



State Administration and Veterans' Affairs Interim Committee

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58th Montana Legislature

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September 17, 2003

TO: Committee members

FROM: John MacMaster

RE: Problem with new administrative rule

The Legislature enacted the following MCA section during the 2003 regular session:

"19-3-515. Purchase of federal volunteer service. (1) Subject to 19-3-514, a member with at least 5 years of membership service may, at any time prior to retirement, file a written application with the board to purchase membership service and service credit for up to 5 years of the member's service as a volunteer in a United States service program, such as the peace corps, or successful completion of a term of service in a national service position as described in the National and Community Service Act of 1990, 42 U.S.C. 12501, et seq.

(2) Purchase of membership service and service credit under this section is subject to the board's verification of the member's volunteer service.

(3) To purchase this membership service and service credit, the member shall pay the actuarial cost of the service credit, based on the system's most recent actuarial valuation.

History: En. Sec. 1, Ch. 292, L. 2003." (emphasis added)

In Issue No. 17 of the Montana Administrative Register, the Public Employees' Retirement Board adopted the following new rule to implement section 19-3-515, MCA:

"RULE I ELIGIBLE FEDERAL VOLUNTEER SERVICE

(1) Federal volunteer service eligible to be purchased into a member's PERS account is limited to:

(a) any documented period of service in the peace corps;

and

(b) any documented, successfully completed required term of service in the following National and Community Service Act (NCSA) programs:

(i) americorps vista;

(ii) americorps national community conservation corps; or

(iii) any other NCSA program that requires the volunteer to enroll for a specific term of service.

- (2) Federal volunteer service eligible to be purchased into a member's PERS account does not include NCSA programs such as:
- (a) freedomcorps;
 - (b) seniorcorps;
 - (c) learn and serve America; or
 - (d) any *other* NCSA program ***for which a specific term of service is not required.*** (emphasis added)

In the rule proposal notice that preceded the adoption notice, the Board had given the following "REASON" for the proposed rule:

"REASON: Chapter 292, Laws of 2003, codified at section 19-3-515, MCA, permits members of the Public Employees' Retirement System (PERS) to purchase membership service and service credit in PERS for up to 5 years of the members' service as a volunteer in a United States service program, such as the peace corps, or successful completion of a term of service in a national service position described in the National and Community Service Act of 1990, 42 U.S.C. 12501, et seq [NCSA]. The proposed rule and the proposed amendments to existing rules implement this new legislation.

RULE I: The new legislation addresses two distinct types of federal volunteer service: (1) service as a volunteer in a United States service program; and (2) a successfully completed term of service in a national service position created by the NCSA. Further clarification is required regarding exactly what federal volunteer service can be purchased.

The PERB could not find a definition of the term 'United States service program' in the United States Code. Absent clearer guidelines, the PERB has determined to limit the purchase of service in a United States service program to that specified in the legislation, service in the peace corps. To do otherwise may expand the ability to purchase service beyond the intent of the legislature. The PERB prefers to be conservative when attempting to implement legislation.

The PERB believes the legislature would not have used the terminology 'successful completion of a term of service' if the legislature had not contemplated that the member be limited to purchasing only that service for which a specific term of service is required. Otherwise, there would be nothing on which to gauge 'successful completion'.

The PERB consulted with individuals in Montana's Office of Community Service and Montana representatives of the Corporation for National and Community Services, for assistance in implementing the purchase of the second type of federal volunteer service. Freedomcorps, Seniorcorps and Learn and Serve America are NCSA programs. However, those programs do not

have a specified term of service. Rather, volunteers are free to participate or not, based on their own availability and wishes. Thus, they are not covered by the new legislation."

After the rule was proposed but before it was adopted, I made the following comments to the Board regarding the proposed rule:

The proposed rule, as the Board's "REASON" for the proposal makes clear, will not recognize, to use the words of the implemented section 19-3-515, MCA, "service as a volunteer in a United States service program", except for service in the Peace Corps. The statute provides a service credit for up to 5 years of "service as a volunteer in a United States service program, such as the peace corps, or successful completion of a term of service in a national service position as described in the National and Community Services Act of 1990" (emphasis added). The statute's use of the word "or" makes it clear that there are two separate categories of service for which one may obtain credit.

