

LAW REVIEW 1251

May 2012

USERRA and Public Sector Defined Benefit Pension Plans

By Captain Samuel F. Wright, JAGC, USN (Ret.)

1.1.1.7—USERRA Applies to State and Local Governments

1.3.2.3—Pension Credit for Service Time

1.8—Relationship between USERRA and other Laws/Policies

Q: I am a Major in the Army Reserve and a life member of ROA. I have also been a police officer in a major city since 1995. My police officer career has been interrupted by three involuntary calls to active duty since the terrorist attacks of September 11, 2001. Accordingly, I have read with great interest your ROA "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), but I have not found an article that addresses my specific factual situation.

Our city has a traditional defined benefit pension plan for its police officers. While I am working, I contribute \$150 for each two-week pay period. This contribution comes off the top of my salary, before federal and state income taxes are applied. The city also contributes, and the funds are managed by a board of trustees appointed jointly by the city and the union. I am promised a pension that is computed based on my years of police officer service and the average of my high three years of city compensation. Because this is a defined benefit plan, the city is responsible for paying the promised benefit even if the invested funds are insufficient to pay the benefits.

After the terrorist attacks of September 11, the city and its pension fund established a special policy for pension contributions by police officers who had been called to the colors. During each of my three call-up periods, I contributed \$150 per month (rather than \$150 for each two-week period) to the pension fund. I made these contributions while I was away from work for service. I made arrangements for the \$150 per month to be paid directly from my checking account on the first of each month. I believe that the other police officers who were called to active duty as National Guard or Reserve members made similar arrangements.

Recently, the Mayor directed an audit of the police officers pension fund, and the audit showed that the promised benefits are only 20% funded, as a result of decades of underfunding and in recent years an unexpectedly poor performance of the investments. The Mayor fired the pension fund administrator and brought in a new administrator, who has changed lots of long-standing policies.

The pension administrator has sent me a substantial bill, representing the difference between what I paid (\$150 per month) and what I allegedly should have paid (\$150 every two weeks) during each of my three military duty

periods. The administrator has taken the position that if I do not pay this bill I will not receive pension credit for these military periods, meaning that my eligibility to retire from the police department would be substantially delayed.

I think that the city is treating me unfairly. Does this new policy violate USERRA?

A: First, let me address how your city's policies and practices have differed over the years from the requirements of USERRA. Under section 4318, you were entitled to be treated as if you had been continuously employed by the civilian employer during the time that you were away from work for service, *but only when you were "reemployed under this chapter."* See 38 U.S.C. 4318(a)(2)(A).

As I have explained in [Law Review 0766](#) and other articles,^[1] you must meet five eligibility criteria to have the right to reemployment under USERRA:

1. You must have left a civilian position of employment for the purpose of performing voluntary or involuntary service in the uniformed services.
2. You must have given the employer prior oral or written notice.
3. Your cumulative period or periods of service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. Because these three periods were involuntary, they do not count toward your five-year limit with respect to the city. See 38 U.S.C. 4312(c)(4)(A).
4. You must have been released from the period of service without having received a punitive or other-than-honorable discharge.
5. You must have made a timely application for reemployment, after release from the period of service.

In retrospect, you met these five conditions for each of your three military service periods, but during each of those periods it was not clear beyond all doubt that you would meet the conditions. You could have won the Publisher's Clearinghouse Sweepstakes and retired. You could have done something really stupid and have received a bad discharge that would disqualify you under section 4304, 38 U.S.C. 4304. You could have stayed on active duty voluntarily and have exceeded the five-year cumulative limit under section 4312(c), 38 U.S.C. 4312(c).

The employer was not required to treat you as if you had been continuously employed, for seniority and pension purposes, until you met all five conditions and returned to work. Most employers do not make payments to pension funds on behalf of employees, or accept employee contributions, during the time that the employee is away from work for service.

Accepting contributions from you during your service, by transfer from your checking account, was not necessarily in your best interests. While you are working, you pay the pension contributions with *pre-tax dollars*. When you return to work after service and then make make-up contributions to the pension plan, you can also do that with pre-tax dollars. Please see [Law Review 82](#) (July-August 2003), by Lieutenant (now Commander) Marc Soss. When you paid the pension contributions from your checking account, during your period of military service, you were paying with funds for which you had already paid federal and state income tax. It does make a difference.

USERRA provides as follows concerning the returning veteran's obligation to make up missed pension plan contributions after returning to work:

A person *reemployed under this chapter* shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment *may exceed* the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's service in the uniformed services, such payment period not to exceed five years.

38 U.S.C. 4318(b)(2) (emphasis supplied).

Under section 4302 of USERRA, this federal law is a floor and not a ceiling. USERRA does not supersede or override a state law, a local ordinance, a collective bargaining agreement or other contract, or an employer policy or practice that provides you *greater or additional rights*. USERRA does supersede and override these things insofar as they purport to limit USERRA rights or to impose an additional prerequisite on the exercise of USERRA rights. Section 4302 provides:

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), 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 such right or the receipt of any such benefit.

38 U.S.C. 4302.

During each of your three periods of military service, the city gave you a benefit that was greater than the benefit that USERRA required the city to give. Under USERRA, the city could have required you to make up the employee contributions that you would have made if you had been continuously employed, but the city only required you to pay approximately half of those contributions (\$150 per month vice \$150 every two weeks).^[2] When an employer provides an extra-statutory benefit to employees who are away from work for military training or service, USERRA does not require the employer to maintain that extra-statutory benefit in perpetuity. See *Crews v. City of Mount Vernon*, 567 F.3d 860 (7th Cir. 2009).^[3]

It is certainly not controversial for the city to discontinue an extra-statutory benefit when it decides that it can no longer afford that generosity. What is controversial and unusual is the city's "Indian giver" approach of demanding that you return a benefit that you were already provided some years ago.^[4] While it certainly seems chintzy for the city to make the demand at this time, this unseemliness does not make the demand unlawful under USERRA.

In many states, the severe underfunding of state and local government defined benefit pension plans is a huge problem for which there is no easy solution. When a plan is as underfunded as the one you describe, it is likely that the employees and retirees will have to “get a haircut” as part of a bankruptcy process. If there is insufficient funding to pay all the promised benefits, there needs to be a proportional reduction for everyone, not 100% for those retiring now and nothing for those who retire a decade from now.^[5]

State and local government pension plans must not be permitted to balance their budgets on the backs of those who have been called to the colors. If all beneficiaries are likely to see their benefits cut, it is all the more important that veterans receive their USERRA pension benefits *before* the benefits of all employees are proportionally cut in a bankruptcy mechanism.^[6]

^[1] I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 751 articles about USERRA and other laws that are particularly pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

^[2] Requiring you to make these payments while you were on active duty, rather than as make-up contributions after you returned, was also different from what USERRA provides but not necessarily in your favor.

^[3] I discuss the implications of *Crews* in detail in [Law Review 1004](#) (January 2010).

^[4] *The American Heritage Dictionary* defines “Indian giver” as “one who gives something as a gift to another and then takes or demands it back.”

^[5] Under the Employee Retirement Income Security Act (ERISA), there is federal insurance for *private sector* defined benefit plans, through the Pension Benefit Guaranty Corporation (PBGC), but PBGC insurance does not apply to state and local government pension plans. And the states are in very bad shape with respect to their budget deficits and creditworthiness. See “Illinois Default Insurance Cost Rises as Weak States Punished,” <http://www.bloomberg.com/news/print/2010-12-28/Illinois-default-insurance>.

^[6] Please see [Law Review 1119](#), February 2011.