



STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

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(701) 328-2210

Drew H. Wrigley
ATTORNEY GENERAL

LETTER OPINION
2024-L-01

Jackie A. Huber
Brigadier General
Deputy Adjutant General
North Dakota National Guard
Office of the Adjutant General
P.O. Box 5511
Bismarck, ND 58506-5511

Dear Brigadier General Huber:

Thank you for your letter requesting my opinion regarding the correct application of the “North Dakota taxable income” reduction for military pay created under North Dakota Century Code (N.D.C.C.) § 57-38-30.3(2)(g).

You explain that, in 2023, Senate Bill 2293 expanded a state tax exemption for “military pay” as defined in that bill. The exemption and the definition were codified in N.D.C.C. § 57-38-30.3(2)(g). Although it is clear the definition of “military pay” includes otherwise taxable compensation received by a member of the military on federal active duty under Title 10 or Title 32, on state active duty (SAD) to respond to emergencies or disasters, on full-time National Guard duty for annual training, or on federal inactive duty training (IDT)^{1, 2}, you raised questions concerning compensation for other military service. In particular, you asked this office to analyze whether compensation for Active Guard Reserve (AGR) members, National Guard Dual Status Technicians, (DSTs), Dual Status State Employees (DSSEs), and National Guard members on active duty orders for special purposes (ADOS) is included in the tax exemption. For the following reasons, it is my opinion that taxable pay received by a member of the armed forces of the United States for serving in any AGR, DST, DSSE, or ADOS status constitutes military pay under N.D.C.C. § 57-38-30.3(2)(g).

Analysis

North Dakota Century Code § 57-38-30.3(2)(g) states, in part:

For purposes of this section, ‘North Dakota taxable income’ means the federal taxable income of an individual, estate, or trust as computed under the Internal Revenue Code of 1986, as amended, adjusted as follows:

¹ 10 U.S.C. §101(d)(7); 37 U.S.C. §206.

² 32 U.S.C. § 502. This status includes military members generally referred to as “Traditional” or “M-Day” members of the National Guard who attend regularly scheduled Drills or Unit Training Assemblies pursuant to Title 32.

...

- g. Reduced by the amount of military pay received by a taxpayer as a member of the armed forces of the United States on federal active duty, *member of the national guard*, or reserve member of the armed forces of the United States, to the extent that military pay is included in North Dakota taxable income of the taxpayer. For purposes of this subdivision, *'military pay' includes all federal pay for training, education, mobilization, and bonuses and state pay when called to support an emergency on state active duty.* (emphasis added)

Members of the Army, Navy, Air Force, Marines, Coast Guard, Space Force, and National Guard are members of the armed forces of the United States and therefore may exempt their military pay from their state income calculations. The definition of "military pay" in N.D.C.C. § 57-38-30.3(2)(g) refers to the source (federal or state government) and purpose (training education, mobilization, bonuses, and supporting emergencies) of the pay at issue. A member of the armed forces of the United States may receive pay from different sources for various purposes, however, depending on their duty status. A member's duty status is based on many factors, including the type of duty being performed, the funding source for the pay and benefits, the area of operation, the applicable title of the United States Code calling the military member to duty, and the status of the commanding official.³

The duty statuses you identify in your inquiry are necessary for the National Guard or a reserve component of the Army, Navy, Air Force, or Marine Corps to maintain military operations and ensure readiness. Although some of the statuses include work that is technically deemed civilian duty for purposes of the National Guard, much of that work would be performed by active duty service members in other military branches, and each of the duty statuses is dedicated to performing essential services for the military. Moreover, an individual in any of the duty statuses must be a member of the military to qualify for the position and must wear a military uniform while working, and each of their positions is subject to the control of military officers. Positions for military members on AGR, DST, and ADOS duty statuses are funded directly by federal funds, while DSSE positions are funded by the state and then reimbursed by the federal government under cooperative agreements. Additional information about each of the duty statuses at issue follows.

