Opinion No. 88-24

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OPINION OF: HAL STRATTON, Attorney General

BY: Michael J. Vargon, Assistant Attorney General

TO: Carlos A. Gallegos, Executive Secretary, Public Employees Retirement Association, P.E.R.A. Building, Santa Fe, New Mexico 87503

QUESTIONS

May a member of the Public Employees Retirement Association be given credited service pursuant to section 10-11-6A NMSA 1978 for a period of active military duty, where the member was not reemployed until more than ninety days after his discharge but requested to be reemployed within ninety days of his discharge in a position for which the member was otherwise fully qualified?

CONCLUSIONS

Yes.

ANALYSIS

Modesto T. Chavez initially was employed by the New Mexico State Highway and Transportation Department ("Department") on May 27, 1957. The Department is an affiliated public employer, as that term is defined in Section 10-11-2B of the Public Employees Retirement Act, Sections 10-11-1 to 10-11-140 NMSA 1978 ("Act"). Chavez became a contributing member of the Public Employees Retirement Association at that time. In May, 1960 Chavez received notice that he had been drafted into the United States Army. On May 12, 1960 he wrote to the District Engineer and requested a two-year leave of absence so that he could return to his employment after his discharge. The Department considered this as a resignation, effective May 13, 1960. On June 6, 1960 Chavez was inducted into the Army. Chavez received an honorable discharge on May 21, 1962.

Chavez states that, beginning in June, 1962, he repeatedly sought reemployment with the Department. The Department has no written employment applications on file for this period. However, Chavez has supplied statements from the Department employees who served as District Traffic Supervisor and Chief Clerk during 1962. These statements corroborate Mr. Chavez' claim. For purposes of this opinion we assume the claim is true. For reasons that are not clear, the Department did not reemploy Chavez until October 11, 1962. Mr. Chavez now seeks to obtain credited service for the period of his active duty pursuant to Section 10-11-6A of the Act.

Section 10-11-6A provides that:

A member who leaves the employ of an affiliated public employer to enter an armed service of the United States shall be given credited service for periods of active duty subject to the following conditions:

(1) the member is reemployed by an affiliated public employer within ninety days following termination of the period of active duty;

(2) the member reinstates any forfeited credited service;

(3) credited service shall not be given for periods of active duty following voluntary reenlistment; and

(4) credited service shall not be given for periods of active duty which are used to obtain or increase a benefit from another retirement program.

The issue is whether Chavez has met the requirements of paragraph (1) of Section 10-11-6A.

The Department had a duty under federal and state law to reemploy Mr. Chavez after his discharge from the Army. Section 2021 of Title 38 of the United States Code provides, in pertinent part, that:

(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...

(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;

Congress did not impose this mandate to reemploy veterans upon states and their political subdivisions until 1974. However, courts have held the provisions to be retroactive. Von Allmen v. State of Conn. Teachers Ret. Bd., 613 F.2d 356, 360 (2d Cir. 1979). States may not restrict the reemployment rights created by the act. Peel v. Florida Dept. of Transp., 600 F.2d 1070, 1074 (5th Cir. 1979); Fitz v. Board. of Educ. of

Port Huron Area Schools, 662 F. Supp. 1011, 1015 (E.D. Mich. 1985). The fact that no positions are open or available at the time the veteran applies for reemployment is not a defense or excuse for failure to reemploy. See Fitz v. Board. of Ed. of Port Huron Area Schools, supra; Davis v. Halifax City Sch. System, 508 F. Supp. 966, 968 (E.D.N.C. 1981). If Chavez qualified under 38 U.S.C. § 2021, the Department had a duty to reemploy him.

According to the Public Employees Retirement Association file, Chavez was inducted into the Armed Services. At the time he was inducted, he was a permanent employee. The only authority for drafting individuals into the armed services at that time was the Universal Military Training and Service Act, the immediate predecessor to the Military Selective Service Act, 50 U.S.C. App. §§ 451 to 473. Chavez received an honorable discharge. This constitutes a certificate of satisfactory completion of his period of service and training. Chavez requested reemployment within 90 days of his discharge. Although Department employees apparently did not provide him with an employment application form in June, 1962 because no positions were available, the federal act does not require a written reemployment application. The act is to be liberally construed for the benefit of the returning veteran. Coffy v. Republic Steel Corp. 447 U.S. 191, 196 (1980). It is therefore our opinion that Chavez's reemployment requests constituted an application for reemployment. Chavez apparently was qualified to perform the duties of his former position, inasmuch as the Department reemployed him in that position 143 days after his discharge. Chavez therefore met all of the requirements of the federal act.

Chavez also had certain reemployment rights under state law. Section 28-15-1 NMSA 1978 states that:

Any person who, since July 1, 1940, has left or leaves a position he has held, other than a temporary position, in the employ of any employer to enter the armed forces of the Unites States, national guard or organized reserve, and who serves on active duty and is honorably discharged or released from active duty to complete his remaining service in a reserve component, or is entitled to a certificate of service, or who terminates his service without dishonor, if an officer, and is still qualified to perform the duties of such position, and makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year shall be reemployed as follows:...

B. if the person's position was in the employ of the state of New Mexico or any political subdivision thereof, he shall be deemed to meet all the requirements of the Personnel Act as well as all residency requirements or other provisions of law and shall be restored to such position or to a position of like seniority, status and pay.

Although no New Mexico courts have interpreted this statute, the Attorney General has determined that it imposes a duty on the employing agency to "forthwith return the person his same job, or to a position of like seniority, status and pay" even if this requires terminating another employee. Att'y Gen. Op. 4813 (1945-6).

Thus, under federal and state law the Department had a duty to reemploy Chavez immediately when he applied for reemployment. A court in the exercise of its equitable powers will consider as done that which ought to have been done. Logan v. Emro Chemical Corp. 48 N.M. 368, 151 P.2d 329 (1944). This is particularly true where all that remains to be done are mere ministerial acts. Dynasty Footwear v. United States, 551 F. Supp. 1138, 1141 (Ct. Int'l Trade 1982); Sanders v. Folsom, 104 Ariz. 283, 451 P.2d 612 (1969); Mutual Life Ins. Co. of New York v. Owens, 39 N.M. 421, 48 P.2d 1024 (1935). The Public Employees Retirement Association therefore should treat Chavez as having met the requirements of Section 10-11-6A(1).

In summary, Section 10-11-6A(1) must be interpreted in a manner consistent with the federal and state laws on veteran reemployment rights. If the veteran otherwise qualifies for reemployment and applies within ninety days of the termination of his active duty period, he still may acquire service credit for retirement purposes even though the employer does not actually rehire him until after the ninetieth day.

ATTORNEY GENERAL

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