



Administration

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MEMO

TO: Cass County Commission

FROM: Tracy Peters, HR Director / Assistant County Administrator

DATE: March 13, 2024

SUBJECT: Deputy Nathan Boerboom Military Leave Retirement credit request

Deputy Nathan Boerboom approached me several months ago concerning his NDPERS contributions during military deployments. Deputy Boerboom had military deployments in 2011, 2012, 2017, and 2023. Over the course of the first three deployments, there were approximately 23 months when he was on leave without pay from the county. When an employee is on leave without pay, there are no contributions made to NDPERS by the employee or by the county.

Under the Uniformed Service Employment and Reemployment Rights Act (USERRA), a service member is entitled to purchase service credit for the months of deployment when no NDPERS contributions were being made. The service member is required to make timely application to purchase this credit by submitting a written request to NDPERS. Deputy Boerboom missed the deadline to apply after three of his deployments. He is now asking the county to purchase service credit for him to make up for the months of service he would otherwise have if he had completed timely applications after his military deployments.

I have had extensive conversations with the State's Attorney's Office on this matter. In a written memorandum dated 2/21/24 which has been provided to you in your meeting materials, the State's Attorney has offered an opinion that the county has satisfied our legal obligations in this case.

There are three options for you to consider:

1. Deny the request of Deputy Boerboom based on the legal opinion of our State's Attorney.
2. Approve the request of Deputy Boerboom.
3. Request more information and table the conversation for a later discussion.

Date: 03-07-2024

To: Chair Commissioner Chad Peterson and County Commissioners

Reference: Deputy Nathan Boerboom Military leave retirement credit

County Commissioners, I am respectfully requesting for previous Active Duty Military leave from the Cass County Sheriff's Office to be reimbursed for retirement credit for leave taken on the following time periods:

- 04-02-2011 to 08-19-2011 (4 Months)
- 10-24-2012 to 09-30-2013 (10 Months)
- 03-27-2017 to 03-20-2018 (9 Months)

Cost estimate for 23 months purchase of service credit is \$28,652.04 as of 03/06/2024. Of that Deputy Boerboom's responsibility is at least \$2,119.65.

Background: In November of 2023, I contacted NDPERS representative to request an estimate to purchase years of service. I was educated by the NDPERS representative that my Military leave during the period of 2022-2023 was Federally protected by USERRA (Uniformed Services Employment and Reemployment Rights Act). I was advised that I needed to fill out paperwork (SFN 17758) in order to have my years of service reimbursed by my employer and so I could get credit for my time on Military Leave. I was unaware that this benefit was available to me until advised by the NDPERS representative. The NDPERS representative advised me that my previous 3 leave of absences (stated above) were also covered under USERRA however, it was outside of the time frame for me to purchase under USERRA.

Key observations:

- I was unaware of this Federal benefit along with all HR Directors since 2010. The USERRA poster fulfills the legal requirement under the law however, it does not advise of this specific benefit anywhere on the poster. I find it unseasonable for me to know about an employee benefit because of this poster when that same poster is insufficient to educate HR directors.
- Human Recourses, Cass County Sheriff's Office, and I were unaware of this federally protected benefit.
- All of my Active Duty Military leave of absence orders were submitted to HR and CCSO during each leave of absence.
- This benefit was budgeted and allocated by Cass County Government at the time of my leave, and if informed, I would have taken part in the benefit.

Cass County States Attorney Legal opinion:

1. (See attachment) Conclusion: It does appear that the County did have an obligation to inform the employee about the option to buy back their years of service for retirement purposes under USERRA. After speaking with Tracy Peters, I was able to confirm that the County has displayed the USERRA rights poster on multiple bulletin boards on County property and has therefore fulfilled its obligation to give notice for purposes under USERRA.

Legal Factors not considered in Legal review:

1. USERRA poster is not currently posted at the Cass County Jail bulletin board and likely was never posted where all the other notices are posted. Deputy Boerboom was working at the Cass County Jail for the first two Active Duty leave periods. The poster is currently hung at the Courthouse and Law Enforcement Center.
 - Question "If we have more than one building on our corporate campus, do we have to have labor law posters in every building?" Answer "You might. Posters need to be place where employees can readily observe them. If all employees report to one building, posters can be displayed there. **If they work in several different buildings, the posters must be displayed in each building.** Displaying them only in one main building may not make them readily accessible to employees who work in other buildings, **especially if they never have occasion to enter the main building for work.** (JJkeller.com)

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- Non-legal factor: CCSA Legal review concluded that if the poster was sufficient to make aware of USERRA benefits however, 3 Cass County Human resource Directors were unaware of the benefit.
- 2. During my first active duty leave (2011) the Cass County Government contribution was 100% into our pension plan. Employee contribution was 0%.
 - Question: When must I (employer) make pension contributions attributable to the employee's military-related absence? Answer: For employer contribution plans in which employees are not required or permitted to contribute, **the employer must make the contribution attributable to the reemployed service member's military-related absence no later than ninety days after the date of reemployment**, or when plan contributions are normally due for the year in which the military service was performed... (Department of Labor website)
 - This contribution required by law was not completed. If it was completed, I would have been advised but filling out paperwork (SFN 17758), therefore educating me on this benefit and later could have applied it to my follow-on activations.
- 3. Additional information to consider:
 - NDCC and Cass County Employee Handbook make no mention of this benefit. Under other benefits it states "Retirement contributions cease during any unpaid leave period"
 - 38 U.S.C 4318. C. – "in writing notification to administrator (NDPERS) of return from service by employer" (Cass County Government). (Legal information institute)
 - The law is vague on who (employee/employer) is ultimately responsible for initiating any of the previous benefits stated. The legal opinion infers that I (employee) am responsible.

