



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

August 26, 2002

The Honorable Phillip K. Sinclair
Member, House of Representatives
710 Zimmerman Lake Road
Spartanburg, South Carolina 29306

Dear Representative Sinclair:

You seek an opinion regarding one of your constituents who "is actually in the Air Force Reserve and has been called to active duty, effective October 21, 2001 through October 20, 2002. He is an employee of the city of Spartanburg." The question which you wish to have this Office answer is stated by you as follows:

[a]ccording to South Carolina Code 8-7-90, individuals called to active duty during an emergency are entitled to thirty days of paid leave in addition to the fifteen days for annual training requirements. The city of Spartanburg maintains that the thirty days includes Saturdays, Sundays, holidays and normal days off. The constituent normally works one day on and two days off. The city paid him for ten days only of military leave. The code section mentioned above appears to indicate that off days, including, Saturdays, Sundays and holidays, are not included as workdays.

I would appreciate an opinion from your office regarding whether or not the thirty days of paid leave is thirty workdays or the number of days he would have worked in thirty calendar days.

Correspondence has also been received by this Office from J. Russell Goudelock, II who serves in a volunteer capacity as the State Ombudsman for the ESGR (Employer Support of the Guard and Reserve) who has advised on this question. Mr. Goudelock states that he has "always responded to inquiries with the recommendation that the pay for the 30 day period should be intended to replace the pay for the employee over a 30 calendar day period of time." Mr. Goudelock qualifies this advice, however, by adding that "maybe the letter of the law allows for the more liberal approach in the case of such shift work."

Request Letter

Law / Analysis

S.C. Code Ann. Section 8-7-90 provides as follows:

All officers and employees of this State or a political subdivision of this State who are either enlisted or commissioned members of the South Carolina National Guard, the United States Army Reserve, the United States Air Force Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, or the United States Coast Guard Reserve are entitled to leaves of absence from their respective duties without loss of pay, time, or efficiency rating for one or more periods not exceeding an aggregate of fifteen regularly scheduled work days in any one year during which they may engage in training or any other duties ordered by the Governor, the Department of Defense, the Department of the Army, the Department of the Air Force, the Department of the Navy, the Department of the Treasury, or any other department or agency of the government of the United States having authority to issue lawful orders requiring military service. Saturdays, Sundays, and state holidays may not be included in the fifteen-day aggregate unless the particular Saturday, Sunday, or holiday to be included is a regularly scheduled work day for the officer or employee involved. In the event any such person is called upon to serve during an emergency he is entitled to such leave of absence for not exceeding thirty additional days.

As used in this section, "in any one year" means either a calendar year or, in the case of members required to perform active duty for training or other duties within or on a fiscal year basis, the fiscal year of the National Guard or reserve component issuing the orders.

The provisions of this section must be construed liberally to encourage and allow full participation in all aspects of the National Guard and reserve programs of the armed forces of the United States and to allow state officers and employees who are enlisted or commissioned members of the National Guard or reserve components to excel in military and emergency preparedness and service by taking full advantage of all career-enhancing assignments and training opportunities. (emphasis added).

Thus, the fundamental question here is the meaning of the word "day" as used in the phrase "such leave of absence not exceeding thirty additional days" and in the phrase "regularly scheduled work day."

Several principles of statutory construction serve as guides to the interpretation of this statute. First and foremost, is the cardinal rule that legislative intent is paramount. Bankers Trust of SC v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). Words used in a statute are to be given their plain and ordinary meaning unless there is something in the enactment requiring a different interpretation.

Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964). Resort to a subtle or forced construction either to limit or extend the statute's reach is to be discouraged. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). Where the terms of the statutory provision are clear and unambiguous, the courts, as well as this Office, must apply them according to their literal meaning. Finally, Section 8-7-90 commands that its provisions are to be "construed liberally to encourage and allow full participation in all aspects of the National Guard and reserve programs of the armed forces of the United States."

We have previously commented upon the meaning of the term "days" as used in Section 8-7-90. In an opinion issued on March 17, 1997, we addressed the issue of whether the term "day" as used in the statute means "a twenty four hour period or does it mean a common 8 hour workday." In responding to that opinion, we referenced and quoted from an earlier opinion dated July 8, 1996. Therein, we stated that Title 8, Chapter 7 of the Code [of which § 8-7-90 is a part]

"does not attempt to define the phrase, 'regularly scheduled work day' by reference to a specific number of working hours. In other words, the number of regularly scheduled work hours that compose a work day is not a consideration in interpreting [§ 8-7-90]. ... Accordingly, those state, county and municipal government employees whose regularly scheduled work day is larger than eight hours, e.g. twelve, sixteen, or twenty-four hour shifts, are statutorily authorized to take up to fifteen such regularly scheduled work days in any one year for military leave.

