

Attorney General's Opinion

Attorney General, Richard Blumenthal

August 31, 2000

The Honorable John J. Armstrong
Commissioner
Department of Correction
24 Wolcott Hill Road
Wethersfield, CT 06109

The Honorable Barbara Waters
Commissioner
Department of Administrative Services
State Office Building, Room 402
Hartford, CT 06106

Dear Commissioners:

This opinion responds to Commissioner Armstrong's request for advice regarding the Department of Correction's leave policy for employees who participate in the military reserves or National Guard. Because his question concerns the implementation of a General Notice issued by the Department of Administrative Services, we address this advice to both of you.

Commissioner Armstrong has explained that, in accordance with the Department of Administrative Services' General Notice No. 88-6, issued March 24, 1988, the Department of Correction (DOC) currently grants paid military leave to its employees for "required field training";¹ For other military activities, such as weekend drills, correctional employees do not receive paid military leave, even if they are scheduled to work on the weekends that the drills are held. Instead, employees who are absent from work due to weekend drills have the option of charging the missed time to accrued vacation or personal leave, or they may elect to have their absence classified as unpaid leave.

You note in your request that several of your employees have contacted the Labor Department regarding DOC's practice. They believe that the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) entitles them to be compensated for weekend drills, because to do otherwise would adversely impact their eligibility for longevity payments and retirement.

We conclude that DOC's present policy and practice regarding military leave should be revised to allow reservists three weeks of paid leave annually to participate in either annual training or weekend drills. Additionally, the policy must ensure that employees accrue longevity and retirement credit during any periods of unpaid leave they take to perform military duty.

Section 5-248(c) of the Connecticut General Statutes grants reservists a limited amount of paid leave annually for the performance of their routine military obligations. That statute provides:

Any full-time permanent employee in the state service who is a member of the armed forces of the state or of any reserve component of the armed forces of the United States and is required to undergo field training therein shall, for the period not exceeding three calendar weeks of such field training, be entitled to a leave of absence with pay in addition to his annual vacation. Nothing in this section shall be construed to prevent any such employee from attending ordered annual field training while on regularly scheduled vacation if he so desires.

In General Notice No. 88-6, the Department of Administrative Services interpreted this statute to grant reservists three weeks of paid leave for active duty that is required for retention in the National Guard or military reserves, but not for inactive duty, such as weekend drills. We conclude, for the following reasons, that this interpretation conflicts with the plain language of the statute.

Section 5-248(c) allows state employees to receive paid leave for "field training," but it does not define "field training" or distinguish between annual training and monthly weekend drills. We have consulted with several high-ranking military personnel who all agree that there are few, if any, differences between the kinds of activities that reservists routinely perform during annual training and the activities they perform during weekend drills. The legislative history of this statute is also silent as to any distinction between the two pertinent forms of required military service.

Additionally, the statute does not discriminate between active duty and inactive duty. It does not specify that only annual periods of training, which are active duty, are to be paid, while weekend drills, which are inactive duty, are to be unpaid. "It is an axiom of statutory construction that legislative intent is to be determined by an analysis of the language actually used in the legislation." Rizzo Pool Co. v. Del Grasso, 240 Conn. 58, 73-4 (1997). "We seek the intent of the legislature not in what it meant to say, but in what it did say."

Keeney v. Fairfield Resources, Inc., 41 Conn. App. 120, 133 (1996). If the General Assembly had intended to limit the paid leave to periods of active duty or to annual training, it could easily have done so. See International Brotherhood of Police Officers, Local 564 v. Jewett City, 234 Conn. 123, 137-

38 (1995);

Petco Insulation Co., Inc. v. Crystal, 231 Conn. 315, 325 (1994);
Buonocore v. Branford, 192 Conn. 399, 403 (1984).

