

**LETTER OPINION
2004-L-61**

October 5, 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 questioning whether section 16 of Article XI of the North Dakota Constitution unconstitutionally prohibits women and nonresidents from being members of the National Guard. It is my opinion that article XI, § 16 defines which individuals may be required to serve in the military, but does not prohibit women, men over 45 or under 18, or nonresidents from serving in the National Guard.

ANALYSIS

The North Dakota Attorney General's office has long recognized that North Dakota's statutes are presumed to be constitutional until declared to be otherwise by a court having competent jurisdiction, and only where a statute is clearly and patently unconstitutional will this office deviate from this presumption of constitutionality. N.D.A.G. 2003-L-54; N.D.A.G. Letter to Tangedahl (Apr. 15, 1980). Further, the Attorney General owes a duty to uphold and defend both the North Dakota Constitution and the United States Constitution. N.D.A.G. 2003-L-54; N.D.A.G. Letter to Adams (Oct. 28, 1983). Therefore, when it is alleged that a section of the North Dakota Constitution violates the United States Constitution, this office will defend the North Dakota Constitution unless the challenged provision is manifestly contrary to the federal constitution and it is beyond a reasonable doubt that the state constitutional provision will be declared void by a court of competent jurisdiction. Accordingly, any analysis of your question must be tempered by a strong presumption of constitutionality. N.D.A.G. 2003-L-54.

In construing constitutional provisions, every effort must be made to take into account the entire constitution. State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 908 (N.D. 1977) (superseded on other grounds by N.D. Const. art. V, § 7). Generally, principles of

construction applicable to statutes are also applicable to constitutional provisions. Id.
As the North Dakota Supreme Court has stated:

In construing and interpreting the Constitution we must give effect and meaning to every provision and reconcile, if possible, apparently inconsistent provisions.

. . .

“In ascertaining both the intent and general purpose, as well as the meaning, of a constitution or a part thereof, it should be construed as a whole. As far as possible, each provision should be construed so as to harmonize with all the others, with a view to giving effect to each and every provision in so far as it shall be consistent with a construction of the instrument as a whole. . . .

Different sections, amendments, or provisions relating to the same subject, or of the same matter so that they can be said to be in *pari materia*, are to be construed together and read in the light of each other.”

Id. (citations omitted).

The North Dakota National Guard is the active militia of this state. N.D.C.C. § 37-01-01(1). The reserve militia consists of all person subject to service in the active militia and who are not serving in the National Guard of this state. N.D.C.C. § 37-01-01(7). The reserve militia are included within the active militia when called to active service. N.D.C.C. § 37-01-01(1).

Three sections of the North Dakota Constitution relate to service in the National Guard. Article XI, § 16 of the North Dakota Constitution provides that “[t]he militia of this state shall consist of all able-bodied male persons residing in the state, between the ages of eighteen and forty-five years, except as may be exempted by the laws of the United States or of this state.” Article XI, § 17 provides that the militia shall be enrolled in the manner provided by law not incompatible with the constitution or laws of the United States. Article XI, § 18

provides that the “legislative assembly shall provide by law¹ for the establishment of volunteer organizations of the several areas of the service, which shall be classed as active militia.”² Under the principles of constitutional construction set out above, these provisions must be read together as a whole to construct a consistent meaning on the single subject of membership in the North Dakota National Guard. See State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 908 (N.D. 1977).

Although the Legislature may not reduce constitutional rights, the Legislature may expand the rights of citizens beyond those given by the constitution. Johnson v. Wells County Water Resource Bd., 410 N.W.2d 525, 529 (N.D. 1987).³ Participating in the National Guard is a privilege under the Privileges and Immunities Clause of the United States Constitution. Nelson v. Geringer, 295 F.3d 1082, 1090 (10th Cir. 2002). See also U.S. Const. art. IV, § 2, cl. 1 (providing, “The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.”). Consistent with the principle set forth in Johnson, and under the authority of Article XI, §§ 17 and 18, the Legislature has expanded the classes of individuals who may join the National Guard beyond the statement concerning the militia contained in Article XI, § 16. N.D.C.C. §§ 37-02-01, 37-02-02. Particularly, the militia also includes all able-bodied male citizens, all able-bodied males of foreign birth who have declared intention to become citizens, “and other volunteers allowed by law.” N.D.C.C. § 37-02-01. Further, the North Dakota National Guard consists of regularly enlisted and enrolled members within the age limits prescribed by federal law, N.D.C.C. § 37-02-02, and the National Guard is defined to mean that part of the military forces of this state organized, equipped, and federally recognized under the National Defense Act, N.D.C.C. § 37-01-01(5). Therefore, the

