LETTER OPINION
2007-L-11

July 12, 2007

Mr. Rudy Jenson
Chairman
North Dakota Administrative Committee on Veterans Affairs
408 6th Ave NE
Valley City, ND 58072-3149

Dear Mr. Jenson:

Thank you for your letter asking my opinion whether certain limitations on eligibility for adjusted military compensation provided in N.D.C.C. ch. 37-28 are constitutional. Specifically you ask whether providing additional adjusted compensation to National Guard members who are mobilized to stateside service, but excluding the active duty component of the Armed Forces serving in an identical active duty role, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It is my opinion that the differential treatment between members in the National Guard and Reserve and members in the active duty component as outlined in N.D.C.C. § 37-28-03 does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

ANALYSIS

All legislative enactments are presumed constitutional.[1] Further it is the duty of the Attorney General to defend the constitutionality of any enactment of the Legislative Assembly.[2] Accordingly, this office will issue advisory opinions that a measure is unconstitutional only when it appears beyond all reasonable doubt that the measure contravenes provisions of the North Dakota Constitution or the United States Constitution.[3]

To address your question, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution must be discussed.[4] The clause is essentially a requirement "that all persons similarly situated should be treated alike."[5] Legislation that classifies or distinguishes between groups of individuals must comport with the Equal

[1] N.D.C.C. § 1-02-38.
[2] N.D.A.G. 2002-L-36 (citing N.D.C.C. § 32-23-11).
[3] N.D.A.G. 2007-L-08; N.D.A.G. 95-L-133; N.D.A.G. 94-L-314; N.D.A.G. Letter to Schulz (Nov. 6, 1978).
[4] U.S. Const. amend. XIV, § 1.
[5] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).

Protection Clause. However, legislative bodies are generally free to make rational distinctions between groups or address the distinguishing characteristics between groups.[6]

Equal protection analysis depends on the nature of the classification. Where the classification is drawn upon inherently suspect criteria such as race or affects a fundamental right, the measure is subject to strict scrutiny. Strict scrutiny requires that the legislative classification be narrowly tailored to further a compelling governmental interest.[7] Classifications based on quasi-suspect criteria are ordinarily subject to an intermediate scrutiny in which the distinctions drawn must serve important governmental interests and be substantially related to the achievement of those interests.[8] Social and economic legislation is ordinarily subject to a less stringent test, in which differential treatment is permissible so long as it is rationally related to a legitimate governmental interest.[9]

The United States Supreme Court has explained this limited scrutiny:

> [R]ational-basis review in equal protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. Nor does it authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.
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> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's

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[6] Cleburne at 441-442 (1985); 3 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 18.2 (3d ed.1999); 16B Am. Jur. 2d Constitutional Law §§ 785, 808 (1998).
[7] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).
[8] United States v. Virginia, 518 U.S. 515, 533 (1996), c.f. R. Rotunda & J. Nowak, Treatise on Constitutional Law § 18.3 (3d ed.1999).
[9] Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 462-63 (1988).

> generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.[10]

In this case, N.D.C.C. § 37-28-03 distinguishes members of the National Guard and Reserve who are mobilized and serve stateside from members of the active armed forces who serve in identical stateside active duty roles. No suspect classification is at issue nor does the measure affect any fundamental or important substantive right. Rather, the Legislature has sought to provide additional compensation to ease the financial and personal hardships resulting from mobilizations occurring after December 5, 1992. Accordingly, any conceivable rational justification for treating the groups differently is legally sufficient to withstand scrutiny.[11]

In enacting this benefit, the Legislature could rationally determine that there are distinctions between members serving in the National Guard and Reserve and members of the active duty component of the armed forces, and that military mobilizations affect members in the National Guard and Reserve differently than members in the active duty component. Therefore, it is within the province of the Legislature to decide to provide additional compensation for mobilizations affecting members in the National Guard and Reserve who serve stateside while excluding such service for members in the active duty component.[12]

It is my opinion that the differential treatment between members in the National Guard and Reserve and members in the active duty component as outlined in N.D.C.C. § 37-28-03 does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[13]

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[10] Heller v. Doe by Doe, 509 U.S. 312, 319-321 (1993) (quotations and citations omitted).
[11] N.D.C.C. § 37-28-01.
[12] See generally Heller, 509 U.S. at 319-321.
[13] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).