

Office of the Attorney General
State of North Dakota

Opinion No. 83-38

Date Issued: October 10, 1983

Requested by: Nevin Van de Streek
Minot City Attorney

--QUESTION PRESENTED--

Whether employees of the State or a political subdivision who are entitled to invoke the provisions of Section 37-01-25 of the North Dakota Century Code, can use their 20 work days each calendar year for regularly scheduled weekend, daily or hourly drills or monthly unit training assemblies.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that employees of the state or a political subdivision who are entitled to invoke the provisions of Section 37-01-25, N.D.C.C., cannot use their 20 work days each calendar year for regularly scheduled weekend, daily or hourly drills or monthly unit training assemblies.

--ANALYSIS--

Chapter 388 of the 1983 Session Laws amended Section 37-01-25, N.D.C.C., as follows:

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, they shall receive twenty work days each calendar year without loss of pay. In addition, any leave of absence necessitated by a full or partial mobilization of the reserve and national guard forces of the United States of America, or emergency state active duty, shall be without loss of pay for the first thirty days thereof less any other paid leave of absence which may have been granted during the calendar year pursuant to this section. However, if leave is required for weekend, daily, or hourly periods of drill for military training on a day in which a public officer or employee is scheduled to perform the work of the state or of a political subdivision, the officer or employee must be given the option of time off with a concurrent loss of pay for the period missed or must be given an opportunity to reschedule the work period so that the reserve or national guard weekend, daily, or hourly drill or period of training occurs during time off from work without loss of status or efficiency rating.

Section 37-01-25, N.D.C.C., allows 20 work days leave of absence each calendar year without loss of pay for all officers and employees of the State of North Dakota or a political subdivision thereof who are members of the National Guard or the Armed Forces Reserve of the United States of America, and who are subject to or who shall volunteer for federal service. This entitlement is for periods of active service or active noncivilian employment. Section 37-01-01(2), N.D.C.C., defines 'active service' as follows:

37-01-01. DEFINITIONS. In this title, unless the context or subject matter otherwise requires:

2. 'Active service' means 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.

There appears to be no definition in the Century Code of 'active noncivilian employment'. However, it is readily apparent from the context of Sections 37-02-01(2) and 37-01-25, N.D.C.C., that active noncivilian employment does not include regularly scheduled weekend, daily or hourly drills or monthly unit training assemblies. This conclusion is supported by rules of interpretation in determining the exact meaning of the statute. Section 1-02-39, N.D.C.C., provides for the following aids in construction of ambiguous statutes:

1-02-39. AIDS IN CONSTRUCTION OF AMBIGUOUS STATUTES.--If a statute is ambiguous, the court, in determining the intention of the legislation, may consider among other matters:

1. The object sought to be attained.

3. The legislative history.

In looking at the legislative history surrounding the enactment of the 1983 amendments to Section 37-01-25, N.D.C.C., it is clear that the reference to the 20 work days leave of absence each calendar year without loss of pay was a distinct problem addressed by the legislature separate from the question addressed in the last sentence of Section 37-01-25, N.D.C.C., relating to the rescheduling of work when leave is required for weekend, daily, or hourly periods of drill. Specifically, the comments of Representative Martinson made before the House State and Federal Government Committee on January 24, 1983, are pertinent. Those comments are summarized as follows:

Rep. Martinson appeared to testify in favor of this bill. He also pointed out that he was testifying as a member of the National Guard where he holds the rank of Major. For quite some time the National Guard has felt that they should do something about the discrepancies regarding the amount of military leave that is allowed employees. An Attorney General's Opinion stated that an employee is allowed not more than 30 consecutive days; however, there could be several times a year that an employee would be gone and still be paid as long as he worked at least one day in between absences. The Guard felt that this should be clarified. They have changed it from 30 days to 20 work days each calendar year. They have also eliminated the 'double dipping' on the weekend. It allows the guardsman to reschedule his weekend duty so that he does not have a loss of pay. . . . (Emphasis supplied).

It is clear from reading the legislative history that the portion of Section 37-01-25, N.D.C.C., which deals with rescheduling of scheduled work which conflicts with weekend, daily, or hourly periods of drill for military training was separate and distinct from the provision changing the paid military leave of absence provision from 30 days to 20 work days each calendar year. It is just as clear that the elimination of 'double dipping' on the

weekend was intended by the legislature and was one of the objects sought to be attained by this particular amendment to Section 37-01-25, N.D.C.C.

While I am aware that laws protecting the civil rights of public employees who enter the armed forces are generally to be liberally construed in favor of the employee, see generally, *Snell v. Mapleton Public School Dist. No. 7*, 222 N.W.2d 852 (N.D. 1974), I am of the opinion that a liberal construction of this statute will not stand in light of the clear legislative intent behind the enactment of the 1983 amendments.

Therefore, it is my opinion that the portion of Section 37-01-25, N.D.C.C., dealing with the 20 work days paid leave of absence each calendar year for active noncivilian employment is unrelated to the portion of that section dealing with the rescheduling of work which conflicts with weekend, daily, or hourly periods of drill for military training. It is my further opinion that an employee entitled to invoke the provisions of Section 37-01-25, N.D.C.C., cannot use the 20 work days annually for regularly scheduled periods of weekend, daily, or hourly drills or monthly unit training assemblies which conflict with the individual's regularly scheduled work, but must instead utilize the provision contained in the last sentence of Section 37-01-25, N.D.C.C.

--EFFECT--

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

Robert O. Wefald
Attorney General

Prepared by: Robert J. Udland
Assistant Attorney General