The foregoing interpretation of *Conn. Gen. Stat. § 5-248(c)* comports with the provisions of the federal Uniformed Services Employment and Reemployment Act (USERRA), 38 U.S.C. §§ 4301- 4333. In 1994, Congress enacted USERRA in order to "clarify, simplify and, when necessary, strengthen the existing veterans' employment and reemployment right provisions...[contained in Section 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRA)]." H.R. Rep. No. 65, 103d Cong. 2d Sess. 18 (1994). Those provisions of VEVRA, in turn, were intended to ensure that an employee "shall not be denied retention in employment or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." 38 U.S.C. § 2021(b)(3), quoted in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 557, 101 S.Ct. 2510, 69 L.Ed 2d 226 (1981).

Although states are free to establish additional rights and protections supplemental to those provided in USERRA, they are not free to restrict the employment rights that the Act has created. See *Peel v. Florida Department of Transportation*, 600 F.2d 1070, 1073-1074 (5th Cir. 1979) (interpreting the veterans' reemployment rights statutes that preceded USERRA). In fact, USERRA specifies that it "supersedes any state law, contract, agreement, policy, plan, practice or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any right or the receipt of any such benefit". 38 U.S.C. § 4302.

USERRA does not require an employer to pay its employees while they are absent from their employment due to the obligations of military service. To the contrary, the Act provides: "[A] person who is absent from a position of employment by reason of service in the uniformed services shall be...deemed to be on furlough or leave of absence while performing such service...." 38 U.S.C. § 4316(b)(1)(A). USERRA, however, does prohibit an employer from discriminating against employees who serve in the uniformed services, or from treating different types of military duty unequally. It expressly mandates: "A person who...performs...service in a uniformed service shall not be denied...any benefit of employment by an employer on the basis of that...performance of service." 38 U.S.C. § 4311(a).

Congress deliberately gave the terms "uniformed services" and "service

in the uniformed services" very broad definitions.

The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.

38 U.S.C. § 4303(16).

The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform such a duty.

38 U.S.C. § 4303(13).

The legislative history of USERRA explains the purpose of the foregoing definition: *Section 4303(13)* would define "service in the uniformed services" to include all types of military training or service....Under current law, entitlements and eligibility criteria for reemployment rights differ based upon categories of military training or duty. It is the Committee's view that those distinctions are no longer appropriate for reemployment rights purposes and only lead to confusion and anomalous results in some cases.

H. Rep. No. 103-65, 103d Cong. 2d Sess. 23 (1993). Another section of the legislative history further explains:

[B]ecause of the diverse designations of the type of training or duty for which service members have been called, uncertainty regarding individuals' eligibility for reemployment rights has arisen in some cases. To clarify this uncertainty, protections and responsibilities imposed under [USERRA] would be based on actual time spent in the uniformed service and not on the designation of the service or type of training performed.

Id. at 19.

As the foregoing statutory language and legislative history shows, USERRA prohibits discrimination against any type of military duty. Although USERRA does not require employers to grant employees any

paid military leave, it nevertheless prohibits employers from granting a benefit, such as a period of paid leave, for some types of military duty, but not others. *Section 5-248(c)* of the Connecticut General Statutes satisfies the requirements of USERRA, because it grants state employees three calendar weeks of paid leave annually for the performance of military training, regardless of whether that training is classified as active duty or inactive duty, annual training or weekend drills.

On the basis of the foregoing analysis, we advise you that correctional employees must be allowed to take three weeks of paid leave annually to fulfill military obligations. The paid leave authorized by *Conn. Gen. Stat. § 5-248(c)* may be used either for weekend drills or for annual training.

We turn now to the issue of longevity and retirement credit for employees absent from work due to the obligations of military service. You informed us that the Department of Correction currently grants employees who are absent from work due to weekend drills the option of utilizing either accrued vacation or personal leave to account for their absence, or classifying their missed time from work as unpaid leave.² If correctional employees select the latter alternative, their longevity and retirement benefits may be impacted under DOC's current policy, because periods of unpaid leave do not count toward the accrual of those benefits. That result, however, runs afoul of various provisions of USERRA.

