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OPINION	:	No. 80-1008
	:	
of	:	<u>DECEMBER 30, 1980</u>
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The Honorable Frank J. Schober, Jr., Commanding General, Military Department, has requested an opinion on the following question:

Is a public employee who is a member of the National Guard entitled to a temporary military leave of absence while engaged in military duty ordered for purposes of active military training, if the employee has initially volunteered to be placed on such orders?

CONCLUSION

A public employee who is a member of the National Guard is entitled to a temporary military leave of absence while engaged in military duty ordered for purposes of active military training, even though the employee has initially volunteered to be placed on such orders.

ANALYSIS

We are informed that a county deputy sheriff who is a member of the Army National Guard recently applied for an eight day course of study at the Advanced Noncommissioned Officer's Academy in San Luis Obispo conducted under the auspices of the Secretary of the Army. The course was not required for the member's continued status in the reserve but was necessary for a promotion. The application was approved, and the member was ordered to active duty for training. Prior to his departure for the training, the member requested paid military leave from the county; such leave was refused upon the advice of the county counsel.

The question presented for analysis is whether a public employee is entitled to paid military leave under the above described circumstances. We conclude that he is.

The statute governing our discussion is Military & Veterans Code section 395.¹ It has been amended on several occasions and has been the subject of much analysis by the courts and this office over the years. Currently, the statute provides:

“Any public employee who is a member of the reserve corps of the armed forces of the United States or of the National Guard or the Naval Militia shall be entitled to a temporary military leave of absence while engaged in military duty ordered for purposes of active military training, encampment, naval cruises, special exercises or like activity as such member, providing that the period of ordered duty does not exceed 180 calendar days, including time involved in going to and returning from such duty, and provided that military leave of absence is not authorized for periods of inactive military duty.

“He shall have an absolute right to be restored to his former office or position and status formerly had by him in the same locality and in the same office, board, commission, agency, or institution of the public agency upon the termination of such temporary military duty. If the office or position has been abolished or otherwise has ceased to exist during his absence, he shall be reinstated to a position of like seniority, status, and pay if such position exists, or if no such position exists he shall have the same rights and privileges that he would have had if he occupied the position when it ceased to exist and had not taken temporary military leave of absence.

¹ All section references hereafter are to the Military & Veterans Code.

“Any public employee who has been in the service of the public agency from which the leave is taken for a period of not less than one year immediately prior to the date upon which his temporary military leave of absence begins, shall receive the same vacation, sick leave, and holiday privileges and the same rights and privileges to promotion, continuance in office, employment, reappointment to office, or reemployment that he would have enjoyed had he not been absent therefrom, excepting that an uncompleted probationary period if any in the public agency must be completed upon reinstatement as provided by law or rule of the agency. For the purposes of this section, in determining the one year of service in a public agency all service of said public employee in recognized military service shall be counted as public agency service.

“If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4 of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.” (Emphasis added.)

One significant consequence of whether a public employee may take a temporary military leave of absence” under section 395 is provided in section 395.01 as follows:

“(a) *Any public employee who is on temporary military leave of absence* and who has been in the service of the public agency from which the leave is taken for a period of not less than one year immediately prior to the day on which the absence begins *shall be entitled to receive his salary or compensation as such public employee for the first 30 calendar days* of any such absence. Pay for such purposes shall not exceed 30 days in any one fiscal year. For the purposes of this section, in determining the one year of public agency service, all service of said public employee in the recognized military service shall be counted as public agency service.

“(b) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4, of Title 1 of the Government Code, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of

understanding require the expenditure of funds the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.” (Emphasis added.)

Accordingly, “military duty ordered for purposes of active military training” (§ 395) results in paid military leave. (See 63 Ops. Cal. Atty. Gen. 483, 485–486 (1980).) The sole issue we have been asked to decide is whether the word “ordered” includes the situation where the order is based upon the public employee’s request for military duty. Does his initial voluntary act preclude his entitlement to the specified benefits under the two statutes?

In interpreting the pertinent language of section 395, we are guided by two well established principles of statutory construction. As was stated by the Supreme Court in *California Mfgs. Assn. v. Public Utilities Com.* (1979) 24 Cal. 3d 836, 844, “Where a statute is theoretically capable of more than one construction we choose that which most comports with the intent of the Legislature. [Citations.]” In determining legislative intent, we look to the words used in the enactment, giving them their ordinary and usual import. (*Moyer v. Workmen’s Comp. Appeals Board* (1973) 10 Cal. 3d 222, 230.)

The main purpose of sections 395 and 395.01 “is to provide for national defense and civil calamity [citation] by encouraging public employees to join the military reserve organizations so as to be ready for call in times of emergency. [Citations.]” (*Bowers v. City of San Buenaventura* (1977) 75 Cal. App. 3d 65, 70; see also 17 Ops. Cal. Atty. Gen. 110, 111 (1951).) In furtherance of this purpose, the statutes are to be liberally construed. (See *Clopton v. Scharrenberg* (1951) 106 Cal. App. 2d 430, 434.) Hence, an interpretation of sections 395 and 395.01 that discourages participation in the National Guard program is not to be favored. Clearly, paid military leave is an incentive for public employees to serve in the reserve organizations, and adopting an interpretation of the word “ordered” so as to allow such leave manifestly effectuates the Legislature’s intent.

Indeed, since the purpose of section 395 is to encourage public employees to volunteer for military reserve service, the Legislature’s intent in enacting the statute would be totally frustrated if we were to conclude that an initial voluntary act prevents its application. Accordingly, we cannot interpret section 395 in a manner that would require all orders to be based on an unwilling state of mind by those subject to the orders. (See *Kirkwood v. Bank of America* (1954) 43 Cal. 2d 333, 341.)

Moreover, we do not believe that the ordinary and usual meaning of the word “ordered” precludes its application where the order is based upon a prior voluntary request of the person subject to the order. In common usage, the verb “order” includes the definition: “to command to go or come to a specified place (was ordered to a distant post)

(ordered home for misbehavior).” (Webster’s New Internat. Dict. (3d ed. 1966) p. 1588.) In military terms it often denotes having official papers authorizing and directing the performance of some duty or activity. In either case, an initial voluntary request does not change the essential command element of the order once it is given.

We have previously so concluded on two prior occasions involving the application of section 395. In 14 Ops. Cal. Atty. Gen. 202, 203 (1949), we concluded that an employee was entitled to compensation from his civil position regardless of the fact that he had requested or volunteered for the ordered military duty; we stated in part, “The laudable purpose of section 395 is to encourage State and county personnel to maintain and improve their military training and to be ready for service in times of emergency. That employees will not have to use vacation time while in training is a definite encouragement towards the achievement of the State’s objective.” In Ops. Cal. Atty. Gen. 2–NS2124 (1939), we concluded that “it makes no difference whether the employee has requested or consented to such ordered military or naval duty.”

We reaffirm the conclusions drawn in our prior opinions and conclude that a public employee who is a member of the National Guard is entitled to a temporary leave of absence while engaged in military duty ordered for purposes of active military training, even though the employee has initially volunteered to be placed on such orders.
