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June 8, 2006

Michael C. Dolsen
Executive Director
Milwaukee Employes' Retirement System
Room 603 - City Hall

Re: Military Leave of Absence—Calculation of Final Average Salary; Member Contribution Reporting

Dear Mr. Dolsen:

This opinion is in response to your letter of April 21, 2006. You ask how to calculate the final average salary of a member who had taken a military leave of absence. Section 36-02-12 directs you to calculate the final average salary based upon the member's last month of employment prior to the beginning of the leave. The effect of this provision is that you would not include in your calculation any increase in pay the member would have received had the member not been on leave. You ask whether this provision is consistent with federal law. You also ask about the obligation of the employer to continue to make the member's contributions into the employee's account while the employee is on military leave.

The answers to your questions are governed in part by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301-4333, which was enacted in October 1994 (and significantly updated in 1996 and 1998), and provides reemployment and employee benefit protection for veterans and employees who perform military service. USERRA applies to voluntary as well as involuntary military service, in peacetime as well as wartime, and the law applies to virtually all civilian employers, including the Federal Government, State and local governments, and private employers, regardless of size. It completely replaced the Veterans' Reemployment Rights (VRR) law effective December 12, 1994.

Under USERRA, if a military member leaves his civilian job for service in the uniformed services, he or she is entitled to return to the job, with accrued seniority and no loss of benefits, provided he or she meet the law's eligibility criteria. USERRA does not supersede, nullify, or diminish any federal or state law (including a local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to persons protected by USERRA, or is in addition to rights and benefits accorded to those persons by USERRA. § 4302(a). USERRA does supersede any state law (including a local law or ordinance), contract, agreement, policy, practice, or other matter that reduces, limits, or eliminates USERRA rights and benefits or that imposes additional prerequisites upon the exercise of such rights or the receipt of such benefits. § 4302(b).

In enacting USERRA, Congress intended a uniform set of protections available to returning veterans and expressly forbade modification of these protections by state law, benefit plans or contractual bargaining agreements because it would frustrate the statutory purpose. Accordingly, state laws, local law, collective bargaining agreements, contracts, and benefit plans inconsistent with USERRA are preempted. *Wriggelsworth v. Brumbaugh*, 129 F.Supp. 2d 1106 (W.D. Mich. 2001).

Under USERRA, service in the "uniformed services" gives rise to rights. Those services include the Army, Navy, Marine Corps, Air Force, Coast Guard, and Public Health Service commissioned corps, as well as the reserve components of each of these services. § 4303(16). Federal training or service in the Army National Guard and Air National Guard gives rise to rights under USERRA, but state service, pursuant to a call from the Governor, is not protected by the federal law, although it might be protected by state law. § 4303(13).

In Wisconsin, state service pursuant to a call from the Governor is protected by Wisconsin's "Reemployment Rights after National Guard, State Defense Force, or Public Health Emergency Service," Wis. Stat. § 21.80, (commonly referred to as Wisconsin's "little USERRA"). This law applies to all persons in the state who engage in any activity, enterprise, or business employing one or more persons on a permanent basis. Wis. Stat. § 21.80(1)(b). The law extends to

persons on active state service essentially the same protections as USERRA provides to persons on active federal service. Wis. Stat. § 21.80(5).

The city of Milwaukee and the city agencies participating in the Employes' Retirement System are employers subject to USERRA, and Wisconsin "little USERRA." 38 USC § 4303(4)(A); Wis. Stat. § 21.80(1)(b). In reference to pension benefits, however, the Employes' Retirement System has an independent obligation to comply with USERRA, even though it is not the members' employer, because it is deemed to be an employer with respect to the provision governing pension benefits. § 4303(4)(C).

Section 4316 provides that a person reemployed under USERRA is entitled to the seniority and other rights and benefits the person "would have attained if the person had remained continuously employed." The term "benefit" is defined to include benefits under a pension plan. § 4303. The state law requires employers to extent to persons in state active service "all rights and benefits" that the persons "would have had" had their employment not been interrupted by active service, or "are generally provided by the employer to employees having similar seniority, status, and pay." Wis. Stat. § 21.80(5)(a), (b).