In conclusion, this was clearly an issue of education and awareness of a Federally protected benefit. Please put yourself in my shoes while assessing this request. You only know what you know. The expectation placed on me to have a better understanding of this benefit than HR is very disheartening. I respectfully ask to reimburse NDPERS for the federally protected benefits during my Military Service to make my time at Cass County whole.

Please note: I am asking for my time, and my time only to be funded. Additional persons affected may have different specific circumstances than mine. Additional information is available, and respectfully requesting to have an opportunity to discuss this letter in front of the commission as an agenda item during the next appropriate commission meeting.

Respectfully,

Deputy Nathan Boerboom

MEMORANDUM

To: Tracy Peters and Kim Hegvik
From: Kate Naumann
Re: NDPERS Benefits While on Active Military Deployment
Date: February 21st, 2024

Background

A Cass County employee has been deployed for active duty four times in the course of their employment with the County. The employee was deployed for respective periods of time in 2011, 2013, 2017 and 2023. Under N.D.C.C. 54-52-17.14: an NDPERS member that is re-employed under the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”) is entitled to receive retirement credit for the period of qualified military service. The required contribution for the credit, including payment for retiree health benefits, must be made in the same manner and by the same party as would have been made had the employee been continuously employed . . . Employees must be allowed up to three times the period of military service or five years, whichever is less, to make any required payments.

As I understand it, the employee at issue missed the statutory deadline to exercise the option of paying in for the employee share of their retirement credit in at least two or three of their deployment periods. The employee’s position is that, had they known about this option, they would have acted on it in a timely manner.

Issue: Did the County have an affirmative obligation to notify the employee of this option to pay in for their employee share within the statutory deadline under N.D.C.C. 54-52-17.14?

Analysis

N.D.C.C. 54-52-17.14 effectively makes it so that an employee can be away on active military leave and not have their benefits interrupted during their absence. The employer would pay in their share in the same manner as though the employee was still actively at work. The employee, in turn, has the option of buying their employee service credits under NDPERS within a certain timeframe of their deployment ending. Under state law, it says that employees must be allowed up to three times the period of military service or five years, whichever is less, to make any required payments. The example I was given was that if a person was deployed for three months, they would then have up to nine months to apply.

The employee at issue says that they were unaware of this option to buy back their years of service for retirement credit. I did see some references to military leave in our County Employee handbook, but nothing specific to buying back years of service. USERRA does require that an employer provide to persons entitled to rights and benefits under USERRA a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. 38 U.S.C.

§4334(a). It goes on to say that the requirement for the provision of notice may be met by the posting of the notice where employers customarily place notices for employees. The Department of Labor has a USERRA poster in PDF form off of their website for downloading and posting/distributing. [Your Rights Under USERRA Poster | U.S. Department of Labor \(dol.gov\)](https://www.dol.gov/eis/vrow/whd/USERRA/USERRA%20Poster.pdf).

Conclusion: It does appear that the County did have an obligation to inform the employee about the option to buy back their years of service for retirement purposes under USERRA. After speaking with Tracy Peters, I was able to confirm that the County has displayed the USERRA rights poster on multiple bulletin boards on County property and has therefore fulfilled its obligation to give notice for purposes under USERRA.



YOUR RIGHTS UNDER USERRA

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

REEMPLOYMENT RIGHTS

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- ☆ you ensure that your employer receives advance written or verbal notice of your service;
- ☆ you have five years or less of cumulative service in the uniformed services while with that particular employer;
- ☆ you return to work or apply for reemployment in a timely manner after conclusion of service; and
- ☆ you have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

RIGHT TO BE FREE FROM DISCRIMINATION AND RETALIATION

If you:

- ☆ are a past or present member of the uniformed service;
- ☆ have applied for membership in the uniformed service; or
- ☆ are obligated to serve in the uniformed service;

then an employer may not deny you:

- ☆ initial employment;
- ☆ reemployment;
- ☆ retention in employment;
- ☆ promotion; or
- ☆ any benefit of employment

because of this status.

In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

HEALTH INSURANCE PROTECTION

- ☆ If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.
- ☆ Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

ENFORCEMENT

- ☆ The U.S. Department of Labor, Veterans Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.
- ☆ For assistance in filing a complaint, or for any other information on USERRA, contact VETS at 1-866-4-USA-DOL or visit its website at <https://www.dol.gov/agencies/vets/>. An interactive online USERRA Advisor can be viewed at <https://webapps.dol.gov/elaws/vets/userra>
- ☆ If you file a complaint with VETS and VETS is unable to resolve it, you may request that your case be referred to the Department of Justice or the Office of Special Counsel, as applicable, for representation.
- ☆ You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

The rights listed here may vary depending on the circumstances. The text of this notice was prepared by VETS, and may be viewed on the internet at this address: <https://www.dol.gov/agencies/vets/programs/userra/poster> Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying the text of this notice where they customarily place notices for employees.



U.S. Department of Labor
1-866-487-2365



U.S. Department of Justice



Office of Special Counsel



1-800-336-4590

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