Some of the most important protections which USERRA grants to employees who are absent from their employment due to service in the uniformed services are outlined in *38 U.S.C. § 4316(a)*. That section provides, in pertinent part:

A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

Another section of the Act specifically addresses the rights of returning employees with regard to pension benefits. That section, codified at *38 U.S.C. § 4318(a)(2)*, states, in pertinent part:

(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.³

Because USERRA was enacted less than six years ago, there is little case law addressing the specific sections of the Act cited above. When enacting USERRA, however, Congress made clear that interpretations of the Act should be guided by the case law interpreting earlier veterans' employment rights statutes. "[T]he committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of the Act, remains in full force and effect in interpreting these provisions." H. Rep. No. 103-65, 103 Cong. 2d Sess. 19 (1993).

In Alabama Power Company v. Davis, 431 U.S. 581, 97 S.Ct. 2002, 52 L.Ed.2d 595 (1977), the Supreme Court was called upon to decide whether an employee was entitled to receive credit from his employer with respect to his pension plan for the thirty months that the employee spent in military service. The Court established a two-part test for determining whether a particular benefit was a right of seniority secured to a veteran by federal law.³ If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if the benefit is in the nature of a reward for length of service, then the particular benefit is an aspect of seniority. If, on the other hand, the veteran's right to the benefit at the time he entered the military was subject to a significant contingency, or if the benefit is in the nature of short-term compensation for services rendered, it is not an aspect of seniority. *Id.* at 589. The Court concluded that the employee's pension benefits certainly would have accrued had he remained with his employer, and that the pension benefits were primarily rewards for continuous employment with the same employer. *Id.* at 591-94. Accordingly, the Court held that the employer was required to pay the employee the full pension to which he would have been entitled had he not been called to military service. *Id.* at 594.

Subsequently, in Reilly v. New England Teamsters and Trucking Industry Pension Fund, 737 F.2d 1274 (2d Cir. 1984), the Second Circuit Court of Appeals applied the "seniority" test articulated in Alabama Power. It held that an employee who was injured during a two-week National Guard encampment, and consequently remained in the military service for 15 months, was entitled to a full pension credit in his employment for the 15 months that he was absent from his employment. See also Palmarozzo v. Coca-Cola Bottling Co. of New York, 490 F.2d

586 (2d Cir. 1973). (A severance pay plan which gave one credit for each year of continuous service with the employer created a seniority benefit, not merely a benefit in the nature of compensation, and the employer was therefore required to apply time spent by the employee in the armed services toward the employee's qualification for severance benefits); Cronin v. Police Department of City of New York, 675 F. Supp. 847 (S.D.N.Y. 1987). (A City policeman, who was an Air National Guard reservist, was entitled to have his pension vest as if he had not served two active training tours of duty.)

Applying the "seniority" test articulated by the federal appellate courts in Alabama Power and its progeny, it is clear that the longevity and retirement benefits of correctional employees are benefits which accrue with reasonable certainty and which are in the nature of a reward for lengthy and continuous service with the state. Accordingly, the uninterrupted accrual of these benefits is protected by USERRA. Notably, one of the purposes of USERRA was to "make explicit the rights of reemployed service members in their pension plans, such as no break in employment service would be considered to have occurred...by reason of absence for military service." H. Rep. No. 103-65, 103rd Cong., 2d Sess. 36 (1993). We therefore advise you that, whenever a correctional employee opts to have his absence from work due to military obligations classified as unpaid leave, the Department of Correction must not record a break in the employee's accrual of longevity and retirement credit. Such an interruption violates the mandates of USERRA, which dictates that any period of military training shall be deemed to constitute service with the employer. The employee must not be treated as having incurred a break in service.³

We encourage your agency, as a matter of policy, to review the records of all employees who have previously taken unpaid military leave and to grant them retirement and longevity credit for all such past periods of leave. As part of the process of crediting employees for their previous breaks in service, DOC should ensure that both the agency and the employees have made all necessary contributions to the state employees retirement fund. USERRA requires an employer to make contributions on behalf of the employee who is absent from work due to military training. *38 U.S.C. § 4318(b)(1)*. *Section 4316(b)(2)* further mandates that, if a plan is contributory (i.e. it requires employee contributions as well as employer participation), the reemployed service person must be given the opportunity to make the required contributions, without interest or penalty, for the period of his military service.

Very truly yours,