

MEMORANDUM

State of Alaska Department of Law

TO: BG Phillip E. Oates
Commissioner, DMVA

DATE: July 7, 1999

FILE NO: 661-99-0228

TEL. NO: 269-5178

SUBJECT: Alaska State Defense
Force Pay Authorization

FROM: Mary A. Gilson
Assistant Attorney General
Governmental Affairs Section, Anchorage

You have requested a legal opinion concerning whether members of the Alaska State Militia (ASM) also known as “the Alaska State Defense Force”¹ can receive pay equivalent to military active duty pay for their services when called to state active duty. As we understand the facts, for a number of years members of the ASM have received pay for their services while in active duty status.² ASM pay rates are based on the member’s ASM military grade. Military grades in the ASM mirror the uniformed service and ASM personnel have received pay equivalent to military active duty pay when called to state active duty. Recently questions have arisen regarding the Department of Military and Veterans Affairs’ (DMVA) authority to pay the ASM members at this level when they are called to state active duty.

I. Brief Answer

This opinion confirms our previous oral advice that paying ASM members pay equivalent to military active duty pay when called to state active duty is not authorized.

DMVA’s longstanding practice of paying ASM members wages equivalent to their military rank within ASM while in active duty status does not in itself provide the

¹ The “Alaska State Militia” is commonly known as the “Alaska State Defense Force”. This may be as a result of federal statutory language which provides that states can maintain a “defense force” in addition to the National Guard. *See* 32 U.S.C. 109(c).

² The ASM does not receive pay for attending training and routine drills.

authority for such payment. There must be some legal authority. The Alaska statutes provide that the National Guard and Naval Militia are to receive pay and allowances equal to those provided for members of equivalent grades of the United States armed forces, but there is no similar authorization to pay the ASM at that level. The absence of any statutory language authorizing payment of the ASM for state active duty at a level equivalent to the active military compels the conclusion that, under existing law, such payment is not legally authorized. Legislative action is necessary to provide authorization. Our department can provide assistance in drafting such legislation if desired.

ASM members who are hired as emergency employees or some other class of state employee would, of course, be paid, but the pay would be based on the job classification not on their ASM military grade. Emergency employees can be appointed for up to 30 days if immediate action is needed to carry on work that is required in the public interest. AS 39.25.200(3). Therefore, ASM members could be called out and appointed as emergency employees. Using this mechanism, pay would be authorized. The procedures for appointing emergency employees would have to be followed and, as noted, the pay level would not be tied to active military pay levels but would be related to the work performed.

Any ASM forms, written procedures, manuals, etc. should be reviewed to ensure that any reference to military pay for services is removed. Notice should be sent immediately to all ASM members that there has been a determination that under current law there is no authority for the ASM to be paid military pay for state active duty, and, therefore, until there is a change in the law, there will be no payment for future deployments. The notice should state that pay is authorized if a member is hired as an emergency employee or nonpermanent employee, but the amount would depend on the job class not on military rank.

To ensure effective notice, there should be no deployments until such notice is given.

II. Analysis

A. ASM Background and Composition

Federal law provides that, in addition to the National Guard, a state may provide and maintain at its own expense a defense force. 32 U.S.C. 109(c); *Perpich v. Dept. of Defense*, 110 S. Ct. 2418, 2429 (1990). Federal law does not address whether a state defense force is to be paid when called out to active duty.

The Military Code of Alaska, AS 26.05.010 – 26.05.350, provides the state statutory scheme governing the operation of the ASM. There are no state regulations. The ASM is established under AS 26.05.010 as part of Alaska’s “organized militia.” The organized militia in Alaska consists of the Alaska National Guard, the Alaska Naval Militia, and the Alaska State Militia. AS 26.05.010(b)(1). The ASM became part of the organized militia in 1968. Secs. 1-2, ch. 44, SLA 1968. Enlistment in the ASM is voluntary. AS 26.05.100. The composition of the ASM is addressed under AS 26.05.030(d), which provides:

(d) The Alaska State Militia consists of units authorized by the governor, and manned by volunteer personnel qualifying under state law and regulation. All State Militia personnel shall be (1) appointed, commissioned, or warranted, and assigned by the governor or the adjutant general as the governor’s designee; (2) subject to serve on state active duty at the call and by order of the governor.

B. Role of the ASM

The role of the ASM is to augment the National Guard or Naval Militia or to act in their stead when those forces are not available. AS 26.05.100. That section provides:

A state militia may be organized through voluntary enlistments under regulations as to discipline and training which may be prescribed by the governor. During the time that the Alaska National Guard or the Alaska Naval Militia, or any part of either of them, is not available to the state by reason of active federal service, or the National Guard or Naval Militia requires augmentation to perform its state mission, the governor may activate the state militia. (Emphasis added.)