Section 4318 specifically governs pension benefits and grants to persons "reemployed under this chapter" specific rights concerning pension benefits. Section 4318(a)(2)(A), provides that a person reemployed under USERRA "shall be treated as not having incurred a break in service." Section 4318(a)(2)(B), provided that the time period spent on military leave shall be deemed as service for the purpose of determining the accrual of benefits. Section 4318(b)(1), provides that an employer reemploying a person "shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service." But for purposes of determining the amount of such liability, earnings and forfeitures shall not be included. If the plan requires an employee's contribution that ordinarily is paid by the employee, then the person is entitled to the accrued benefits only if the person pays the employee's contribution, but the employee may make the payment over a period of time equal to three times the period of service, but not more than five years. § 4318(b)(2).

The application of USERRA is particularly complicated because not all members who take a military leave of absence are entitled to its protection. In order for a member to qualify for the protections of USERRA, the member must be reemployed after completing their uniformed service. The reason for this is that USERRA protects the pension rights of uniformed service members who are reemployed. A member, therefore, who is not reemployed because the member either accepted other employment or died while on leave would not be entitled to the pension protection of USERRA, and any pension benefits to which the member's estate or survivor would be entitled to would be calculated without reference to USERRA. Moreover, in order to be protected under USERRA, returning member must pass each element of a five-part test. 1) The member must have had a civilian job before the period of active duty in question. (All jobs are covered except for a brief, non-recurrent job for which there is no reasonable expectation that the employment would continue indefinitely.) 2) The member must have given advance notice to the employer before leaving for active duty, either orally or in writing. 3) The member is entitled to five years of protected absence. 4) The member must have received an honorable or general discharge for the service in question. Soldiers with less favorable discharges or who were dropped from the rolls because of AWOL or desertion are not protected by USERRA. 5) The member must return to work within a reasonable period of time after completion of service. The definition of "reasonable" depends on how long the member had been gone. For absences of up to 30 consecutive days, the member is entitled to safe travel time from place of duty to his or her residence, plus eight hours of rest. The member must "report" to work at the beginning of the first normal shift on the full calendar day following this period. For absences of 31 to 180 days, the member must "apply" for work not later than 14 days after completing service. For absences of 181 days or longer, the member must apply for work not later than 90 days after completing service. The application of Wisconsin's "little USERRA" is subject to similar conditions. Wis. Stat. §21.80(3).

In reference to creditable service of members on military leave, Chapter 36 grants a greater benefit than required by USERRA. Under USERRA, a member would be entitled to creditable service for the time the member had spent on

leave only upon reemployment. Under §36-04-1-b, however, the member is entitled to creditable service for the time spent on military leave whether or not the member is reemployed. (Opinion of March 17, 1993.) Accordingly, a member who dies while on leave or chooses not to accept reemployment would, nevertheless, be entitled to creditable service for the time spend on military leave.

Your first question concerns Charter § 36-02-12, which directs you to calculate the final average salary of a member who had taken a military leave of absence and returned to work based upon his or her last month of employment prior to the beginning of the leave. The provision states in pertinent part as follows:

> [W]here service is credited during periods of absence as provided in s. 36-04-1-b [which provides for military leave], the employe shall be considered to have an earnable compensation during such periods of absence equivalent to his of her earnable compensation as of his or her last month of employment prior to the beginning of such absence.

The effect of this provision is that you would not include in your calculation any increase in pay the member would have received had the member not been on leave. This is inconsistent with federal law and state law when applied to members who have been reemployed upon return from military leave of absence and is otherwise qualified for the protections of USERRA. Under USERRA, a person returning to work after military leave is entitled to the seniority and other rights and benefits the person "would have attained if the person had remained continuously employed." § 4316. Wisconsin's "little USERRA" is to the same effect. Accordingly, if you are calculating the benefit of a USERRA protected individual who has returned to work and would have received an increase in salary because he or she would have been eligible for a step increase, or an across the board salary increase, or because of a new contract went into effect, had they not been absent on military leave, then you must count the increase in your calculation irrespective of the provisions of Chapter 36.

You ask that we amend Chapter 36 so that it is accordance with federal law. Chapter 36, however, is not out of accord with federal law because USERRA does not require a pension plan to amend its provisions to conform to it; instead, it requires pension plans to abide by its requirements irrespective of the plan's provisions. In other words, the provisions of USERRA preempt the contrary provisions of the plan in so far as the plan provisions provide less protection than does USERRA.

