OPINION
79-14

August 2, 1979 (OPINION)

Mr. Wayne O. Solberg

Fargo City Attorney

Solberg, Stewart and Boulger

P.O. Box 1897

Fargo, ND 58107

Dear Mr. Solberg:

This is in response to your request for an opinion concerning military leave for city employees.

Your letter states, in part:

> The personnel Officer for the City of Fargo has proposed the adoption of a policy relating to pay of city employees on military leave. This proposed policy would be as follows:
>
> > That personnel be entitled to pay only in the amount required to keep an employee from losing pay while on military leave and that in no case will an employee be recompensed at a rate which, when combined with military pay, exceeds the employee's normal rate of pay."
>
> I . . . would appreciate your response to two questions:
>
> 1. May such a policy be adopted (either by ordinance or otherwise) in view of section 37-01-25 N.D.C.C.?
>
> 2. If the answer to the first question is "no", may the city of Fargo, as a home rule city, pass an ordinance which would permit such a policy?

We note that you have already provided an opinion on this matter. On June 21, 1979, you wrote the Board of City Commissioners stating:

> At the meeting of the City Commission of June 18, 1979, the Board of City Commissioners directed the preparation of an ordinance which would require the reduction of the pay of a city employee while on military leave, so that the combined compensation of both would not exceed his normal rate of pay.
>
> This is to advise you that an ordinance provision of this nature is prohibited by state law. . . .
>
> Active service is defined in section 37-01-01(8) as: "Service on behalf of the state . . . or at encampments, whether ordered by state or federal authorities . . ."

> 32 U.S.C. section 502 specifies requirements for national guardsmen and states that he shall "participate in training at encampments, . . . at least 15 days each year."
>
> It is my opinion that the foregoing statutory provisions require that military leave be granted without reduction in pay for the first 30 days of such military service. It is also my opinion that active duty by national guardsmen for the purposes of "summer encampment" or "annual field training" is military service, which is included in the statutory provision. Military leave need not be granted for unit training assemblies (weekend guard drills) which are not classified as active duty or active military service.

I. Introduction

Both federal and state law now apply to military leave for state employees. The federal statute is 38 U.S.C. section 2024; it will not be discussed since its application is not necessary for resolution of your questions. Section 37-01-25 of the North Dakota Century Code which states:

> 37-01-25. OFFICERS AND EMPLOYEES OF STATE OR POLITICAL SUBDIVISIONS IN NATIONAL GUARD OR FEDERAL SERVICE TO RETAIN STATUS FOR PERIOD OF ACTIVE SERVICE. All officers and employees of this state or of a political subdivision thereof who:
>
> 1. Are members of the national guard;
>
> 2. Are members of the armed forces reserve of the United States of America;
>
> 3. Shall be subject to call in the federal service by the president of the United States; or
>
> 4. Shall volunteer for such service.
>
> when ordered by proper authority to active noncivilian employment, shall be entitled to a leave of absence from such civil service for the period of such active service without loss of status or efficiency rating. If such persons have been in the continuous employ of the state or political subdivision for ninety days immediately preceding the leave of absence, the first thirty days of such leave of absence shall be without loss of pay.

A historical review of the above-quoted section discloses that the law was originally adapted by Chapter 213 of the 1935 Session Laws and at that time applied only to National Guard members. In 1939 the Act was amended by Chapter 182 to include members of the Officers' Reserve Corps. In 1941 the Act was again amended by Chapter 221 and was put substantially in the form as we have it today, except it did not have the ninety-day prior employment provision. In 1945 the Act was amended by Chapter 239 to include the following provision: "if they have been in continuous employ thereof for ninety days immediately preceding". Upon republication of the Code and adoption

of the Century Code, the words "armed forces reserve" were substituted in lieu of the words "officers' reserve corps".

Section 37-01-25 contains several elements, some of which have been individually addressed by separate opinions or letters from this office. The key issues for the purposes of this opinion are:

1. What is meant by the term "active noncivilian employment"?

2. Does the term "first thirty days" refer to thirty working days (240 hours) or thirty calendar days (about 173 hours)?

3. Do thirty days of military leave with pay accrue to the public employee annually or on some other basis?

4. Does section 37-01-25 apply to city employees?

5. May a home rule city adopt an ordinance in conflict with section 37-01-25.

6. Does section 37-01-25 apply to individuals, usually members of a reserve component such as the North Dakota National Guard, who voluntarily apply for "active noncivilian employment"?

None of these issues have been directly addressed by the North Dakota Supreme Court. The Court has, however, specifically stated that laws protecting the civil rights of public employees who enter the armed forces are to be liberally construed in favor of the employees. Snell v. Mapleton Public School District No. 7, 222 N.W.2d. 852 (1974).

