involuntary separation when a person is forced to leave the Guard for purely personal reasons?

As you know, this office has previously issued an answer to question number four.

In answer to question number one, subsection (a) of § 44-230 provides that the service in the National Guard meet the same requirements specified for entitlement to retired pay for nonregular service under chapter 67, Title 10 of the United States Code. Chapter 67 only requires 'creditable' service, not 'continuous and uninterrupted' service. Further, considering the language of chapter 67, Title 10 above, it can be concluded that the phrase '... the final or last ten years of service immediately prior to retirement ...,' likewise would not prescribe uninterrupted service. Author, it is only required that the last ten years, whether uninterrupted or not, be in the South Carolina National Guard. For example, suppose a Guardsman were to serve in the South Carolina National Guard for five years then transfers to a unit in Georgia. After serving five years with the Georgia unit he transfers back to a South Carolina unit. He serves in this unit for four years and then leaves the Guard. After a year he hears of the new Pension Act and he re-joins in hopes of qualifying. If he serves for six more years he would qualify for the pension. Although he left the South Carolina National Guard for a total of six years, he still has served twenty years in the National Guard, fifteen of those with a South Carolina unit, and the last ten years, though interrupted for one year, in the South Carolina National Guard.

Now suppose that an individual serves in the South Carolina National Guard for fifteen years, and then he transfers to a unit in Georgia where he serves for five years. He then retires from the Guard, returns to South Carolina, and applies for the pension. He would not qualify. Although he has served for twenty years with fifteen in a South Carolina unit, he did not serve his last ten years with the South Carolina unit. In order to qualify he would have to serve an additional ten years. Note that an additional five years would not suffice.

As to question number two, the intention of the legislature in inserting the bar against a Guardsman who is receiving retirement pay from a regular component of the armed forces, is clearly to prevent persons from receiving double retirement benefits for duty in the armed services. The fact that an individual receiving benefits from a regular component must waive those benefits for the days served in the National Guard does not per se entitle him to a pension under the Act. Rather, the Act contemplates a choosing by that individual of which benefits he wishes to receive. If, when he retires from the National Guard, he wishes to continue to receive benefits from the regular components he cannot qualify for the pension. If, on the other hand, he prefers to receive the benefits under the State pension plan he would have to terminate receipt of the benefits from the regular components.

\*2 As to your third question, I think you will agree that this situation was covered in the answer to question number four. Accordingly, it can be concluded that the situation where a person is asked to leave the Guard because he is holding up the promotion of a more qualified person would be an involuntary separation for the purposes of the South Carolina National Guard Pension Act.

If this office can be of further assistance in this matter, please do not hesitate to call upon us.

Yours very truly,

Randall T. Ball  
Assistant Attorney General

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