Thus, we have read the statute as defining the word "day" in terms of an employee's particular work shift or work day rather than a calendar day.

Indeed, the July 8, 1996 opinion appears to have addressed a situation somewhat similar to that posed here. In that opinion, we were advised that "the Department of Corrections currently schedules its employees in twelve hour shifts, with fourteen days on duty and fourteen days off." One of the questions faced was "whether a twelve hour work day currently scheduled by the Department of Corrections constitute[s] a 'regularly scheduled work day' under the requirements of S.C. Code Ann. § 8-7-90." In response, we concluded that "those state employees who are regularly working twelve hour days are statutorily authorized to take up to fifteen such regularly scheduled work days (i.e. fifteen twelve-hour days) in any one year for military leave." While the opinion does not expressly so state, it is apparent that Corrections' employees were most likely working 12 hour shifts which spanned part of two calendar days.

No South Carolina case has as yet squarely interpreted the term "day" "or "regularly scheduled work day" for purposes of § 8-7-90. But see, Marchant v. Hamilton, 279 S.C. 497, 502, 309 S.E.2d 781 (1983) [§ 8-7-90 requires the State and its political subdivisions to pay their employees "full salary during absences for military training"]. However, a number of cases in other jurisdictions have addressed this question. The authorities have divided – some reaching the same conclusion as our earlier opinions suggested, while a large majority of the other decisions have

interpreted the term “days” to mean calendar days. We will now review those decisions in some detail.

In Kalb v. Village of Oak Lawn, 128 Ill.App.3d 481, 470 N.E.2d 1268 (1984), the trial court had interpreted an ordinance which provided for payment to an employee of accumulated unused sick leave of up to “120 days.” The Court construed the word “day” as meaning “calendar days” as applied to a firefighter. See, Airido v. Village of Westchester, 95 Ill.App.3d 568, 420 N.E.2d 472 (1981). In Airido, the Court rejected an interpretation by the administrative agency of the word “days” to mean “duty days” for a firefighter who worked 24-hour-on, 48-hour-off shifts. Concluding it would constitute an absurdity to construe the statute as meaning “duty days,” thereby resulting in the law applying differently, depending upon the employee’s work schedule, the Court concluded that a definition which equated with “calendar days” was the only logical interpretation. Accordingly, the Village of Oak Lawn Court ruled as follows:

[t]he sick leave ordinance in the instant case provides for compensation for accumulated unused sick leave of “up to but not exceeding 120 days ...” Under our decision in Airido, the word “days” in the ordinance should be given its common meaning with regard to an employee, eight hours. Plaintiff in the instant case performs 24 hours of work in a three day period, as does anyone working on a conventional eight-hour per day schedule. It would be contrary to the rules of statutory construction, and common sense, to compensate plaintiff for more than eight hours for each of his 120 accumulated unused sick days.

470 N.E.2d at 1270.

Likewise, in Benson v. City of Little Falls, 379 N.W.2d 711 (Minn. 1986), the Court concluded that an interpretation of “day” to mean “shift day” for purposes of severance pay would entitle an employee to “triple the severance pay available to other city employees.” Said the Court,

[s]uch a result would be unfair to those who receive severance pay based only on an eight hour work day. It would be patently unfair to allow Benson, who approved Hevrung’s pay of 100 eight-hour days, to construe the same city ordinance in a different way and collect three times the amount Hevrung was paid.

379 N.W.2d at 713.

Koppin v. Strobe, 761 N.E.2d 455 (Ind. 2002) was a case which addressed the question of the definition of “day” as applied to military leave. Before the Court was the issue of whether “a township policy providing military leave of fifteen work days per year and which defines work day as an eight hour period of regularly scheduled duty contravene this section [of state law] when applied to firefighters whose duty is scheduled in twenty four hour shifts?” 761 N.E.2d at 456. Under the relevant state statute, members of the Indiana National Guard and Reserves were entitled

to a total of 15 days military leave in any one calendar year. The Township of Lawrence defined a “work day” as “an eight (8) hour period of regularly scheduled duty.” In addition to constitutional arguments the plaintiffs argued that the Township’s policy violated the Indiana statute. Employees urged to the Court that a “day,” by definition, consisted of a full twenty-four hour period, while the employer contended that “the most reasonable construction of the word ‘day,’ given its statutory context, is an eight (8) hour work day.” 761 N.E.2d at 460.