It is fundamental administrative rules law that a rule cannot conflict with a statute. This proposed rule and the "REASON" stated for it make it clear that, except for the Peace Corps, the Board intends to ignore the statute's phrase "service as a volunteer in a United States service program". The rule is thus, in my opinion, invalid. That phrase is the law, and the Board cannot ignore the phrase simply because the Board does not wish to do its best to adequately and reasonably define the phrase. It is incumbent upon the Board to do its best to define that phrase in a reasonable manner, not define the phrase out of existence, which is what the "REASON" makes it clear that the Board is doing. The Board has no authority to ignore, or in effect attempt to repeal, a law passed by the Legislature. The Board's "REASON" refers to the absence of clear guidelines in the statute as to the meaning of the phrase. That's why the Board has rulemaking authority--to provide clear guidelines that are reasonable and do not negate the statute that the guidelines are supposed to flesh out. It is common for statutes to use vague or broad language that must be fleshed out and implemented by rule.

There is another problem with the proposed rule. Under the proposed rule, service in a National Community Services Act program will not be recognized unless it is, to use the language of the rule, in a "program that requires the volunteer to enroll for a specific term of service".

There seems to be a (mistaken) belief that the Act requires one to sign up for service for a specific period of time. I found no such requirement in the Act. The only people who have to sign up for (and complete) service for a specific period of time are those who want a "national service education award" under 42 U.S.C. 12601 through 12604. See 42 U.S.C. 12593.

The Act is not limited to more or less permanent, ongoing programs for which one has to (or even could) sign up for a specific period of time. For example, the Act speaks of service in a program during summer vacation from school and during other school vacation periods. See 42 U.S.C. 12572(a)(6). The Act also speaks of programs providing "food during emergencies". See 42 U.S.C. 12572(a)(14). For many programs, for example those set up specifically to clean up and assist after a natural disaster, one will not know how long volunteers' services will be required and it won't be feasible to require signing up for a time-specific period.

For many federal programs, whether or not they're covered by the Act, the program administrators may not and will not require signing up for a time-specific period.

I realize that it is sometimes difficult, if not impossible, to confirm the time served, but that does not justify adding to the statute a rule requirement not contemplated by the statute or the Legislature that enacted the statute; that is, the requirement that one sign up for and complete a specific period of service. Such an addition is invalid. See *Bell v. St.*, 182 Mont. 21, 594 P.2d 331 (1979). Verification will sometimes be difficult or impossible, and sometimes it won't. The Board will have to somehow deal with the verification problem. It has already done so in the proposed ARM 2.43.423 amendment requiring, for service for a specified period of time, records verified by the federal program. You could do the same for service for a nontime-specific period. I understand that it is believed that records of time served may not be kept for some programs for which one does not serve for a specified period of time, but that evidentiary problem is not grounds for misconstruing the statute to not cover such programs. If the time can't be verified, it can't be verified, and the Board can decide to deny the purchase. If a person knows, prior to commencement of the service, that the person will want to purchase the service, the program can be requested to record and verify the service. Perhaps means other than verified program records can be devised to show service time.

The Board's adoption notice stated that the following comment was received and the following response given:

"COMMENT 1: A Legislative Services staff attorney commented that the proposed Rule I does not address United States service programs other than the Peace Corps. The Legislative Services staff attorney believes that this omission results in a rule that is in direct conflict with the statute.

RESPONSE: The Board acknowledges that the only United States service program addressed in Rule I is the Peace Corps. This is intentional. The statute implemented by Rule I, section 19-3-515, MCA, provides in pertinent part: '[A] member . . . may . . . purchase . . . up to 5 years of the member's service as a volunteer in a United States service program, such as the peace

corps, or successful completion of a term of service in a national service position as described in the National and Community Service Act of 1990 . . . '

The statute thus provides for the purchase of two distinct types of federal volunteer service: (1) service in a 'United States service program, such as the Peace Corps'; and (2) a successfully completed specific term of service described in the National and Community Service Act of 1990. However, the statute is silent regarding the criteria used to determine exactly what a United States service program is or whether a United States service program is similar to the Peace Corps.

Board staff have made numerous contacts and researched federal law trying to determine what other types of United States service programs exist. No definition of 'United States service programs' has been found. No service programs similar to the Peace Corps have been identified.

Absent further guidance from the Legislature regarding the intent of the phrase 'United States service programs, such as the peace corps' the Board is in no position to permit the purchase of service from any United States service program other than the Peace Corps. Requiring the Board to identify 'United States service programs' without further criteria could be considered an unconstitutional delegation of legislative authority. Were the Board to perform that exercise, it would be performing responsibilities that should have been exercised by the Legislature."

With respect to the last two sentences in the above paragraph, I do not believe that there is an unconstitutional delegation of legislative authority. The Executive Branch agencies have on occasions that are too numerous to document used their rulemaking authority to adopt rules that define words and phrases contained in statutes. The Legislature did not neglect to perform its responsibility.

The Committee should consider objecting to the rules on the grounds discussed above.

I will be addressing this matter during that part of the Committee's first meeting that relates to administrative rules.

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