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OPINION	:	No. 80-303
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of	:	<u>June 9, 1980</u>
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SUBJECT: SCHEDULED RESERVE DRILL PERIOD—A member of the California National Guard who is required to attend scheduled reserve drill periods during a time when he or she ordinarily would be employed in a regular work shift at a non-military job is entitled to an unpaid leave of absence from that place of employment to attend such drill.

The Honorable Frank J. Schober, Jr., Commanding General, Military Department, has requested an opinion on the following question:

Is a member of the California National Guard who is required to attend scheduled reserve drill periods during a time when he or she ordinarily would be employed in a regular work shift at a non-military job, entitled to a paid or unpaid leave of absence from that place of employment to attend such drill?

CONCLUSION

A member of the California National Guard who is required to attend scheduled reserve drill periods during a time when he or she ordinarily would be employed in a regular work shift at a non-military job is entitled to an unpaid leave of absence from that place of employment to attend such drill.

ANALYSIS

We are asked whether, when an employee is scheduled to attend weekend National Guard drills, the employee is entitled as a matter of right to be excused from work if the time of drill coincides with a regularly scheduled work shift of the employee. Apparently some public employers have required the employee to use either his or her own free time, compensating overtime, or vacation to attend such drills. Our review of the law leads us to conclude that employers, public and private, are obligated to excuse members of the National Guard to attend such drills with unpaid leaves of absence, and may not require the employee to use his or her own free time, compensating overtime or vacation time. The provisions of Military and Veterans Code section 395 and Government Code section 19774, relating to public and state employees, are contrary to this conclusion, but are superseded by the applicable federal law.

1. California Law

A. Private Employers

Military and Veterans Code section 394.5¹ provides:

“Any employee of any corporation, company, or firm, or other person, 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 leave of absence without pay while engaged in military duty ordered for purposes of military training, drills, encampment, naval cruises, special exercises or like activity as such member, providing that the period of ordered duty does not exceed 17 calendar days annually including time involved in going to and returning from such duty.”

In addition, section 394 provides in part:

“

¹ All unidentified code references are to the Military and Veterans Code.

“No employer or officer or agent of any corporation, company, or firm, or other person shall discharge any person from employment because of the performance of any ordered military duty or training or by reason of being an officer, warrant officer or enlisted man of the military or naval forces of this State, or hinder or prevent him from performing any military service or from attending any military encampment or *place of drill* or instruction, he may be called upon to perform or attend by proper authority, or prejudice or harm him in any manner in his employment or position or status by reason of his performance of military service or duty or attendance at military encampments or places of drill or instruction or dissuade, prevent or stop any person from enlistment or accepting a warrant or commission in the National Guard or Naval Militia by threat of or injury to him in respect to his employment, position, status, trade, or business in case of his enlistment or acceptance of a warrant or commission.

“ . . . ” (Emphasis added.)

The language of these sections clearly requires a private employer to grant an employee who is a member of the National Guard a leave of absence without pay to attend, among other events, military training and drills.² The non-discrimination clause of section 394 protects the employer from harming the employee in any manner in his employment or position or status by reason of his . . . attendance at military places of drill . . . ” Read together, these sections prohibit requiring the employee to take overtime or vacation time for National Guard drills.

B. Public Employers

California has developed a statutory system of providing public employees with both paid and unpaid leaves of absence for military service. (§ 395 *et seq.*) A change in 1970 in this system has led to the present opinion request.

Prior to 1970, section 389(a) defined “temporary military leave of absence” to include a leave of absence from public employment to engage in ordered military duty for purposes, among others, of drills, and section 395 granted any public employee a temporary military leave of absence not to

² The language of section 394.5 limits the obligation of the employer to a maximum of 17 days leave of absence per year. Although not directly an issue in this opinion, we note, as we will discuss below, that this limitation may well be superseded by the provisions of federal law. (See also *Peel v. Florida Dept. of Transportation* (N.D. Fla. 1977) 443 F. Supp. 451, 459–460.)

exceed 180 calendar days of military training, including drills.³ Section 395.01 *et seq.* requires the public agency, under specified circumstances, to pay the public employee up to 30 days of compensation or salary for such temporary military leave of absence. (Emphasis added.)

