

OPINION
70-319

October 21, 1970 (OPINION)

Mr. Lloyd F. Zander

Commissioner, Department of

Veterans Affairs

Fargo, ND

RE: State Game and Fish Licenses - Members of Armed Forces

This is in reply to your letter of October 14, 1970, relative to section 20-03-05 of the North Dakota Century Code relating to resident licenses which may be issued to servicemen at the discretion of the Commissioner of North Dakota Game and Fish Department. You state the following facts and questions:

According to our interpretation, the above section among other provisions gives the State Game and Fish Commissioner authority to permit members of the armed forces who are residents of North Dakota and are in the state on furlough, leave or temporary duty, 'to hunt game birds or fish without a license during the open season during the time of war.' This is of course contingent upon the servicemen filing a satisfactory affidavit with the Game and Fish Department attesting to residency and military status.

It appears that inasmuch as the words 'during the time of war' are in the language of this section, no such permission has been granted by the commissioners to date and it is on this wording, 'during the time of war,' that we seek your counsel.

It is our belief that for the purpose of administering state benefits relating to servicemen and veterans, the Korean Conflict and Vietnam Era are both war periods. As an example, we have an official opinion from your office dated December 20, 1951, which, for the purpose of grant State Veterans' Aid loans reads in part: 'It is our opinion that a soldier, sailor, marine, or member of the armed forces of the United States during such campaign which started in the summer of 1950, and still continues, has so served while the United States was at war.' Although this Vietnam war has not been officially declared a so-called war by our United States Congress, the Congress, nevertheless, pays their veterans war time rates for disabilities that were incurred while serving during either the Korean Conflict or during the Vietnam Era. I know that it would be difficult, to say the least, if we were to tell the mothers or wives of servicemen who died during the Vietnam Era that no war existed.

Your kind assistance in furnishing an official opinion on wording 'during the time of war' for the purpose of granting resident licenses by the State Game and Fish Commissioner to

servicemen on leave will be strongly appreciated."

Section 20-03-05 of the North Dakota Century Code provides:

RESIDENT LICENSES MAY BE ISSUED AT DISCRETION OF THE COMMISSIONER. Any resident license prescribed by this title may be issued by and in the discretion of the commissioner to a person who has come to this state with a bona fide intention to become a resident thereof, even though he has not been a resident of this state for the required period of time immediately preceding the application for the license or to any person who is a member of the armed forces of the United States, and who is within the state on furlough, or leave, or on temporary duty, or to any person who is in the employ of the United States fish and wildlife service or the conservation department of any state or province of Canada, and who is in the state for the purpose of advising or consulting with the North Dakota game and fish department. Any resident of the state, while in the military service of the United States, shall be permitted to hunt game birds or fish without a license therefor during the open season during the time of war. No license shall be issued under the provisions of this section unless a satisfactory affidavit of some bona fide resident setting for the actual conditions accompanies the application."

We note the above section contemplates two situations insofar as military personnel are concerned. The statute authorizes, but does not require, the Game and Fish Commissioner to grant a resident license to any person who is a member of the armed forces of the United States, and who is within the state on furlough, or leave, or on temporary duty. The statute also requires that any resident of the state, while in the military service of the United States, be permitted to hunt game birds or fish without a license therefor during the open season during time of war.

The first situation does not describe that it must be in "time of war." The Commissioner may issue the license, in his discretion, to any serviceman on leave, on furlough or on temporary duty in this state regardless of whether he is a resident and regardless of whether it is in "time of war." We thus assume your question is concerned only with the latter situation, i.e., residents of the state who are to be permitted to hunt game birds or fish without a license therefor during the open season during the time of war. This provision is self executing. We note the Commissioner is not required to issue a license and therefore the last sentence of the section relative to affidavit would not be applicable since no license is to be issued. We assume if a person is found hunting game birds or fishing without a license during an open season and he can prove he is a resident of the state in military service and that it is during the time of war no charge for hunting or fishing without a license would be sustained. In this respect the Court before which the action was brought would determine whether it is a "time of war" within the meaning of the statute.

Insofar as this office is concerned, we can find no reason for distinguishing between the Korean Conflict and the Vietnam Era insofar as this matter is concerned. As you have noted, this office

in an opinion dated December 20, 1951, to Mr. Floyd E. Henderson, Executive Secretary, Veterans' Aid Commission, held a person who had served for a period of not less than thirty days in the armed forces of the United States during the Korean Conflict was entitled to a loan under the provisions of chapter 37-14 of the North Dakota Revised code of 1943, as amended. The statute (section 37-1406) made veterans eligible for a loan if they had served for a period of not less than thirty days "while the United States was at war."

We also note that the Vietnam Era has been recognized by this state insofar as establishing of service dates for veterans. See section 37-01-40(10) of the North Dakota Century Code, as amended. See also chapter 37-24 of the North Dakota Century Code with regard to the Educational Assistance for Veterans Act. In addition the electors of this state in September of this year approved a constitutional amendment authorizing the issuance of bonds and the expenditure of the proceeds thereof for payment of adjusted compensation to North Dakota Veterans of the Vietnam Conflict. It is obvious that state has recognized the Vietnam Era as a situation comparable to a state of war since the benefits authorized to veterans in this instance are essentially the same or greater than the benefits authorized to veterans of declared wars. We see no reason for drawing a distinction in this instance.

However, as stated above, the Game and Fish Commissioner is required to issue no license to the serviceman. The statute merely provides they may hunt game birds and fish during open seasons in time of war without a license if they are residents of this state and in military service. If they are accused of hunting without a license the Court would determine whether they were exempt from a license under the provisions of section 20-03-05. In this respect our opinion is not binding upon the Courts and it is the Courts rather than the Game and Fish Commissioner who would ultimately determine the question.

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Attorney General