II. The Term "Active Noncivilian Employment"

This term was considered by this office in a February 4, 1966, opinion to the Adjutant General wherein we stated:

> It is significant to note that neither in the original Act nor in the Act in its present form are limitations found restricting the application of the Act to specific instances such as in time of war, required length of service, benefits available only once, etc. It is general in its application and applies whenever the individual is properly called to "active noncivilian employment." This term is not one of art and consequently by its nature has a broad application. Any active military service would come within this term.
>
> The broad application of the section was observed in opinions issued to Mr. R. H. Sherman, Chairman of the Board of Administration, dated August 31, 1956, and to Mr. T. L. Brouillard, State's Attorney, Dickey County, North Dakota, dated April 2, 1949.
>
> We must assume that at the time the original Act was adopted the Legislature was fully aware of the normal two weeks' active duty training required of the National Guard members and if the Legislature had in mind that the same should not apply, it

> certainly would have employed language to that effect. (Emphasis added).

These prior opinions indicate that a broad construction has generally been given to the term "active noncivilian employment". We are, however, for the purpose of this opinion specifically interested whether "active noncivilian employment" includes the annual two-week active duty for training, monthly weekend assemblies, active duty upon the call of the President or the Governor and other situations.

It cannot be questioned that "active noncivilian employment" includes temporary or sustained state or federal active duty during wartime or other emergencies. Such a call to active duty could be initiated by the President pursuant to 10 U.S.C. section 331 et seq., by the Congress pursuant to 10 U.S.C. section 263, or by the Governor pursuant to Section 75 of the North Dakota Constitution and Title 37 of the North Dakota Century Code.

The definitions contained in section 37-01-01 provide certain guidance on this issue, although "active noncivilian employment" is not defined:

> 37-01-01. DEFINITIONS. In this title, unless the context or subject matter otherwise requires:
>
> 1. "Militia" shall mean the forces provided for in the Constitution of North Dakota, and shall be divided into two classes designated as the active militia and the reserve militia;
>
> 2. "Active militia" shall consist of the organized and uniformed military forces of this state, which shall be known as the "North Dakota national guard";
>
> 3. "Reserve militia" shall consist of all those persons who are subject to service in the active militia, but who are not serving in the national guard of this state; * * *
>
> 8. "Active service" shall mean service on behalf of the state in case of public disaster, riot, tumult, breach of the peace, resistance of process, or the threat thereof, whenever called in aid of civil authorities, or under martial law, or at encampments, whether ordered by state or federal authorities, and shall include the performance of any other duty requiring the entire time of the organization or person, except when called or drafted into the federal service by the president of the United States. Such term shall include service in case of, or to prevent, insurrection, riot, or invasion under the order of the commander in chief communicated through proper military channels;
>
> 9. "On duty" shall include periods of drill and of such other training and service as may be required under state or federal law, regulation, or order. (Emphasis added).

These definitions clearly distinguish between the active and inactive

militia. The inactive or "reserve" militia includes individuals who are "subject to service" but do not belong to a unit and are not uniformed. However, the "active militia" (e.g., the North Dakota National Guard) consists of personnel who are uniformed, who belong to a unit, and who are periodically called to duty. Individual personnel or units in the active militia are required to devote their "entire time" to duty for periods as short as four hours (one unit training assembly) or as long as indefinite periods when called to active duty in emergencies.

Therefore, it is our opinion that the term "active noncivilian service" includes "active service" as defined above. Consequently, "active noncivilian employment" includes the annual two weeks active duty for training, monthly weekend training assemblies, and any other duty (e.g., service schools) which may be required to maintain unit or individual proficiency.

III. "Thirty Days"

Does the term "first thirty days" refer to thirty working days (240 hours) or thirty calendar days (about 173 working hours)?

This question was addressed by this office in a January 8, 1969, letter to the Nelson County State's Attorney:

> ... We believe the term 90 days refers to 90 calendar days rather than 90 working days since the statute merely refers to 90 days and does not further modify that term. If it were to be construed as 90 working days, then it would also appear the employee would be entitled to pay for 30 working days rather than 30 calendar days. We do not believe this was the legislative intent since they did not modify the term "days" in any means. According to section 1-02-02 of the North Dakota Century Code words used in any statute are to be understood in their ordinary sense unless a contrary intention plainly appears or the words are specifically defined by the Code.

It continues to be our opinion that the term "first thirty days" refers to the first thirty calendar days.

IV. Recurrence of Thirty-Day Provision

Do thirty days of military leave with pay accrue to an individual annually or on some other basis?

This issue was also considered by this office in the February 4, 1966, opinion to the Adjutant General. We stated:

> . . . it is our opinion that the thirty days' leave of absence without loss of pay is not a one-time proposition only. However, an annual basis would be a justifiable application thereof. It is in this respect observed that if this statute were to have a one-time application only, those who served in World War II and again during the Korean conflict would have been denied the benefits of this section, which we are sure was not the intent of the Legislature.