In 1970, this office in 53 Ops. Cal. Atty. Gen. 84 (1970) concluded that pursuant to these sections, a city fireman who was a member of the California National Guard and who was ordered to attend weekend training sessions at the same time he was required to work as a fireman was entitled to temporary military leave of absence with compensation. Apparently as a result of that opinion, the Legislature in 1970 amended section 395 (1) to require *active* military duty to qualify for temporary military leave of absence, (2) to delete “drills,” and (3) to provide specifically that military leave of absence is not authorized for periods of “inactive military duty.” (Stats. 1970, ch. 467, § 1.)⁴ In 1973, the Legislature also amended the definition of “temporary military leave of absence” to require active military

³ Section 389(a) then read:

“(a) As used in this chapter, ‘temporary military leave of absence’ means a leave of absence from public employment to engage in ordered military duty for a period which by the order is not to exceed 180 calendar days including travel time for purposes of military training, drills, encampment, naval cruises, special exercises or like activity as a member of the reserve corps or force of the armed forces of the United States, or the National Guard, or the Naval Militia.” (Emphasis added.)

The first paragraph of section 395 then read:

“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 military training, drills, 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.” (Stats. 1951, ch. 1561, 1, p. 3555.) (Emphasis added.)

⁴ After the 1970 amendment, the first paragraph of section 395 read, as it does now:

“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.” (Emphasis added.)

duty and to delete “drills.”⁵ (Stats. 1973, ch. 174, § 1.) In addition, the Legislature in 1971 added a chapter to the Civil Service Act relating to military service for state employees (Gov. Code, § 19770 *et seq.*) including a military leave of absence system. (Stats. 1971, ch. 446; Gov. Code, §§ 19771–19774.) Government Code section 19774 provides:

“Employee members of reserve military units and the National Guard required to attend scheduled reserve drill periods shall use their own free time, overtime, or vacation time to fulfill such reserve obligations. If such reserve obligations fall on the employee’s regular work shift, the appointing power shall make every attempt to change the employee’s schedule to avoid the necessity of using vacation time or overtime, provided five working days notice is received from the employee.”

Thus, public employees, as far as California statutes are concerned, are required to be given military leave of absence for active military duty, but not for inactive military duty, which includes weekend drills. State employees also specifically may not be given leaves of absence for such drills but must use their own free time, overtime or vacation time. In *Bowers v. City of San Buenaventura* (1977) 75 Cal. App. 3d 65, 73–75, the court of appeal recognized the legislative changes in 1970 and following, and noted the distinction between weekend drills, when no paid military leave is involved, and summer camp which is considered active military training. (*Id.* at 75.) The court also noted the provisions of Government Code section 19774 set out above. The court did not, however, examine the provisions of applicable federal law. “A case is not authority for propositions neither considered nor discussed in the opinion.” *In re Muszalski* (1975) 52 Cal. App. 3d 500, 504.) We now turn to the federal law.

2. Federal Law

The federal statutes on leaves of absence from military duty provide a classic case of the involvement of the Supremacy Clause of the United States Constitution. Article VI, section 2 of the Constitution provides:

⁵ Section 389(a) now reads:

“As used in this chapter, ‘temporary military leave of absence’ means a leave of absence from public employment to engage in ordered military duty for a period which by the order is not to exceed ISO calendar days including travel time for purposes of active military training, drills, encampment, naval cruises, special exercises or like activity as a member of the reserve corps or force of the armed forces of the United States, or the National Guard, or the Naval Militia.”

“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under’ the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby anything in the Constitution or laws of any State to the contrary notwithstanding.”

(See also, Cal. Const., art. III, § 1.) State laws that conflict with federal statutes enacted pursuant to constitutional authority must yield under the Supremacy Clause. (*Hamm v. Rock Hill* (1964) 379 U.S. 306, 311–312; *California Comm’n v. United States* (1958) 355 U.S. ¶ 34, 544; *Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal. 2d 274, 282.)

Article I, section 8 of the Constitution grants Congress certain powers in regard to the military, generally referred to as the war powers (see *Peel v. Florida Dept. of Transportation, supra*), including clause 16:

“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 States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.”

The National Guard, of course, is the modern militia. (§ 120; *Maryland v. United States* (1965) 381 U.S. 41, 46.) Clause 18 of article I, section 8, grants Congress the power to make all laws necessary and proper to carry out the foregoing powers. In these war powers, the authority of the federal government is broad, plenary, and exclusive. (*United States v. O’Brien* (1968) 391 U.S. 367, 377; *Tarble’s Case* (1871) 80 U.S. 397, 408.)

Our tracing of the laws enacted by Congress with respect of the rights of National Guard⁶ members leads us to conclude that public and private employers must grant at least unpaid leaves of absence for military drills, and thus, under the Supremacy Clause, those statutes control over any California statutes which are inconsistent with the acts of

⁶ We have assumed in this opinion that the question refers to members of the National Guard having federal recognition (see 32 U.S.C. §§ 301, 305–310), and thus an employee in question would be a member of the Army or Air National Guard of the United States. (32 U.S.C. § 101 (4)-(7).) Consequently, such employee would be part of the “reserve component” of the “Armed Forces” (38 U.S.C. § 101(27), (1)) for the purposes of Title 38, United States Code. See also footnote 8, *infra*.

