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Ms. Diana S. Russell  
Plan Administrator  
Firemen's Relief & Retirement Fund  
City of Lufkin  
300 E. Shepherd  
Lufkin, Texas 75902

**LEGAL OPINION NO. 13-03**

RE: Whether under USERRA the City is required to contribute its pension match if a reemployed firefighter makes up his or her contributions to the Lufkin Plan following a period of uniformed service.

Dear Ms. Russell:

You ask specifically whether the Uniformed Services Employment and Reemployment Rights Act (USERRA) and/or the Heroes Earnings Assistance and Relief Tax Act of 2008 (the HEART Act) require the City of Lufkin to make contributions to the pension fund of a firefighter who was reemployed after uniformed service in the Armed Forces, if that firefighter made up his or her contributions missed during active service.

USERRA and the HEART Act impose certain legal requirements upon employers and grant a number of benefit rights to employees when those employees leave for military service and subsequently reenter the workforce.

**SUMMARY OF USERRA**

USERRA provides certain protections for members of the military who are participants in an employee pension benefit plan, which is defined to include any plan that provides retirement income to employees until the termination of employment or later. According to the non-technical resource guide issued by the Department of Labor Veterans' Employment and Training Services, a pension plan includes defined benefit plans, defined contribution plans, and profit sharing plans that are retirement plans. USERRA also covers certain pension plans not covered by the Employee Retirement Income Security Act of 1974 (ERISA), such as those sponsored by a state, government entity, or church. USERRA does not apply, however, to pension benefits under a Federal Thrift Savings Plan. USERRA also impacts certain health benefit plans of

retiring members of the military. As well, USERRA allows for continuation of coverage during qualifying military leave.

#### **SUMMARY OF THE HEART ACT**

The HEART Act, passed into law on June 17, 2008, applies to qualified retirement plans, 403(b) plans, and 457(b) plans (like the Lufkin Plan). If a plan participant dies while performing in the uniformed services, the HEART Act provides that survivors are entitled to receive any additional benefits (other than benefit accruals relating to the period while on military leave) provided under the plan as if the participant had resumed employment on the day before death. The HEART Act allows, but does not require, plans to provide benefit accrual for participants who do not return to work due to death or disability on account of their military service.

Under the Pension Protection Act of 2006, employees reporting for active duty were permitted to make distributions from a 401(k) plan, 403(b) plan, 457(b) plan, or an IRA without paying a penalty on early withdrawals. The HEART Act amendment makes this exemption permanent for employees called into duty (in excess of 179 days) after September 11, 2001. Any such individual must be called into active duty for a period in excess of 179 days or an indefinite period.

The HEART Act also allows survivors of a member of the military to rollover a death gratuity to a Roth IRA or Education Savings Account on a tax-free basis; it allows employers to choose to supplement any lost income of a service member by making differential wage payments; and it allows employers to amend a cafeteria plan to permit a distribution of any unused amount from a member of the military's health flexible spending account if the participant is called to active duty for a period in excess of 179 days or for an indefinite period.

#### **WHETHER EITHER OF THE ACTS REQUIRE THE CITY MAKE CONTRIBUTIONS TO THE PENSION FUND OF A FIREFIGHTER WHO IS REEMPLOYED AFTER A PERIOD OF UNIFORMED SERVICE**

The HEART Act does not directly address this question. Under USERRA, an employee who takes a qualified military leave is generally entitled to be reemployed if he or she returns to employment within a specified time period. In addition to reemployment rights, a returning veteran also is entitled to the restoration of certain retirement benefits that would have accrued had the employee not been absent due to the qualified military service. The protections provided under USERRA do not apply unless the veteran is reemployed by the veteran's civilian employer, leaving a gap for individuals who could not return to employment after military leave because of a disabling injury or death. In 2007, President Bush signed the HEART Act, which addressed some gaps in USERRA, and provided additional benefits to the service members and their beneficiaries in the event of debilitating injury or death.

In light of the purposes behind the two Acts above, it is USERRA that provides an answer to the question you pose. Under USERRA, on reemployment, the employee is treated as not having a break in service with the employer maintaining a pension plan, "for purposes of participation, vesting and accrual of benefits, by reason of the period of absence from

employment due to or necessitated by service in the uniformed services.” TITLE 20, § 1002.259, CODE OF FEDERAL REGULATIONS (the federal regulations governing USERRA).

With respect to a defined contribution plan, the employee must be allowed (but not required) to make up any missed contributions attributable to his or her service. 20 CFR § 1002.262(b). If the employee makes up his or her missed contributions, in a contributory plan, the employer is required to match the amount obligatory under the plan for employer matching contributions. 20 CFR § 1002.262(c). The employee must, of course, return to active employment to receive these USERRA retirement plan benefits.

#### **SUMMARY AND ILLUSTRATION**

Federal law (USERRA) does require the City of Lufkin to make contributions to the pension fund of a firefighter who is reemployed after uniformed service in the Armed Forces, provided the firefighter makes his or her missed contributions. For purposes of illustration only, the following example is offered to illustrate the effect of USERRA on reemployment after uniformed service, as it related to a defined pension plan:

Assume that a firefighter is called to active uniformed service after five full years with the City and his total contributions have been \$2000 per year to the pension plan. He thus leaves for active duty with five years of service with the fire department and \$10,000 in his pension fund. Further assume that he spends exactly one year on active duty and is reemployed by the City immediately after that year.

When he returns to work:

- He will have six years of service in the fire department (no break in service); and
- He will have \$10,000 in his pension fund.

As required by USERRA, the City informs him that he may “buy back” his pension year by paying his missed contributions. If he makes up his missed contributions to the pension fund, the City must match the amount obligatory under the plan for employer matching contributions.

He then returns to work:

- With six years of service in the fire department; and
- He will have \$12,000 in his pension fund.