Military leave, calendar or working days

Number: INFORMAL

Date: February 11, 2009

Mr. Anthony Garganese
Winter Springs City Attorney
Post Office Box 2873
Orlando, Florida 32802-2873

Dear Mr. Garganese:

You ask on behalf of the City of Winter Springs whether service members taking a leave of absence from employment with the city due to active military service are entitled under section 115.09, Florida Statutes, to full pay for the first 30 calendar days or the first 30 working days of any such leave.

Chapter 115, Florida Statutes, authorizes state and local governments to provide leaves of absence for officers and employees when they are engaged in military service. Section 115.09, Florida Statutes, controls leaves of absence for active military service by all officers of the state and its political subdivisions. The statute provides:

"All officials of the state, the several counties of the state, and the municipalities or political subdivisions of the state, including district school and community college officers, which officials are also servicemembers in the National Guard or a reserve component of the Armed Forces of the United States, shall be granted leave of absence from their respective offices and duties to perform active military service, the *first 30 days of any such leave of absence* to be with full pay." (e.s.)

For purposes of this Chapter, "active military service" means

"active duty in the Florida defense force or federal service in training or on active duty with any branch of the Armed Forces or Reservists of the Armed Forces, the Florida National Guard, the Coast Guard of the United States, and service of all officers of the United States Public Health Service detailed by proper authority for duty with the Armed Forces, and shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause."[1]

According to your letter a question has been raised as to whether the above language requires the city to provide a city official with the first 30 working days of leave or whether the statute refers to calendar days. You state that the city has historically interpreted the statute to refer to calendar days.

The statute was originally adopted in 1941.[2] While the statute has been subsequently amended, the language "the first 30 days of any leave of absence to be with full pay" in the

statute has remained substantially unchanged.

You note section 115.07, Florida Statutes, which provides that leaves of absence for state and local officers or employees who are engaged in military training and states that "[l]eaves of absence granted as a matter of legal right under the provisions of this section shall not exceed 17 *working* days in any one annual period."[3] (e.s.) Prior to 1985, however, section 115.07 limited paid leave to "17 days in any one annual period."[4] The statute was amended in 1985 to specify "working days."[5] Since the Legislature amended section 115.07 to specify "working days," but did not similarly amend section 115.09, Florida Statutes, you ask whether section 115.09 refers to calendar days.

In 1951, this office considered whether the reference in sections 115.07 and 115.09, Florida Statutes (1951), to "days" referred to work-days or calendar days.[6] As stated in that opinion:

"(3) The seventeen days' leave of absence granted by ss. 115.07 and 250.48 are calendar days and not work-days. This apparently was the legislative intent for this reason: in each of such sections, the 17-day leave is mandatorially granted without loss of *pay, time or efficiency* rating. Time of service with the state is computed generally on a calendar month basis, not on a work-day basis; thus, leave without loss of *time* would appear necessarily to mean time in State service, which includes Sundays and other holidays in any given period. If the 17-day leave is figured on a work-day basis, there results a time of service with the State inconsistent with the recognized custom and rule as to computing such service.

(4) Without further comment, this question [as to whether the leave authorized in s. 115.09 consists only of actual working days or all calendar days falling with the calendar period] is answered by stating that the 30-day period under s. 115.09 consists of the calendar days in such period and not work-days." (e.s.)

Subsequently, in Attorney General Opinion 60-103, then Attorney General Richard Ervin, citing to the 1951 opinion, reiterated that the term "days" in section 115.07, Florida Statutes, referred to calendar days and not to workdays.

As noted above, section 115.07, Florida Statutes, was amended in 1985 to refer to "working days." A review of the legislative history indicates that such action may have been prompted by a final order of the Department of Administration in which the department rejected the hearing officer's conclusion of law that the days of leave referenced in section 115.07 did not include those days for which an employee was not required, in other circumstances, to take leave such as Saturdays, Sundays, or other normal non-workdays.[7] The hearing officer noted that the term "day" referred back to the words "leave of absence from their respective duties, without loss of pay, time or efficiency rating." Thus, the hearing officer concluded:

"The Legislature has clearly granted State employees a certain number of days 'leave.' To interpret the word 'leave' to mean time not ordinarily spent performing state duties would be to violate the meaning of the plain words used in the statute."

In rejecting the hearing officer's conclusion, the department relied on the 1960 Attorney General Opinion and a rule defining "day" as calendar day.[8] While section 115.07, Florida Statutes, was

amended by the Legislature to refer to "working" days, the Legislature did not similarly amend section 115.09, Florida Statutes. This office has been advised that the state has continued to interpret the term "day" as used in section 115.09 to refer to calendar day.[9]

This office recognizes that the language of section 115.09, Florida Statutes, in referring to the "first 30 days of *any such leave of absence,*" might well be read as granting officers leave with pay for the first 30 days for which they would ordinarily be performing their duties for the state or local government, rather than leave with pay for 30 days including days on which they were not required to work. This office would note that the federal court in *Butterbaugh v. Department of Justice*,[10] rejected the government's argument that the term "days" in 5 U.S.C 6323(a)(1) relating to military leave referred to working days, not calendar days, even though "federal agencies had done for decades, had included days on which employees were not scheduled to work (*e.g.*, weekends and holidays) when calculating how much military leave employees took." The court noted that Congress had amended the act in 2000 and the Office of Personnel Management determined that the law could no longer be interpreted to charge non-workdays against federal employees' military leave. Prior to 2000, federal employees were charged non-workdays against their military leave to attend military training sessions for the National Guard. The court held that even before the 2000 amendment, federal agencies were not entitled to charge non workdays against their military leave.