The most recent review by this office has, however, modified the previous observation. In response to an inquiry from the New Rockford city attorney, we stated, in a letter dated June 22, 1978:

> You indicate that a city patrolman from a named city desires to join the North Dakota National Guard. You indicate that the City Commission is agreeable. You indicate that his National Guard commitment will require that he attend a two-week summer camp and in addition devote a Saturday and Sunday each month to training at the unit headquarters in Carrington, North Dakota. You indicate that as a patrolman on the police force, he is occasionally assigned duty hours on weekends. You indicate further that occasionally his weekend National Guard commitment will conflict with these duties as a policeman. You state that apparently it is impossible to exchange weekends with other members of the police force, so a substitute policeman must be hired.
>
> You indicate that the city involved concedes that the patrolman would be entitled to the two weeks of summer camp and would receive full pay during that time. You further indicate that the city's question is: "* * * must the city * * * also allow him to attend such two-day training sessions at full pay up to and until the combined leave totals thirty days?"
>
> We believe that the training practices of the National Guard have changed to some degree since 1945. As we understand the 1945 practices, the National Guardsman was normally obligated to attend a weekly drill of two to three hours and an annual summer encampment normally lasting for two-weeks, though perhaps every three years a six-week encampment was undertaken. The program you describe, i.e., an annual two-week summer encampment plus a Saturday and Sunday each month, is apparently in accordance with the present National Guard practice.
>
> Under the present practice you describe the individual in question may well be unavailable for police duties for a total of thirty-nine days each year. Under the former practice as a practical matter the maximum unavailable time during the usual summer encampments was for practical purposes fifteen days per year.
>
> * * *

We note that the February 4, 1966, opinion . . . makes it quite clear that the summer encampment was included as such "active noncivilian employment." We would assume that the reference in the quoted portion of the 1966 opinion to " * * * an annual basis would be a justifiable application thereof * * *" was in reference to the then prevailing National Guard practice of two-week annual encampments, with occasional six-week encampments and short drill periods, which would not go beyond thirty days per year excepting in the event of a six-week encampment where the National Guardsman for the last twelve days of such encampment would not be paid by the public employer. We feel, however, that the ultimate point of that opinion is that the National Guardsman is entitled to the thirty days leave of absence without loss of pay each time he is called or to use more technical

language "ordered" to active noncivilian employment. There is no justification in the language of the statute for any limitation of the quantum of leave "without loss of pay" on the basis of the passage of one or more years.

You do not inform us in detail as to the National Guard procedure relevant to the "two-day training sessions." Assuming that such National Guardsman is "ordered" to attend each such "two-day training session," such orders being enforceable under the Military Code of Justice, we would necessarily have to conclude that the city must allow him to attend such two-day training sessions at full pay. If each two-day training session were on such separate orders, the thirty-day limitation would obviously have no application to a two-day session or any combination of two-day sessions.

We are informed through National Guard sources that:

> Section 37-01-25 also refers to an order "by proper authority." Proper authority would mean any individual within the chain of command authorized to issue an order directing attendance at annual training or weekend training assemblies. Training directives issued by the North Dakota Adjutant General require that all unit training schedules contain the following statement: "Personnel of this organization are hereby ordered, subject to appropriate provisions of law and regulations, to attend the reserve training assemblies scheduled herein . . ." The unit training schedule is signed by the unit commander. It is evident that the Adjutant General and the unit commander are proper authorities to direct attendance at annual training and weekend training assemblies. * * *

and

> * * * Members of the North Dakota National Guard normally receive five separate orders during a calendar year: quarterly orders for weekend training assemblies and an order for fifteen days annual training.

In summary, it is our opinion that the public employee is entitled to up to thirty calendar days paid military leave each time he is ordered to duty, whether it be for state or federal active duty, the annual two-week active duty for training, weekend training assemblies, or for other purposes.

V. City Employees

Does section 37-01-25 apply to city employees?

In a September 26, 1961, opinion to the City Attorney of Minot, we stated "that the obvious intent of the legislature was to grant a leave of absence with the right of reinstatement to the former position to any public or civil employee entering military service". (Emphasis added).

In support of this statement, we pointed out that section 37-01-25 applied to all "officers and employees of this state or of a political subdivision" and that the term "political subdivision"

usually includes cities. He quoted, as an example, Sections 183 and 184 of the North Dakota Constitution, both of which provided: "any county, township, city, town, school district or any other political subdivision".

The North Dakota Supreme Court confirmed in Snell v. Mapleton Public School District No. 7, supra, that section 37-01-25 applied to teachers employed by a public school district.

VI. Home Rule

May a home rule city adopt an ordinance in conflict with section 37-01-25?

