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July 16, 1991

Mr. Michael T. Smith, Director
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Charleston, West Virginia 25305

Dear Mr. Smith:

You have requested an opinion of the Attorney General regarding W. Va. Code § 15-1F-1, as amended by Enrolled Committee Substitute for House Bill 2834, effective from passage March 8, 1991, concerning military leave benefits for state classified employees.

In your letter, you first questioned the effective date of this legislation and its relationship to reservists activated during the Persian Gulf Crisis. Specifically, you asked whether the amendment should be considered retroactive to August 2, 1990, the day President Bush called up the National Guard for active duty. Your second question involves the determination of what benefits individuals are entitled to receive under the amended statute, and how those benefits are to be determined.

The statute, as amended, provides:

> All officers and employees of the state, or subdivisions or municipalities thereof, who shall be members of the national guard or any military reserve unit of the United States armed services, shall be entitled to leave of absence from their respective offices or employment without loss of pay, status or efficiency rating, on the days during which they shall be engaged in drills, parades or other duty, during business hours ordered by proper authority, or for field training or active service of the state for a maximum period of thirty days in any one calendar year. The term "without loss of pay" means that the officer or employee shall continue to receive his normal salary or compensation, notwithstanding the fact that such officer or employee may have received other compensation from federal or state sources during the same period.

> Benefits of this section shall accrue to individuals ordered or called to active duty by the president for twenty-four working days after they report for active service. [Underscoring indicates new language].

W. Va. Code § 15-1F-1 (Supp. 1991).

I.

The first issue to be resolved is whether or not this statute may be given or may be interpreted as having been given retroactive effect to August 2, 1990, the beginning of Operation Desert Shield. Because the statute does not specifically contain a provision making the amendment retroactive in its application, we conclude that it must be applied prospectively. This conclusion is mandated by state statute and case law.

The general rules for construction of statutes are found in W. Va. Code § 2-2-10 (1990). Subsection 2-2-10(bb) states that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." W. Va. Code § 15-1F-1, as amended, contains no express provision regarding retroactivity. Thus, the statutory rules of construction would dictate that the law is not retroactive.

Moreover, the case law would require a similar conclusion. In Syllabus Point 3 of Sizemore v. State Workman's Compensation Commissioner, 159 W. Va. 100, 219 S.E.2d 912 (1975), the West Virginia Supreme Court of Appeals held:

> A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment: only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application. [Emphasis added].

In Woodring v. Whyte, 161 W. Va. 262, 242 S.E.2d 238 (1976), several inmates at the Huttonsville Correctional Center filed suit against the warden of the facility alleging that he had failed to implement a statute providing for commutations of their sentences in return for good behavior. In refusing to apply good time credit acquired prior to the effective date of the statute, the West Virginia Supreme Court stated, "The general rule is that a statute is presumed to apply prospectively only. Retroactive application

of a statute is warranted only where the legislative intent to do so is clearly indicated." Id. at 272, 242 S.E.2d at 244.

In Loveless v. State Workman's Compensation Commissioner, 155 W. Va. 264, 184 S.E.2d 127 (1971), a claimant appealed a decision of the Workman's Compensation Appeal Board denying his petition to reopen a barred claim under an amended statute of limitations. In rejecting his appeal, the Supreme Court noted, "The general rule is that statutes are construed to operate in the future only and are not given retroactive effect unless the legislature clearly expresses its intention to make them retroactive." Id. at 266, 184 S.E.2d at 129.

In State v. Bannister, 162 W. Va. 447, 250 S.E.2d 53 (1978) the West Virginia Supreme Court reiterated its position by refusing to apply a 1978 amendment of a juvenile law to an offense that had occurred prior to the enactment of the statute. The Court said:

> This ruling is consistent with the general rule in this jurisdiction that there is a presumption that a statute is intended to operate prospectively, unless it appears, by clear, strong and imperative words or by necessary implication that the Legislature intended to give the statute retroactive force and effect.

Id. at 453, 250 S.E.2d at 56. See also State v. Highland, ___ W. Va. ___, 327 S.E.2d 703 (1985); State ex rel. Glauser v. Board of Education, ___ W. Va. ___, 318 S.E.2d 424 (1983); Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980).

In the language of W. Va. Code § 15-1F-1, as amended, there appear to be no "clear, strong, and impartial" words that would give this statute retroactive force and effect. Therefore, in accordance with the statutory presumption, and absent any other indication of legislative intent, it cannot be looked at in a retrospective fashion.

