

**LETTER OPINION
2004-L-13**

February 11, 2004

Major General Michael Haugen
Adjutant General, North Dakota National Guard
PO Box 5511
Bismarck, ND 58506-5511

Dear Major General Haugen:

Thank you for your letter concerning military leave. You ask whether a qualifying service member who is called to active duty for a period extending from one calendar year into the next, or for a period of more than one calendar year, is entitled to receive paid military leave for each year. In your letter, you indicate that certain state agencies and political subdivisions have concluded that paid military leave is available only for the calendar year in which the service member is ordered to active service.

In your letter, you provide an example to outline your inquiry. You state that a number of service members were activated in December 2003. You indicated that the President ordered these members to duty based on 10 U.S.C. § 12302. Qualifying service members received paid military leave for 2003. Some members, however, have been denied paid leave for 2004. For the reasons outlined below, it is my opinion that qualifying service members are entitled to 20 days' paid military leave in 2004.

North Dakota law allows 20 work days' leave of absence each calendar year without a pay loss for all officers and employees of this state or a political subdivision of the state who are members of the National Guard or the United States of America Armed Forces Reserve, or who are subject to or who volunteer for federal service when the officer or employee is ordered to active noncivilian employment. N.D.A.G. 83-38; N.D.C.C. § 37-01-25. In order to qualify for a leave of absence without loss of pay, the officer or employee must be in the continuous employ of the state or political subdivision for ninety days prior to the leave of absence. N.D.C.C. § 37-01-25. If these prerequisites are met, the officer or employee "shall receive twenty work days each calendar year without loss of pay." *Id.* (emphasis added). For purposes of your inquiry, you asked that I presume the service member has met these prerequisites.

General rules of statutory construction answer your inquiry. The North Dakota Supreme Court recently summarized these general rules in Public Serv. Comm'n v. Wimbledon Grain Co., 663 N.W.2d 186, 193 (N.D. 2003):

[O]ur duty is to ascertain the Legislature's intent, which initially must be sought from the statutory language itself, giving it its plain, ordinary, and commonly understood meaning. N.D.C.C. §§ 1-02-02 and 1-02-03. If statutory language is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit, because the Legislature's intent is presumed clear from the face of the statute. N.D.C.C. § 1-02-05. If statutory language is ambiguous, a court may resort to extrinsic aids, including legislative history, to interpret the statute. N.D.C.C. § 1-02-39. A statute is ambiguous if it is susceptible to meanings that are different, but rational. Shiek v. North Dakota Workers Comp. Bureau, 2002 ND 85, ¶ 12, 643 N.W.2d 721.

Statutes must be construed as a whole and harmonized to give meaning to related provisions, and are interpreted in context to give meaning and effect to every word, phrase, and sentence. Meljie v. North Dakota Workers Comp. Bureau, 2002 ND 174, ¶ 15, 653 N.W.2d 62; Doyle ex rel. Doyle v. Sprynczynatyk, 2001 ND 8, ¶ 10, 621 N.W.2d 353. We presume the Legislature did not intend an absurd or ludicrous result or unjust consequences. McDowell v. Gillie, 2001 ND 91, ¶ 11, 626 N.W.2d 666. We construe statutes in a practical manner and give consideration to the context of the statutes and the purposes for which they were enacted. Grey Bear v. North Dakota Dep't of Human Servs., 2002 ND 139, ¶ 7, 651 N.W.2d 611.

The use of the word "shall" in a statute ordinarily creates a mandatory duty. Lippert v. Grand Forks Pub. Sch. Dist., 512 N.W.2d 436, 439 (N.D. 1994). "The word 'shall' is 'generally imperative or mandatory . . . excluding the idea of discretion, and . . . operating to impose a duty.'" Homer Township v. Zimney, 490 N.W.2d 256, 259 (N.D. 1992) (quoting Black's Law Dictionary 1375 (6th ed. 1990)). In Reich v. Dietz School Dist. No. 16 of Grant County, 55 N.W.2d 638, 641-42 (N.D. 1952), the court stated that use of the word "each" generally implies reference to a definite number, group or series and emphasizes the consideration of them as individuals." (Citation omitted.) It is my opinion that N.D.C.C. § 37-01-25 is unambiguous. The operative portion of N.D.C.C. § 37-01-25 states that a qualifying service member shall receive twenty work days each calendar year without loss of pay." (Emphasis added.) Stated another way, the statute mandates 20 days' leave without loss of pay each calendar year, even in circumstances where the leave extends to successive years.

Section 37-01-25, N.D.C.C., also provides:

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, must 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.

While your letter indicates there has been no apparent difficulty with interpreting this portion of N.D.C.C. §37-01-25, I believe a review of that provision is important to understand the relationship between the 20 and 30-day leave provisions. A review of the 30-day provision supports my conclusion that qualified service members are entitled to receive 20 days' leave without a pay loss in successive years. According to the statute, in the event of a full or partial mobilization, an officer or employee of the state or a political subdivision is entitled to leave without a pay loss "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." Id. Thus, irrespective of 90 days' continuous employ, in the event of mobilization, a service member who is an officer or employee of the state or a political subdivision is entitled to 30 days' leave, minus any of the 20 days' leave previously used during that calendar year.

Unlike the 20-day leave provision in which a qualified service member "shall receive twenty work days each calendar year without loss of pay," the 30-day provision does not specify the entitlement in multiple calendar years. Accordingly, the use of the term "each calendar year" in the 20-day provision, and the absence of the language in the 30-day provision, demonstrates that the Legislature intended that qualified service members shall receive 20 days' paid leave each year, and 30 days' paid leave in the year in which the mobilization occurs. See, e.g., Reich v. Dietz School Dist. No. 16 of Grant County, 55 N.W.2d 638, 641-42 (N.D. 1952) (outlining interpretation of the term "each"); Tibor v. Tibor, 623 N.W.2d 12, 23 (N.D. 2001) (Sandstrom, J., dissenting) (referring to 73 Am. Jur. 2d Statutes § 235 and noting that different language used in different parts of a statute raises a presumption that the language is used with a different intent).

In addition, statutes which protect the civil rights of public employees who enter the armed forces should be liberally construed in the employee's favor. See Snell v. Mapleton Public School Dist. No. 7, 222 N.W.2d 852, 856 (N.D. 1974), interpreting a former version of this statute. The apparent overriding intent of N.D.C.C. § 37-01-25 is to provide an additional benefit to our citizens who not only serve their country and state

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in times of emergency or war, but who also daily serve this state or its communities as a public servant.

For the foregoing reasons, it is my opinion that a qualified service member who is mobilized in 2003 is entitled to 30 days' leave of absence without loss of pay for calendar year 2003. It is further my opinion that if the mobilization extends into subsequent years, the qualified service member is entitled to 20 days' leave without loss of pay for each successive year during the mobilization.

Sincerely,

Wayne Stenehjem
Attorney General

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