In light of the above history regarding the interpretation of section 115.09, Florida Statutes, as discussed above, however, this office cannot state that the city's interpretation is in error. The Legislature, however, may wish to review this issue and clarify its intent on this matter.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tsh

---

[1] Section 115.08(1), Fla. Stat.

[2] Section 1, Ch. 20718 and s. 1, Ch. 20863, 1941 Laws of Fla. Section 1, Ch. 69-300, Laws of Fla., amended the statutory language to conform certain terminology in the statutes to the 1968 changes in the Florida Constitution relating to schools; *e.g.*, district was substituted for county. As amended, the statute provided:

"All state and county officials in the state, and all others who hold office under the government of the state, and who are officers or enlisted men either in the Florida Defense Force, the National Guard, the Naval Militia, Marine Corps, Unorganized Militia, United States Army Reserve, United States Naval Reserve, United States Marine Corps Reserve, United States Coast Guard Reserve, or officers or enlisted men in any other class of the militia, or district school officers, and all municipal officials in the state, may, subject to the provisions and conditions hereafter set forth, be granted leave of absence from their respective offices and duties to perform active

military service, the first 30 days of any leave of absence to be with full pay and the remainder without pay."

Section 1, Ch. 91-3, Laws of Fla., reworded the statute in a manner substantially similar to the statute's present language except that section 8, Ch. 03-72, Laws of Fla., substituted "servicemembers" for "officers or enlisted personnel" and "shall" for "may, subject to the provisions and conditions hereafter set forth."

[3] Section 115.07(2), Fla. Stat.

[4] Section 1, Ch. 85-279, Laws of Fla.

[5] Section 115.07, Fla. Stat., was originally enacted in 1937. *See* s. 1, ch. 17975, 1937 Laws of Fla.; CGL 1940 Supp. 470(1); s. 1, ch. 26852, 1951 Laws of Fla.; s. 10, ch. 83-227, Laws of Fla.; ss. 1, 2, ch. 85-279, Laws of Fla.

[6] Ops. Att'y Gen. Fla. 051-273 and 050-478, August 15, 1951, Biennial Report of the Attorney General, 1951-1952, p. 212.

[7] *See* Final Order, *Jacobs v. Department of Administration*, Case No. 84-2073 (January 23, 1985). A copy of the final order was contained in the legislative history records on House Bill 1221, 1985 legislative session.

[8] The rule 22A-8.13(5), Fla. Admin. C., no longer exists. The rule (of the Department of Administration) which was transferred to Rule 60K-5.013 (Department of Management Services) which was repealed on October 24, 1994.

[9] *See* Department of Management Services, Division of Human Resource Management, Program Guidelines, Active Duty Military Leave of Absence ("Military Leave"), V.B., stating in part:

"5. If an employee is called to active duty and wants to work intermittently for the State withinthe first 30 calendar days, is the 30 calendar days extended based on hours worked?

No. Based on current rule language, the employee would receive full pay and benefits for the first thirty calendar days, regardless of the hours worked." (emphasis in original)

And see State of Florida, Department of Environmental Protection, Administrative Directive, DEP 425, effective: March 31, 2005 at p. 39:

"19b. Upon presentation of a copy of the official orders or appropriate military certification, the first 30 calendar days of such leave will be with full pay and benefits and the remainder approved military leave without pay. . . ."

See also Personnel Action Requests (PAR), Actions and Reasons (available at: /files/pdf/page/6265C5C5407AA6738525755A0065981F/ACTIONS+AND+REASONS+MATRIX.pdf), stating:

"Active Military Paid Military Leave for the first 30 calendar days shall be approved for any employee who is drafted or who volunteers for active military service, pursuant to S. 115.08, 115.09, or 115.14, F.S."

Cf. Proclamation by Governor Jeb Bush on Military Service Compensation Law, dated September 12, 2003:

"WHEREAS, the Florida Legislature has provided in sections 115.09 and 115.14, Florida Statutes, that all officials and employees of the state, counties and municipalities or political subdivisions of the state may receive full civilian pay in addition to their military pay for the first 30 days of their active duty, and may thereafter receive the pay necessary to raise their military pay to the level of their civilian pay and continue their existing benefits."

[10] 336 F.3d 1332, 1333-34 (Fed. Cir. 2003).