More particularly, our discussion in this opinion deals only with that component of the California State Militia known as the National Guard. (§ 120.) We express no opinion as to whether the federal statutes to be discussed herein apply to any of the other militia components.

Congress.

Chapter 43 of Title 38 United States Code, deals with veteran's reemployment rights. Section 2024 of that title contains lengthy provisions relating to the rights of reserve members of the armed forces, and subdivision (d) of that section provides in pertinent part that any employee of a State, a political subdivision or private entity:

“ . . . shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes”⁷

⁷ 38 United States Code section 2024(d) provides:

“(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is hospitalized incident to active duty for training or inactive duty training, such employee shall be required to report for work at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty training, whichever is earlier. If an employee covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or such employer's successor in

This section clearly requires a covered employer to grant an employee, upon request, a leave of absence if the employee is ordered to active or inactive training in the Armed Forces,⁸ and the employer may not compel the employee to take vacation, overtime, or use free time, since such would obviously not allow the employee to return to that employment with the same seniority, status, pay and vacation such employee would have had had there been no training. In short, the employer must give unpaid leaves of absence for military reserve training, active or inactive.

Section 2024(d) applies to the National Guard, for both active and inactive duty training, and inactive duty quite clearly includes weekend drills of the type under consideration here. 38 United States Code section 2024(f) provides:

“(f) For the purposes of subsections (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under section 316, 503, 504, or 505 of title 32, is considered active duty for training; and *for the purpose of subsection (d) of this section, inactive duty training performed by that member under section 502 of title 32 or section 206, 301, 309, 402, or 1002 of title 37, is considered inactive duty*

interest, such employee shall be offered employment and, if such person so requests, be employed by that employer or such employer’s successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee’s case.”

⁸ 38 United States Code section 2024(d) refers to the “Armed Forces of the United States.” Section 101 of Title 38 of the United States Code sets forth certain definitions for the purposes of Title 38, including:

“(10) The term ‘Armed Forces’ means the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, including the reserve components thereof.” and

“(27) The term ‘reserve component’ means, with respect to the Armed Forces

(A) the Army Reserve;

(B) the Naval Reserve;

(C) the Marine Corps Reserve;

(D) the Air Force Reserve;

(E) the Coast Guard Reserve;

(F) the National Guard of the United States; and

(G) the Air National Guard of the United States.” (Emphasis added.)

Thus for purposes of section 2024(d), the National Guard is part of the Armed Forces of the United States. (And *cf. Carney v. Cummins Engine Co., Inc.* (7th Cir. 1979) 602 F.2d 763, 765; *Kidder v. Eastern Air Lines, Inc.* (S.D. Fla. 1978) 469 F. Supp. 1060, 1066.)

training.” (Emphasis added.)⁹

Subdivision (d) of section 2024 (set forth in footnote 7 above) grants returning rights to persons in two classes of employment, one of which is described in class (B) of section 2021 (a) as “. . . in the employ of a State, or political subdivision thereof, or a private employer” Finally, 32 United States Code, section 502 (a) dealing with the National Guard and cited in 38 United States Code section 2024 (f) above, provides:

“(a) Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, *each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary concerned, shall—*

“(1) *assemble for drill and instruction, including indoor target practice, at least 48 times each year; and*

“(2) *participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year.*

However, no member of such unit who has served on active duty for one year or longer shall be required to participate in such training if the first day of such training period falls during the last one hundred and twenty days of his required membership in the National Guard.” (Emphasis added.)

Thus, the federal law requires public and private employers to grant unpaid leaves of absence for inactive duty training in the National Guard, that is the weekend drills under consideration here.

We are faced then, with the following conflict: federal law requires a public employer to grant, upon request, an employee who is a member of the National Guard, an unpaid leave of absence to attend weekend drills. California law denies any such right to such employees and state employees are obligated to use free time, overtime or vacation time for such purposes. Under the authority cited above, the Supremacy Clause is to be invoked, and the California law is superseded. (See also *Schaller v. Board of Education of Elmwood Local School* (N.D. Ohio, 1978) 449 F. Supp. 30, 32; *Peel v. Florida Dept. of Transportation, supra*, 443 F. Supp. at 459–460.)

