



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

January 24, 1994

Honorable Sam C. Turk
Major General (TX), TXARNG
Adjutant General
P.O. Box 5218
Austin, Texas 78763-5218

Letter Opinion No. 94-007

Re: Whether a city may deny military leave to
an employee called up by the Texas National
Guard for special service (ID # 21133)

Dear General Turk:

You ask whether the City of Laredo, Texas, may properly refuse a request by one of its employees, a police officer called up by the National Guard, for 15 days paid military leave as authorized under section 431.005 of the Government Code, because such leave is requested for special service rather than the guard member/officer's annual training duty. In our view, so long as the police officer has made no other request for leave within the federal fiscal year such that the paid leave requested would exceed the period permitted under subsection (b) of section 431.005, the city may not refuse this request.

The guard member/police officer, as we understand it, has been called up to participate in the Texas National Guard's counterdrug task force. He requested 15 days paid leave, as well as unpaid leave for the rest of his tour of duty. The City of Laredo refused the officer's request for paid leave, but granted him unpaid leave for the whole call-up period.

The officer's request for paid leave was based upon section 431.005 of the newly amended Government Code, which provides in relevant part:

(a) A person who is an officer or employee of the state, a municipality, a county, or another political subdivision of the state and who is a member of the state military forces or a reserve component of the armed forces is entitled to leave of absence from the person's duties on a day on which the person is engaged in authorized training or duty ordered or authorized by proper authority. During a leave of absence the person may not be subjected to loss of time, efficiency rating, vacation time, or salary.

(b) Leaves of absence under Subsection (a) may not exceed 15 days in a federal fiscal year

Under this section of the Government Code, as under its predecessor statute, a city employee called up for duty is entitled to 15 working days of leave in a year, which need

not be consecutive. Attorney General Opinion C-679 (1966). The City of Laredo, however, apparently relies for its refusal to authorize paid leave to the police officer in question on the basis of its interpretation of a different provision, section 143.072(b) of the Local Government Code.

Section 143.072(b) of the Local Government Code provides that the Fire Fighters' and Police Officers' Civil Service Commission of a municipality which has adopted chapter 143 of the Local Government Code "shall grant to a fire fighter or police officer a leave of absence for initial training or annual duty in the military reserves or the national guard." As we understand it, the City of Laredo has taken the position that, since the leave for which the officer has applied is not leave "for initial training or annual duty," but rather is for special service, the city may refuse to grant the officer paid leave.

We cannot agree with the city's position. Its construction of the Local Government Code provision is strained, and would require us to read that section as in conflict with the Government Code. Further, such a construction would require us to negate our settled construction of the Government Code section, which we have as a matter of principle read liberally for at least three decades. See Attorney General Opinions MW-300 (1981); MW-240 (1980); C-679.

The construction the City of Laredo has apparently placed upon Local Government Code section 143.072(b) is that a leave of absence for National Guard duty may only be granted for initial training or annual duty. The term "only," however, is not to be found in the statutory language, as set out above. The City of Laredo's construction, then, appears to rely upon an application of the maxim, "Expressio unius est exclusio alterius." That is, it would appear that the city is arguing that, because the legislature in this instance only refers to the granting of leave for initial training or annual duty, leave may not be granted for other reasons.

The use of the maxim, however, is inappropriate here, since in fact section 143.072 is not the legislature's only grant of leave to municipal employees for National Guard duty: there is also, as we have seen, the broader grant in section 431.005 of the Government Code. Moreover, the maxim, which is a rule of statutory construction and not of law, may be overcome by a strong indication of contrary legislative intent or policy. 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (5th ed. 1992). We believe section 431.005 of the Government Code evidences a broader legislative intent to grant military leave to municipal employees than a straitened reading of section 143.072 of the Local Government would suggest.

The City of Laredo's reading would require us to find a conflict between the Local Government Code provision and the Government Code provision. No such conflict necessarily arises from the statutory terms. The two provisions may easily be harmonized by reading section 143.072 of the Local Government Code as, in effect, a sub set of section 431.005 of the Government Code. In such a case, the Code Construction Act requires that "the provisions shall be construed, if possible, so that effect is given to both."

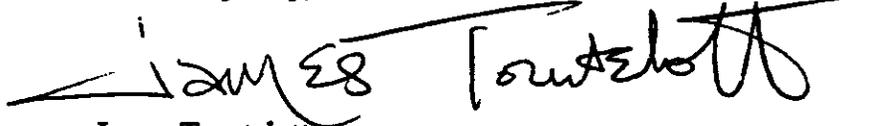
Gov't Code § 311.026(a). A reading of section 143.072 of the Local Government Code which does not purport to restrict its applicability achieves this result.

We are also disinclined to read the Local Government Code provision as restricting the leave provision in the Government Code because of our long-standing interpretation of that provision and its statutory predecessor. In Attorney General Opinion C-679, this office was asked to determine whether the 15 day leave provision provided for in section 7(a) of article 5765, V.T.C.S., the statutory predecessor of section 431.005, was restricted to 15 consecutive calendar days. In holding that the period was not so restricted, we declared that "the courts of this State have consistently construed statutes liberally in favor of patriotic service and are loath to penalize State employees who perform such services." Our later opinions on this statute have followed this principle. See Attorney General Opinions MW-300 (teacher entitled to military leave may not be required to pay for substitute employed by school district); MW-240 (teacher who voluntarily attends military training is eligible for paid leave). We see no reason to overrule this settled interpretation of the statute.

S U M M A R Y

A municipal employee is entitled to the 15-day leave of absence for military duty authorized by section 431.005 of the Government Code, whether the military service for which the employee is called up is annual duty or special service.

Yours very truly,

A handwritten signature in black ink, appearing to read "James Tourtelott", written over a horizontal line.

James Tourtelott
Assistant Attorney General
Opinion Committee