In resolving the issue, the Court noted that the plain and ordinary meaning of the word “day” was to be applied. Finding that the word “day” had an ambiguous meaning – in some instances, a 24 hour period, and in others “the time established by usage or law for work, school or business” – Koppin refused to accept the employees’ definition outright. Instead, the Legislature’s intent was to be determined. In that regard, the Koppin Court concluded that the Legislature intended to treat all employees the same, opining that

[w]e noted in Downing v. City of Columbus, 505 N.E.2d at 844 that the purpose of Ind. Code § 10-2-4-3 was to provide state public employees with military leave rights comparable to those of federal public employees and to further state and federal policy encouraging participation in military duty. Id. Within that framework, we see no indication of legislative intent to treat differently some public employees. Rather, because the statute makes no distinction between classes or types of public employees, we believe that the legislature intended to treat all public employees equally with regard to military service. Township’s policy of paying for fifteen eight-hour days treats all employees the same, in that it results in paying all public employees, regardless of the length of their shift, 120 hours of military leave. If we were to accept Employees’ position, effectively each employee would be treated differently based on the type of shift he or she works. In this case, Employees would receive up to 360 hours of paid military leave, while a similarly situated firefighter working a more traditional forty hour, Monday through Friday work week would be paid for only 120. This cannot be the result that the legislature intended; to treat public employees differently based upon their unique work schedules. Furthermore, in adopting Ind. Code § 10-2-4-3, our General Assembly attempted to balance the desire to reduce the financial burden on those public employees who are members of the armed forces with the cost of doing so to the various governmental entities. Hence it settled on fifteen days as an appropriate medium between these two important interests.

761 N.E.2d at 461-462. Kalb v. Village of Oak Lawn, supra, Airido v. Village of Westchester, supra and Benson v. City of Little Falls, supra, was referenced by the Court in support of its position. See also Donaldson v. Taylor, 327 Ark. 93, 936 S.W.2d 551 (1997) [holding that the City acted within its authority in redefining a sick day as an eight-hour day, so that a firefighter working a twenty-four hour shift would be charged three sick days for missing an entire shift]; Hammock v. City of Auburn, 676 So.2d 362 (Ala. Civ. App. 1996) [city’s interpretation of leave accrual policy equating one day

to one eight-hour day was reasonable. "In fact, any other interpretation may well be unreasonable from a managerial standpoint."].

Howe v. City of St. Cloud, 515 N.W.2d 77 (1994) is the leading case which construes the word "day" as meaning "shift" when applied to certain unique positions such as that of firefighters. In that case the City of St. Cloud scheduled its firefighters to work nine 24 hour shifts every 27 days. This amounted to 216 hours during that period. St. Cloud firefighters usually worked 12 hours of overtime during the 27 day cycle.

Plaintiffs were members of the Minnesota National Guard who reported for military duty two weeks each year. Previously, the City had a policy of paying military personnel such as the Plaintiff for every 24 hour shift up to 15 such shifts, per year, but beginning in 1991, the city paid Plaintiffs for 8 hours of every 24 hour shift, up to 15, per year. Plaintiffs brought suit for the wages lost "because the city paid them for less than 24 hours for the days they were on military leave." Id. The Minnesota Court of Appeals ruled in favor of the Plaintiffs' positions.

Plaintiffs contended that the "term 'day' should be defined in this case as a 24-hour day because the shift that they miss while on military leave is 24 hours long." 515 N.W.2d at 79. The Court agreed, observing:

St. Cloud schedules its firefighters to work 24-hour days. When the Howes miss a "day" due to military leave, they miss 24 hours of work. If the Howes are paid for less than 24 hours for each "day" missed due to military leave, they are penalized for their military service. To ensure that the Howes can take military leave without loss of pay as required by Minn. Stat. § 192.26, in this case they must be paid for 24 hours for every 24-hour day missed, up to 15 days per year.

515 N.W.2d at 79.

The City argued that it had the inherent managerial authority to define "day" as less than 24 hours for firefighters. However, the Court found that the City had not done so. The City admitted it scheduled its firefighters for 24-hour shifts and that firefighters work nine such 24-hour shifts during the 27 day period. Accordingly, the Court found that the City had defined a "day" for the plaintiffs as 24-hours long. Thus, ruled the Court, "[t]o avoid loss of pay from military service, St. Cloud must pay the Howes for 24 hours for every 24-hour shift that they miss due to military leave." 515 N.W.2d at 80. See also, Wash. Federation of State Employees v. State Personnel Bd., 54 Wash.App. 305, 773 P.2d 421 (1989) [term "days" means "work days" for purpose of military statute.]