We finally must examine whether, under our system of federalism, the Congress

⁹ We note that the definition of “inactive duty” as used in 38 United States Code section 2024(f) may be different from that used in California law. (See § 395.) In view of our conclusion herein, that difference, if any, is of no significance.

may impose upon the states a requirement that state or local government employees must be given a leave of absence to attend National Guard weekend drills. In *National League of Cities v. Usery* (1976) 426 U.S. 833, the United States Supreme Court held that the 1974 amendments to the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) which purported to extend that Act's minimum wage and maximum hours provisions to employees of states and local political subdivisions of states so intruded on the power of states that the provisions "would impair the States' ability to function effectively in the federal system . . . ," and went beyond the authority granted to Congress by the Commerce Clause (Cal. Const., art. 1, § 8, clause 3). (426 U.S. at 812.) In *Peel v. Florida Dept. of Transportation, supra* (443 F. Supp. 451) the District Court examined a claim that, under *Usery*, the imposition on states by Congress, through the mechanism of 38 United States Code section 2024(d), of reemployment rights for returning National Guardsmen impairs the power of states to operate effectively and were thus invalid. The court noted that the Congressional acts in *Usery* were based on the Commerce Clause, while 38 United States Code, section 2024(d) was based on the War Powers. The court said:

"The War Powers in the Constitution have been an area where the Congress traditionally wields supreme plenary power. Congress has jealously protected its powers under Art. I, § 8, cl. 12 from any abridgment by the states. The Fifth Circuit described the scope of these powers with great brevity:

"The war power of the federal government is its supreme power. When it is in action it is transcendent . . . *Sr. Johns River Shipbuilding Co. v. Adams*, 164 F.2d 1012, 1015 (5th Cir. 1947)."

"This power is broad enough to render lawful what would be unlawful in a different context. *Simmons v. United States*, 406 F.2d 456 (5th Cir. 1969).

"Generally, a governmental regulation is sufficiently justified if it is within a constitutional power of the government, if it furthers a substantial governmental interest, and if incidental restrictions on state functions are no greater than is essential to the furtherance of that interest. *United States v. O'Brien*, 391 U.S. 367, 885. Ct. 1673, 20 L. Ed. 2d 672, reh. den. 393 U.S. 900, 89 5. Ct. 63, 21 L. Ed. 2d 188 (1968). One justification for the rights granted to National Guardsmen under the VRR Act is our increased reliance on Reserve forces for the national defense of our country. Congressional records indicate the following:

"Active duty military strength has been reduced some 601,000 (-22 percent) since 1964 pre-Vietnam levels—from 2,687,000 in 1964 to

2,086,000 in 1976. Part of this reduction has been accomplished through increased reliance on reserve forces, even though there has been a 6 percent reduction in elected Reserve strength in the same period. Selected Reserve members will make up about 31 percent of the total active duty plus selected reserve strength in 1976. S. Rep. No. 94–562, 94th Cong. 1st Sess., at p. 5.’

“As caretaker of our national defense, Congress bestowed upon plaintiff certain reemployment rights following successful completion of training duties as a National Guardsman. The State of Florida must yield to these rights even if it means the incidental loss of certain controls over state employees. In this case, the Tenth Amendment does not afford defendant grounds to challenge the constitutionality of the VRR Act. *In Fox v. Brown*, 402 F.2d 837 (2nd Cir. 1968), cert. den., 394 U.S. 938, 89 5. Ct. 1219, 22 L. Ed. 2d 471 (1969), the plaintiff tried to annul orders which discharged him from the Air National Guard and directed him to report for active duty with the United States Air Force. These orders came as a result of the plaintiff’s unsatisfactory participation in his reserve unit. The plaintiff claimed that the orders were in derogation of the Tenth Amendment because they usurped powers delegated to the states by the Constitution. The court concluded that the plaintiff’s argument ignored the plenary power of Congress over the raising and maintenance of Armed Forces. 402 F.2d at 841.” (443 F. Supp. at 459.)

The District Court for the Northern District of Ohio reached the same conclusion, citing the *Peel* case, namely, that when dealing with Congressional War Powers, and the reemployment rights of veterans under 38 United States Code section 2024, the interest of state and local government must yield. (*Schalier v. Board of Education of Elmwood Local Sch.*, *supra*, 449 F. Supp. at 33.) We concur with the reasoning of both district courts, and conclude that the Congressional mandate of 38 United States Code section 2024(d) is applicable to states and local government employees.

We conclude therefore, that a number of the California National Guard, whether a public or private employee, who is required to attend scheduled reserve drills during a time when the employee ordinarily would be employed in a regular work shift at a nonmilitary job is entitled to an unpaid leave of absence from the place of employment to attend such drills and may not be required to use free time, overtime or vacation time for such purposes.