¹ The phrase “by law” as used in the constitution has an acquired meaning. “Constitutional provisions directing the Legislature to implement a constitutional provision “by law” operate to permit the Legislature to enact laws for the operation of those provisions, and any such constitutional right must be exercised in accordance with the law the Legislature enacts.” N.D.A.G. 98-F-14.

² Article XI, § 18 also states that the militia shall be organized by law and, without proclamation of the Governor, prohibits any other “organized body of armed men” from performing military duty in North Dakota except for the Army of the United States. The statement concerning “armed men” should be interpreted consistently with the Legislature’s enactments concerning enrollment in the militia.

³ While the United States Constitution is an instrument of grants of authority allowing Congress to enact legislation, the North Dakota Constitution is an instrument of limitation of authority on the Legislature’s ability to enact legislation. State v. Ertelt, 548 N.W.2d 775, 776 (N.D. 1996). The North Dakota Legislature has plenary powers except where limited by the state constitution, and certain federal enactments or treaties. Id. The North Dakota Legislature does not need to have explicit constitutional authority to grant greater rights to the public than those rights which are required to be provided to the public under the state constitution.

Legislature has expanded the opportunity of citizens to serve in the militia to include those persons qualified to join the National Guard under federal law.

The National Defense Act does not prohibit women from serving, contains no residency requirements, and allows 17 year olds to serve with parental consent. 10 U.S.C. § 505. Specific laws relating to the National Guard are similar.⁴ 32 U.S.C. §§ 307(a), 313. Federal law further provides that persons in the National Guard (as part of the organized militia) may serve up to age 45, except where allowed under 32 U.S.C. § 313. 10 U.S.C. § 311. 32 U.S.C. § 313 allows original enlistments in the National Guard from ages 17 to 45, reenlistments for those under 64, and original enlistment for former regular members of the armed forces if under 64.⁵

Your letter indicates that litigation has ensued in other states based on arguments that comparable state constitutional age, gender, and residency statements may be interpreted as restrictions. There is a rule of statutory interpretation stating that the expression of one thing in a statute excludes all others, but this rule should only be applied where it appears to point to legislative intent and it does not apply if there is some special reason for mentioning one thing and none for mentioning the second. Juhl v. Well, 116 N.W.2d 625, 628 (N.D. 1962). As noted earlier, the principles of construction applicable to statutes are also applicable to constitutional provisions. Sanstead, 251 N.W.2d at 908. In this instance, the terms of Article XI, § 16 were consistent with federal laws setting out those persons who were required to belong to the militia when the North Dakota Constitution was adopted. See Perpich, 496 U.S. at 341-42. It is reasonable to believe that the drafters of the 1889 North Dakota Constitution recognized federal supremacy in military matters when drafting Article XI, §§ 16 and 17, and therefore incorporated these federal provisions because they were the governing law at the time.

⁴ The National Defense Act was supplemented by the Armed Forces Reserve Act of 1952, P.L. 82-476, § 201(b), 66 Stat. 482. Therefore, federal laws concerning the National Guard contained in Title 30 of the United States Code are considered as a part of the National Defense Act contained generally in Title 10.

⁵ These laws reflect Congress's constitutional authority over the armed forces, including state militia. "Since 1933 all persons who have enlisted in a state national guard unit have simultaneously enlisted in the National Guard of the United States." Perpich v. Department of Defense, 496 U.S. 334, 345 (1990). Congress has constitutional authority to "provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the state respectively the appointment of the officers and the authority of training militia according to the discipline prescribed by Congress." U.S. Constitution, Article I, § 8. Further, the United States Supreme Court has observed since 1872 "that the constitutional allocation of powers . . . gave rise to a presumption that federal control over the armed forces was exclusive." Perpich at 353, citing Tarble's Case, 80 U.S. 397 (1872).

