

**OPINION
61-122**

October 17, 1961 (OPINION)

GOVERNOR

RE: National Guard - Establishment of State Guard

This is in response to your letter in which you ask the following:

I am authorized by law to establish a State Guard as soon as fifty percent of the North Dakota National Guard has been called into active military service. Since there is no specific appropriation for the State Guard, am I authorized to utilize funds appropriated to the National Guard by the State Legislature for expenses incurred by the formation of a State Guard?"

The answer to the first phase of your question is found in section 37-12-01. The material portion of this section provides as follows:

Whenever fifty percent of the national guard of this state is in active federal service, the governor, by proclamation, may organize, equip, and maintain such a military force as he may deem necessary for the proper defense of this state. . . ."
(Emphasis supplied)

It is noted that the condition upon which the Governor may issue a proclamation to organize equip, and maintain a State Guard is when fifty percent of the National Guard of this state is in active federal service. Merely having been called into active military service is not sufficient. The National Guard of the State must actually be in active federal service. Thus, when fifty percent of the North Dakota National Guard is in active federal service, such a proclamation may be issued.

The term "is in active federal service" means from and after the date the units of the National Guard have been sworn in and are in active federal service. The distinction made here is that a unit may be called up or called into active military service, but until it is sworn in and is "federalized" such unit may not be considered as being in active federal service. The total strength of the State Guard, which may be organized pursuant to the above section, is limited by section 37-12-02 not to exceed one-half of the strength of the National Guard as it existed on June 1, 1940.

This limitation appears to have a direct bearing on the second phase of the question. It is found that chapter 230 of the 1941 Session Laws which created chapter 37-12 of the North Dakota Century Code did not provide for any appropriation to maintain, equip, etc., the State Guard which may be organized. Nothing is found in the original enactment, nor is there anything in our statutes as a result of subsequent legislation, which discloses the source from which funds may be made available to equip and maintain the State Guard.

Inasmuch as the Legislature provided that whenever fifty percent of the National Guard is in active service, a State Guard may be organized and maintained and also limiting the State Guard not to exceed one-half of the allotted strength of the National Guard of this state as of June 1, 1940, a strong presumption is created that the funds appropriated to the National Guard could be and may be used to equip and maintain the State Guard. It appears that the State Guard is to "replace" the National Guard units who were inducted into active federal service.

It is, therefore, our opinion that the Governor of the state is authorized to organize, equip, and maintain a State Guard by issuing a proclamation whenever fifty percent of the State National Guard is in active federal service. The fifty percent referred to means fifty percent of the allotted authorized strength and not fifty percent of the actual strength.

It is our further opinion that the funds appropriated to the National Guard may be used to organize, equip, and maintain the State Guard.

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