

**OPINION
66-177**

February 4, 1966 (OPINION)

Brig. Gen. LaClair A. Melhouse

Adjutant General

RE: Military Service - State Employees - Leave

This is in response to your letter in which you state that some uncertainty exists among several governmental agencies in regard to the meaning of section 37-01-25 of the North Dakota Century Code. You then submit the following questions and ask for our opinion thereon:

1. Would a departmental leave policy limiting military leave to 14 days for a person otherwise qualified to receive military leave under section 37-01-25 be invalid and contrary to law?
2. Is this statute to be interpreted as authorizing 30 days' leave of absence without loss of pay on an "annual" basis, or should it be interpreted as authorizing a person only 30 days' total military leave during his entire lifetime?"

Your letter, as background information, calls our attention to the well known fact that military training is on an annual cycle and that the periods of active duty for training are on an annual basis. You also mention that in order to maintain a first line military reserve so as to be available for immediate deployment in combat, if the occasion arises, such training is necessary and in addition thereto the individual members must be trained in the modern warfare concept which is constantly undergoing rapid changes in technology.

Section 37-01-25 of the North Dakota Century Code provides as follows:

"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 activate 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."

The historical review of the above quoted section discloses that the Act was originally adopted 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 Corp. 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 234, including the following proviso: "if they have been incontinous 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."

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 opinion 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.

The section in question is, in a sense, an inducement and compensatory statute. The state being the employer and being aware of the need for a strong military reserve adopted this method of assuring same, and rewarding in a small degree those who pledged their service and availability if the need arises. During normal peacetime the advantages might appear to be significant but during troubled times or while the county is at war the advantages are small - almost to the point of being insignificant compared to the sacrifice made by the individuals.

It is further observed that the Legislature by the provisions in section 37-01-25.1 as pertaining to private employment as well as public employment provided some safeguards for re-employment of military personnel who were honorable released from active duty. A similar provision has been enacted into law by the Federal Government under the Universal Military Training Act. These Acts illustrate

that the government is protecting and safeguarding, to some degree, employees who serve their country in the military service.

We must assume that the Legislature took into consideration the cost factor and we might further assume that it was aware that the normal situation demanded only two weeks of active duty training, but nevertheless to provide for the other instances it set the maximum at thirty days instead of fifteen. Being that the normal period of active duty is two weeks per year the cost will remain substantially the same, except in those instances where individuals are required to attend further training because of the need to keep abreast with the changes in the warfare concept. The pay on active duty varies in accordance with the rank of the individual. In some instances, if not in most, the pay rate will be less than the civilian pay received, consequently, the individual will lose money. In other instances pay may be equal or higher, but in the latter instances the individual has had some length of service and he apparently made the sacrifice earlier. In any event, we must assume that the Legislature took this means of compensating those who enter the military service in one form or another. We do not believe that the Legislature adopted the Act for mere "window dressing" but really meant it.

Therefore in direct response to the first question, it is our opinion that the departmental leave policy limiting military leave to fourteen days with pay is not in accordance with section 37-01-25 of the North Dakota Century Code and is contrary thereto.

In response to the second question, 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 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.

HELGI JOHANNESON

Attorney General