- **Title 32 Active Guard and Reserve (AGR)**: AGR means active duty performed by a member of a reserve component of the Army, Navy, Air Force, or Marine Corps, or full-time National Guard duty performed by a member of the National Guard pursuant to an order to full-time National Guard duty, for a period of 180 consecutive days or more.⁴ This duty includes organizing, administering, recruiting,

³ See Letter dated 20 June 2023 from CPT Chelsey A. Stoppeworth, Judge Advoc. Gen., N.D. Army Nat'l Guard.

⁴ 10 U.S.C. §101(d)(6)(A). AGR military members receive the same pay and benefits as Title 10 AD military members of the same rank and duty location. AGR military members are required to

instructing, or training the reserve components. Individuals in this duty status receive almost identical benefits and pays as their active duty counterparts.

- **Title 32 Dual-Status Technician (DST)**: A DST is a federal civilian employee under the exclusive control of a state official, namely the Adjutant General, who hires, fires, and supervises their employment. DST positions are specifically classified to require military membership as a condition of employment, and each of these positions corresponds with the employee's military rank.⁵ DSTs are responsible for organizing, administering, instructing, or training the National Guard and for the maintenance and repair of military supplies. They also must train and perform general military duties to ensure their readiness to enter active service at any time. Compensation for a DST is based on the DST's position description or classification in accordance with the Federal Wage System (FWS) set by the federal Office of Personnel Management (OPM).⁶ DST positions are not compensated based on the DST's military grade.

The civilian employment of a DST is contingent upon the DST maintaining military membership. If a DST ceases to maintain their status as a member of the armed forces of the United States, the DST effectively loses their federal civilian employment.⁷ A DST is required to work their federal civilian hours in addition to military duty under Title 32 (e.g. IDT, Title 32 Active Duty) when required of their military duty position. A DST may also be called to Title 10 Active Duty, and they may be activated by the Governor for State Active Duty (SAD) status.⁸

- **Dual-Status State Employee (DSSE)**: A DSSE is a state civilian employee under the same structure and criteria as a DST. DSSE positions require military membership as a condition of employment. If a DSSE ceases to maintain their status as a member of the armed forces of the United States, the DSSE effectively loses their state civilian employment.
- **Full-Time National Guard Duty - Active Duty for Operational Support (ADOS)**: The term "full-time National Guard duty" means training or other duty, other than IDT, performed by a military member of the Army or Air National Guard of the United States in the member's status as a member of the National Guard of a state or territory, the

perform scheduled Drill Assemblies (IDT) with their units; they do not receive additional compensation.

⁵ 10 U.S.C. § 10216(a).

⁶ <https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/federal-wage-system/> (last accessed Mar. 13, 2024).

⁷ 10 U.S.C. § 10216(e)-(g) provide limited, specific exceptions for a DST who loses dual status to remain in their federal civilian employment position.

⁸ Under state law, the term "[s]tate active duty means active service on behalf of the state under authority of the governor at the expense of the state." N.D.C.C. § 37-01-01(12). National Guard members on State Active Duty for emergencies or disasters get that pay exempted from state income tax.

Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of Title 32 for which the member is entitled to pay.⁹ ADOS is one type of full-time National Guard duty, and it is intended to provide the necessary resources to support existing or emerging requirements of the National Guard. Individuals on ADOS may engage in training, short-term National Guard projects, administrative or support functions, and other types of service.

The services provided by members on these duty statuses are necessary to maintain military operations, but are not necessarily considered “training, education, mobilization, and ... support [for] an emergency on state active duty,”¹⁰ thus leading to your question of whether members on the duty statuses are allowed to take the tax exemption in N.D.C.C. § 57-38-30.3(2)(g). To answer your question, we must determine whether the types of service listed in the statutory definition of “military pay” are the only types of military service for which pay is exempt. Statutes are construed to ascertain the intent of the Legislature.¹¹ To identify that intent, we look to the plain, ordinary, and commonly understood meanings of words used in the statute, unless the words are defined in the Century Code or the drafters clearly intended otherwise.¹²

The statutory definition of military pay “includes” pay from specified funding sources for specified types of service. Use of the term “includes” in a statutory definition is a word of enlargement and not a term of limitation.¹³ The North Dakota Supreme Court has held that use of that term “ordinarily indicates an ‘incomplete list.’”¹⁴ Moreover, the North Dakota Legislative Drafting Manual, which sets forth the rules for drafting legislation, instructs drafters to use the word “includes” in lieu of the phrase “includes, but is not limited to,” indicating that the word and phrase share the same meaning when used in statutes.¹⁵ Under the rules of construction, therefore, “military

⁹ 10 U.S.C. § 101(d)(5). This status typically applies to National Guard members performing the required period of Annual Training or their duty status when attending educational or professional development training.