The Court in Koppin, discussed earlier, both distinguished and criticized the St. Cloud decision. Koppin first recognized that in St. Cloud "there was no evidence ... that the city had ever defined day for its employees as anything other than a twenty-four hour period." 761 N.E.2d at 463.

Moreover, the Court noted that the St. Cloud Court's reasoning produced a situation where employees were treated differently:

... an employee who works a twenty-four hour shift would be entitled to receive compensation for more hours of paid military leave than an employee who works an eight-hour shift. Additionally, state and local governments may be required to hire additional employees or pay overtime to current employees to cover the shifts of 24/48 employees while they are on military leave. Adopting this interpretation of a statute which applies equally to all on its face to ensure that Employees' military commitments are fully covered by military leave under every conceivable set of circumstances would elevate this interest over the interests of parity among all public employees and the interests of governmental entities in containing costs.

761 N.E.2d at 463.

Attorneys General in other jurisdictions have issued opinions which reach the same conclusion as Koppin and what appears to be the majority of court decisions – that the term “day” refers to a “calendar” or 8 hour day. See, La. Att'y. Gen. Op. No. 92-60, 1992 WL 610906 (June 2, 1992) [no difference in treatment for employee who works 8 hour day and one who works 12 hour shift]; Ark. Op. Att'y. Gen. No. 92-186, 1992 WL 609679 (August 14, 1992) [a day for military leave purposes would be construed to mean an eight hour day].

Conclusion

It is evident from the language of § 8-7-90 itself that “Saturdays, Sundays and state holidays may not be included in the fifteen day aggregate unless the particular Saturday, Sunday, or holiday to be included is a regularly scheduled work day for the officer or employee involved.” This same rule would apply in calculating military leave “during an emergency.”

The ultimate question, therefore is what is meant by the term “regularly scheduled work day” as used in § 8-7-90. This question appears to be answered by prior opinions of this Office – both the July 8, 1996 opinion as well as the March 17, 1997 opinion. In those earlier opinions, we referenced the fact that § 8-7-90 requires a “liberal interpretation” to “encourage and allow full participation in all aspects of the National Guard and reserve programs of the United States” Moreover, we stressed in these opinions that § 8-7-90 does not attempt to define “regularly scheduled work day” by “reference to a specific number of working hours.” Thus, as we have opined previously, “those state, county and municipal government employees whose regularly scheduled work day is larger than eight hours, e.g. twelve, sixteen or twenty-four hour shifts, are statutorily authorized to take up to fifteen such regularly scheduled work days, in any one year for military leave.” (emphasis added). In other words, in its opinions, this Office has concluded that an employee who works a 24-hour shift and then has 48 hours off, will have each 24 hour shift counted

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as one "regularly scheduled work day." Thus, our interpretation has been that the employee is entitled to thirty "workdays" of paid leave.

These opinions remain the opinion of this Office. I must emphasize, however, that no South Carolina court has yet addressed this question in the specific context of the meaning of the term "day" for purposes of § 8-7-90. But see, Corwin v. Comptroller General, 6 S.C. 390 (1875) [word "day" in its common acceptance "means a civil day of twenty-four hours, beginning and ending at midnight."]

Moreover, it appears that the majority of cases in other jurisdictions – particularly the Koppin case – reach the opposite conclusion from our 1996 and 1997 opinions. These decisions stress the need to treat all employees alike and suggest it would constitute a windfall from the taxpayer point of view to pay certain employees three times what others are paid for military leave. A court would have to address these issues.

Accordingly, notwithstanding this Office's earlier opinions, I believe that the public interest requires that the South Carolina courts definitively settle this question. In view of the heightened tensions around the world which will inevitably involve our brave military personnel more and more frequently, the question of how they are to be paid by government entities while on active duty needs resolution. Therefore, I would recommend a declaratory judgment to resolve this question. Governmental entities, military personnel as well as those with unique employment positions – such as law enforcement, firefighters and others – need to have this important matter definitively answered.

Sincerely,

A handwritten signature in black ink, appearing to be "R. D. Cook", written over a horizontal line.

Robert D. Cook
Assistant Deputy Attorney General

RDC/an