An indication of legislative intent may be found in H.B. 2834 itself, which also amended and enacted several other statutes relating to the military in addition to this one, W. Va. Code § 15-1F-1. One of the other statutes addressed by the same bill was W. Va. Code § 11-21-61, granting an extension of certain personal income tax deadlines due to Desert Shield service. Although the Legislature made the entire bill effective from passage on March 8, 1991, in subsection (f) of § 11-21-61 it was expressly provided: "*Effective Date.* -- The provisions of this section shall be retroactive to the second day of August, one thousand nine hundred ninety." Thus the Legislature made one

section of this bill retroactive, while leaving the others with an effective date of March 8, 1991. The absence of similar language in the amendment to the statute in question, § 15-1F-1, leads us to the inescapable conclusion that the Legislature did not intend it to be retroactive in its application.

We are therefore of the opinion that the amendments to W. Va. Code § 15-1F-1 may only be read prospectively from its effective date of March 8, 1991, and that the additional benefits accrue only to individuals who are on active duty, pursuant to a call by the President, on or after that date.

II.

The second issue that requires our examination is the means of determining the number of days of paid leave that reservists and activated reservists are entitled to receive as benefits under this statute. Although you have posed several hypothetical questions regarding the application of this statute under differing factual circumstances, we decline to respond to each specifically at this time. Instead, we shall address the general rule for determining benefits, and will be available to answer specific questions later on a case-by-case basis. The statute, as amended, appears to us to create two categories of benefits:

(1) The first category, which existed prior to the 1991 amendment, is for "non-active duty" reservists, who are given thirty working days[1] of paid leave of absence per calendar year[2] for "drills, parades or other duty, during business hours ordered by proper authority, or for field training or active service of the

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[1] Our statement that these are "working" days, as opposed to "calendar" days, is based upon the decision of the West Virginia Education and State Employees Grievance Board in Oliverio v. West Virginia Department of Human Services and West Virginia Department of Personnel, Docket No. 89-DHS-154 (April 26, 1990). In that case, the Grievance Board held that W. Va. Code § 15-1F-1 "specifically refers to leave 'during business hours' which is but another way of phrasing 'workday.' The subsequent reference in that provision to calendar year does not explicitly or implicitly control the interpretation of the term 'days.'" Id. at p. 6.

[2] The period January 1 through December 31, as opposed to a "fiscal year," which is the period July 1 through June 30. See W.Va. Code § 2-2-4 (1990).

state." Prior to the 1991 amendments, the last sentence of W.Va. Code § 15-1F-1 provided: "Benefits of this section shall not accrue to individuals ordered or called to active duty by the president."

(2) The second category of benefits is provided by the amended portion of the statute, which gives "activated" reservists twenty-four working days of leave with pay.[3] This portion only benefits a reservist when he or she is "activated" -- i.e., "ordered or called to active duty" by the President of the United States. That is the prerequisite for one to take advantage of this second category of benefits.

For example, if in any calendar year a non-active reservist takes fifteen of his/her thirty working days for drills, parades, or other non-active duty and is then activated, he/she is automatically entitled to an additional twenty-four working days for such active service. If the activated reservist is not activated for a full twenty-four days, he/she then receives his/her pro-rata share of the twenty-four days. If the "activated" reservist is returned to non-active status in the same calendar year, he/she is then still entitled to the remaining fifteen of his thirty working days of paid leave for non-active duty should he/she be engaged in drills, parades or other duties during business hours.

We are therefore of the opinion that reservists who were activated prior to March 8, 1991, and were still on active duty on and after that date, are entitled to receive the additional twenty-four day leave of absence or their pro-rata share thereof (if discharged before a full twenty-four days has expired), calculated from March 8, 1991 forward. Under the reasoning of the foregoing authorities, activated reservists are not entitled to additional leave with pay for active service prior to March 8, 1991.

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[3] "The act allows a twenty-four working day leave of absence for national guardsman [sic] called to active duty." House Finance Committee Summary, Com. Sub. for H.B. 2834, Regular Session, 1991. "The purpose of this bill is to maintain the salary and benefits of state employee members of the national guard and reserves for a period of 24 days after reporting for active duty." Explanatory Note to H.B. 2229, introduced January 21, 1991, amending W. Va. Code § 15-1F-1. These amendments were later incorporated into Com. Sub. for H.B. 2834.

SUMMARY

West Virginia Code § 15-1F-1, as amended by House Bill 2834, may only be applied prospectively from its effective date of March 8, 1991. The statute, as amended, creates two categories of benefits for military reservists. The first category gives non-active reservists thirty working days of paid leave for drills, parades, or other non-active duty during a calendar year. However, if called or ordered to active duty by the President of the United States, the second category entitles such "activated" reservists to an additional twenty-four working days of leave with pay.

Very truly yours,

MARIO J. PALUMBO
ATTORNEY GENERAL

By Jan L. Fox
JAN L. FOX
DEPUTY ATTORNEY GENERAL

JLF/jsm

cc: The Honorable Gaston Caperton
Governor, State of West Virginia

The Honorable Keith Burdette
President, West Virginia Senate

The Honorable Robert "Chuck" Chambers
Speaker, West Virginia House of Delegates