¹⁰ N.D.C.C. § 57-38-30.3(2)(g).

¹¹ *Cont'l Cas. Co. v. Kinsey*, 499 N.W.2d 574 (N.D. 1993); *Dundee Mut. Ins. Co. v. Balvitsch*, 540 N.W.2d 609 (N.D. 1995).

¹² N.D.C.C. § 1-02-02.

¹³ *In re Estate of Elken*, 2007 ND 107 ¶ 8, 735 N.W.2d 842; *Amerada Hess Corp. v. State ex rel. Tax Comm'r*, 2005 ND 155, ¶ 13, 704 N.W.2d 8; *Hilton v. N.D. Educ. Ass'n*, 2002 ND 209, ¶ 12, 655 N.W.2d 60; *Estate of Leier*, 524 N.W.2d 106, 110 (N.D. 1994); *Americana Healthcare Ctrs. Minot & Fargo v. N.D. Dep't of Hum. Servs.*, 510 N.W.2d 592, 594 (N.D. 1994); *State v. Vermilya*, 423 N.W.2d 153, 154–55 (N.D. 1988); *Lucke v. Lucke*, 300 N.W.2d 231, 234 (N.D. 1980). See also, *N.D. Legis. Drafting Manual* 2023, p.91. (“An exhaustive definition uses the word **means** while a partial definition uses the word includes . . . ‘[i]ncludes’ is not a term of limitation”). (emphasis in original).

¹⁴ *Livingood v. Meece*, 477 N.W.2d 183, 194 (N.D. 1991) (construing regulation from N.D. Admin. Code) (citing *Lucke*, 300 N.W.2d at 234, construing statute from N.D.C.C.)) *Americana Healthcare Ctrs. Minot & Fargo*, 510 N.W.2d at 594.

¹⁵ *N.D. Legis. Drafting Manual*, 2023, pg. 16.

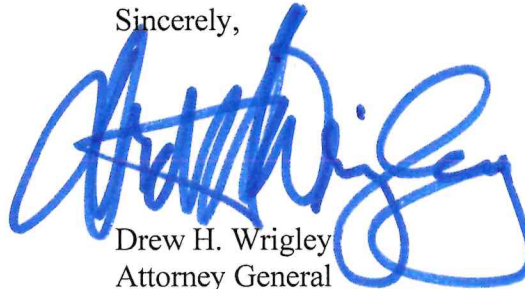
March 14, 2024

Page 5

pay” may include federal pay for things other than training, education, mobilization, and bonuses, and may include state pay for services other than when called to support an emergency on state active duty. Read in its entirety, then, the state income tax exemption in N.D.C.C. § 57-38-30.3(2)(g) applies to any income that is otherwise taxable by the state and which is received by a member of the armed forces of the United States for work related to military duties.

Members of the military in AGR, DST, DSSE, and ADOS duty statuses perform functions that are essential to the military operations and readiness of the National Guard and reserve components of military branches. Their employment positions are under the control of military officers; they are required to wear military uniforms at work; they provide day-to-day continuity in the operation and training of Army and Air National Guard units; and they must be National Guard members. Compensation for this work appropriately fits within the definition of military pay. Based on this, it is my opinion that taxable pay received by a North Dakota taxpayer as a member of the armed forces of the United States for serving in AGR, DST, DSSE, or ADOS duty status constitutes military pay under N.D.C.C. § 57-38-30.3(2)(g) and is, therefore, tax exempt as provided therein.

Sincerely,

A handwritten signature in blue ink, appearing to read "Drew H. Wrigley", is written over the typed name and title.

Drew H. Wrigley
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.¹⁶

¹⁶ See *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).