Nevertheless, if the board chooses to amend § 36-02-12 to recognize that in the case of a USERRA protected member, "earnable compensation" shall be calculated differently from non-protected member, and avoid the complexity of determining in each case whether USERRA applies, we suggest simply adding the following phrase:

> [W]here service is credited during periods of absence as provided in s. 36-04-1-b [which provides for military leave], the employe shall be considered to have an earnable compensation during such periods of absence equivalent to ~~his or her earnable compensation as of his or her last month of employment prior to the beginning of such absence~~ the earnable compensation the employe would have had if the employe had continued to work the full working time for the employe's position during the period of absence.

This proposed amendment would extend to each members returning from military leave USERRA level protection, even it the member did not qualify for that protection. The advantage of adopting this broader amendment is that it avoids the complex process of determining whether a returning veteran is entitled to USERRA protection and permits the contributions to be made at the USERRA protected level while the member is on leave, thereby avoiding the need to do a USERRA compliance catch-up calculation and contribution upon the veteran reemployment. A narrower amendment could be drafted, but the Employes' Retirement System would have to establish an administrative and accounting system to separately account for members who had taken military leave that are entitled to USERRA protection from those who are not entitled to such protection. In addition, additional contributions in small amounts would have to

be solicited upon the reemployment of eligible veterans. The costs of administering such an exact system might exceed the cost of extending USERRA level benefits to the rare veteran who might not be entitled to USERRA protection.

Your second question concerns the obligation of the City and city agencies to make the required members' contribution to the fund for each pay period during which the employees are on military leave. City and city agencies are required to make a contribution ranging from 5.5 to 7 percent of members' earnable compensation. § 36-08-7. The Board is to certify the percentage of earnable compensation of each member to be contributed for a member on each payroll. § 36-08-7-d. The member's account is to be credited with the contribution and interest earned on the contribution. § 36-08-7-e.

Members on military leave are considered to "have an earnable compensation during such periods of absence equivalent to his or her earnable compensation as of his or her last month of employment prior to the beginning of such absence." § 36-02-12. Accordingly, the City and city agencies are required to make member's contributions on behalf of member on military leave based upon an assumed earnable compensation equal to the compensation paid the member during the members last month of employment.

USERRA § 4318(b)(1), provides that an employer reemploying a person "shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service." This provision legally obligates the employer to pay upon the member's reemployment the member's contribution for the period of time the member was on military leave. The obligation to pay the unpaid contribution arises upon the member's reemployment, and not before, because USERRA applies only to members who are reemployed. The section further provides "For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included." This provision means that the employer is neither obligated to pay interest on the contribution because it is late, nor entitled to impose forfeiture for the late payment of the contribution.

As pointed out above, however, § 36-04-1-b, provides that "Upon the retirement of such member . . . he shall be credited with the periods of his military service by city contribution with the same result as though the member and the city during such military service made the required contribution." (Emphasis added.) The phrase "by city contribution" suggests that the employer would make the member's contribution at retirement for the time period the member was on leave. The suggestion, however, is inconsistent with the requirement of Chapter 36, discussed above, that the City and city agencies make members' contribution on behalf of members on military leave based upon an assumed earnable compensation rate. The suggestion is also problematic in the case of a member who earned creditable service while on military leave and returns to withdraw his accumulated contribution. If the contribution had not been made while the member was on military leave, the amount of the accumulated contribution would be less than the employee would be entitled to. The deficiency, of course, could be corrected at the time of withdrawal. Irrespective of the meaning of § 36-04-1-b, however, USERRA requires the employer to make the member's contribution for the time period spent on leave at the time the member is reemployed.

To clarify this language, we suggest §36-04-1-b be amended by deleting the last sentence ("Upon retirement . . .) and replacing it with the following sentence:

> ~~Upon the retirement of such member under the provisions of this act, he shall be credited with the periods of his military service by city contribution with the same result as though the member and the city during such military service made the requirement contribution.~~ City, city agency, and member contributions shall continue to be made during periods of absence as though the employee had continued to work the full working time for the employe's position during the periods of such absence.

We view this amendment as necessary because it clarifies the obligation of the employer to make contribution commensurate with the members' earning of creditable service.

Very truly yours,

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