If Article XI, § 16 stood alone and was interpreted to be a restriction on who may be members of the North Dakota National Guard, the restriction would likely violate federal statute and the United States Constitution.⁶ Nelson v. Geringer, 295 F.3d 1082 (10th Cir. 2002) (residency requirements violated United States Constitution). Some restrictions, however, may be permissible. In reaching this conclusion, I recognize the distinction between persons who are required to serve in the militia through an order to active service and those who may serve as volunteers.

As recently as 1981, the United States Supreme Court determined that women could be statutorily excluded from selective service registration. Rostker v. Goldberg, 453 U.S. 57 (1981). This exclusion from draft registration was based on the general exclusion of women from combat roles, even while Congress authorized the expenditure of funds to recruit women, and while there has been an expansion of women's opportunities in the military. Id. at 63, 72-83.⁷ As noted earlier, however, all sections of the constitution relating to the same subject matter must be construed together and read in light of each other. Therefore, when section 16 is interpreted together with sections 17 and 18, it is apparent that the classifications made in section 16 relate to those persons who may be compelled by law to join the militia. See also N.D. Const. art. I, § 21, North Dakota's Privileges and Immunities Clause (harmonizing the Privileges and Immunities Clause with N.D. Const. art. XI, §§ 15, 17, and 18 further supports the conclusion that the provisions do not operate as exclusions). Persons allowed by state and federal law other than those described in section 16 may join the Guard as volunteers under Article XI, §§ 17 and 18 of the North Dakota Constitution.

Therefore, it is my opinion that Sections 16, 17, and 18 of Article XI of the North Dakota Constitution allows the North Dakota Army and Air National Guard to accept volunteers to

⁶ I conclude that, when read in conjunction with other constitutional provisions, the age, gender, and residency terms of N.D. Const. art. XI, Sec. 16, do not restrict voluntary membership in the North Dakota National Guard. In reaching this conclusion I am mindful of the Tenth Circuit Court of Appeal's decision in Nelson v. Geringer, 295 F. 3d 1082 (10th Cir. 2002) in which the litigants successfully argued that residency restrictions imposed on certain members of the Wyoming National Guard violated the United State Constitution. I find the rationale of that court persuasive and strongly encourage you to seek a concurrent resolution of the North Dakota Legislature to remove or amend the age, gender, and residency terms of N.D. Const. art. XI, Sec. 16.

⁷ Since Rostker was decided, opportunities for women in combat roles in the United States Military have been expanded. In particular, over ninety-nine percent of Air Force positions and sixty-seven percent of Army positions are now open to women. Martha Chamallas, The New Gender Panic: Reflections on Sex Scandals and the Military, 83 Minnesota L. Rev. 305, 331 (1998).

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the fullest extent permitted by federal law, which includes women, nonresidents, and certain persons not between the ages of 18 and 45 years.⁸

Sincerely,

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

⁸ The supremacy clause of the United States Constitution applies even to provisions contained in a state constitution. Reynolds v. Sims, 377 U.S. 533, 584 (1964). Federal agencies acting within the scope of their congressionally delegated authority may preempt state law under the supremacy clause. City of New York v. F.C.C., 486 U.S. 57, 63 (1988). See also U.S. v. Gillock, 445 U.S. 360, 370-72 (1980) (state constitutional provision creating an evidentiary privilege does not apply where this privilege conflicts with federal rules). The supremacy clause also applies to military matters, City of Los Angeles v. U.S., 355 F.Supp. 461 (D.C. Cal., 1972), especially to matters concerning recruitment and enlistment of military personnel, U.S. v. City of Philadelphia, 798 F.2d 81 (3d Cir. 1986). Therefore, if a court were to conclude that Article XI, § 16 was a restriction prohibiting individuals from volunteering to serve in the Guard, its operation would be superseded by federal laws concerning membership in the armed forces.