Section 130 of the North Dakota Constitution provides, in part:

> The legislative assembly shall provide by law for the establishment of home rule in cities and villages. It may authorize such cities and villages to exercise all or a portion of any power or function which the legislative assembly has power to devolve upon a nonhome rule city or village, not denied to such city or village by its own home rule charter and which is not denied to all home rule cities and villages by statute.

Section 40-05.1-05 of the North Dakota Century Code provides that home rule charter is the organic law of a city and that the "charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of the city any law of the state in conflict therewith, and shall be liberally construed for such purposes." See, City of Fargo v. Fahrlander, 199 N.W.2d. 30, 35 (1972) and Opinion to Minot's Assistant City Attorney, dated December 29, 1978.

Section 37-01-25 is to be liberally construed in favor of public employees in the armed forces (Snell v. Mapleton Public School District No. 7, supra) and section 40-05.1-05 declares that home rule charters shall also be liberally construed. However, one must yield to the other.

This issue was raised by the City of Fargo on at least one previous occasion. In responding to an inquiry from a National Guard officer, the Staff Judge Advocate for the North Dakota National Guard stated in a letter dated April 19, 1972:

> Under the home rule statutes of the State, it's possible for certain state laws of local interest to be superseded by a home rule charter when implemented by a specific city ordinance. Since there has been no city ordinance passed which would appear to authorize the type of action contemplated by the Fargo Civil Service Commission, it appears that the Commission would have no authority to implement the type of regulations affecting employees that were presented in your letter. Even if the city were to enact such an ordinance, it would be highly doubtful that it would be effective and supersede the state law since a matter affecting the operation of the National Guard is a matter of State and not local concern, and such an ordinance

affects individuals, not communities, in its application.

In short, it appears that a regulation by the Fargo Civil Service Commission or an ordinance by the City Commission of the type discussed in your letter would be invalid as contrary to superior state law.

You have, of course, arrived at a similar conclusion in the advice given to the Board of City Commissioners: "This is to advise you that an ordinance provision ›reducing pay while on military leave! is prohibited by state law".

We concur with the opinions previously given by the Staff Judge Advocate and you on this matter.

VII. "Voluntary" Duty

Does section 37-01-25 apply to individuals, usually members of a reserve component such as the North Dakota National Guard, who voluntarily apply for "active noncivilian employment"?

This question was asked in a letter from the State Personnel Director. In a response dated December 21, 1977, we said, in part:

You indicate that agency administrators have asked for your opinion on the question of military leave as it relates to training which is requested by individual members frequently for their own benefit and not as a requirement for maintaining their enlistment or military status. You indicate that there is little question that granting the leave for the normal two-week active duty assignment or occasional weekends is covered under the law; however, the voluntary additional time is the period that is in question.

You indicate that you would appreciate our opinion as to the extent to which military leave must be granted for both required and voluntary active duty assignments.

* * *

As we understand the military custom and theory, any enlisted man or officer undertakes any duty assignment only pursuant to orders from a superior officer, which require him to undertake such duty assignment. Such practice is followed whether or not the initial volition for the duty assignment originates with the superior officer or elsewhere in the military chain of command or by "volunteering," "request" or "demand" from the recipient of the orders.

* * * Looking to the wording of the statute, it would appear to us to be unambiguous, referring quite clearly to the fact of having been "ordered by proper authority" without any reference as to the inducement for such "orders".

On such basis, considering the clear and unambiguous wording of the statutes, being familiar with no contemporary or other administrative construction to the contrary, noting the summary

> of the last North Dakota Supreme Court decision cited in the footnote to the statute given in the 1977 Supplement to the North Dakota Century Code (and also the holding and factual situation there concerned), we must conclude that if the individual requests training and then receives orders, this does fall within the intent and purpose of this section of the law. We would also conclude that even though the individual may have volunteered, requested or demanded the additional time, once orders have been issued requiring him to put in such active duty, he is no longer technically putting in such time as a "volunteer" but has been ordered by proper authority to active noncivilian employment and must perform such active noncivilian employment.

In summary, it is our opinion that factors leading to the issuance of orders (e.g., a request for duty by a member of the National Guard) shall not be considered in the granting of military leave pursuant to section 37-01-25.

VIII. Conclusion

It is our opinion that the City of Fargo may not adopt an ordinance or policy which negates the rights granted to public employees pursuant to section 37-01-25.

Rather, the city is required to grant up to thirty calendar days of paid military leave each time a city employee is ordered to federal or state active duty, annual active duty for training, weekend assemblies or other duty. Further, the pay of a city employee on military leave shall not be diminished; reduction "so that the combined compensation of both ›city pay plus military pay! would not exceed his normal rate of pay" ›from the city! is not authorized.

I trust this satisfactorily responds to your inquiry.

Sincerely,

ALLEN I. OLSON

Attorney General