Alaska Statute 26.05.070 outlines the circumstances which may trigger the governor’s use of the organized militia – which, as noted above, includes the ASM. Under AS 26.05.070, the Governor may order the organized militia into active state service when needed in the case of events such as war, disaster, catastrophe, riots, etc. or when responsible civil authorities fail to preserve law and order or protect life and property, or the governor believes such failure is imminent. *See* AS 26.05.070.

If called into active service, the ASM, like other parts of the organized militia, functions as an additional police force retaining its separate identity and operating as a

military organization under separate command. The ASM cooperates with, but does not supercede, civilian law enforcement. They are “to execute the laws and to perform duties in connection with them that the governor considers proper” and can take action “. . . for the re-establishment of law and order and for the protection of life and property.” AS 26.05.070. For example, ASDF personnel assisted in search and rescue after a recent avalanche.

C. Payment of the ASM

Pay and allowances under the Military Code are specifically addressed in AS 26.05.260(b). AS 26.05.260(b) provides in pertinent part:

(b) Members of the Alaska National Guard and Alaska Naval Militia are entitled to receive, for each day of active service under AS 26.05.070, pay and allowance equal to those provided by federal laws and regulations for members of equivalent grades of the United States armed forces. However, a member may not receive less than” (Emphasis added.)

The plain language of AS 26.05.260(b) authorizes pay and allowances only for members of the Alaska National Guard and Alaska Naval Militia. The ASM is not mentioned. Section AS 26.05.260 has been in existence in various forms since statehood and the ASM has never been mentioned in the section providing for pay and allowances. Until 1973 only components of the National Guard were entitled to pay and allowances. In 1973, the Naval Militia was added to the language of AS 26.05.260 which pertained to pay and allowances. Secs. 9-11, ch. 34, SLA 1973. The legislature had the opportunity at that time to add the ASM and did not. In 1981 AS 26.05.260 was amended again and AS 26.05.260(b) was enacted in its current form. Secs. 1-4, 8, ch. 56, SLA 1981. There is no legislative history indicating an effort to include the ASM in the section providing for pay and allowances when AS 26.05.260(b) was amended in 1981.

The remaining subsections of AS 23.05.260 address workers’ compensation and death benefits. As explained below, none of these subsections provide the authority to pay the ASM for active duty. Under current law, AS 26.05.260(d) provides workers’ compensation benefits for members of the organized militia. AS 26.05.260(e) provides death benefits.³

³ AS 26.05.260(d) provides:

(...continued)

Prior to 1989, only the National Guard or Naval Militia were entitled to workers' compensation or death benefits if injured or killed while on active duty. In 1989 the term "organized militia" was inserted into subsections AS 26.05.260(d) and (e) in place of the term "Alaska National Guard or Alaska Naval Militia." Secs. 1-2, ch. 53, SLA 1989. The purpose of the 1989 amendments was to provide the ASM with the same workers' compensation and death benefits that the other components of the organized militia were already receiving. The legislature could have also amended the pay and allowances subsection 260(b) at that time to substitute "organized militia" for "Alaska National Guard or Alaska Naval Militia," as was done in subsections 260(d) and 260(e), but the legislature chose not to do so.

Alaska Statute 26.05.260(h) was enacted in 1989 in the same piece of legislation as the amendments to 260(d), (e) discussed above. Sec. 4, ch. 53, SLA 1989.⁴ Subsection 260(h) addresses the level of benefits a member of the ASM is entitled to if injured or killed in the line of duty and bases the computation of benefits on the level of earnings a member of the regular armed forces of equivalent rank would receive.

Alaska Statute 26.05.260(h) states: "For purposes of computation of benefits under AS 23.30, the earnings of a member of the organized militia will be presumed to be no less than the pay and allowances authorized for a member of the regular armed forces of the United States in the same grade or rank as the organized militia member at the time of the injury or death."

A member of the "*organized militia*" who, while performing duties under AS 26.05.070, including transit to and from the member's home of record, suffers an injury or disability in the line of duty is entitled to all compensation and benefits available under AS 23.30 (Alaska Workers' Compensation Act) for injuries or disabilities suffered in the line of duty. (Emphasis added.)

AS 26.05.260(e) provides:

If a member of the *organized militia* dies as a result of an injury or disability suffered in the line of duty while performing duties under AS 26.05.070, including transit to and from the member's home of record, death benefits shall be paid to the person in the amounts specified in AS 23.30.215. (Emphasis added.)

⁴ Subsection (h) was enacted as (i) and renumbered in 1989.

Statutory authorization of workers' compensation and death benefits at a certain level is not equivalent to authorizing payment of wages at that level or any other. Nor does providing workers' compensation and death benefits necessarily imply that *wages* will be also paid. For example, residents of Alaska temporarily volunteering in a civil defense or disaster relief function for the state are considered employees of the state for the purposes of the Workers' Compensation Act and therefore are entitled to workers' compensation and death benefits if injured or killed while providing services. *See* AS 23.30.244. However, it cannot be said that AS 23.30.244 provides authority to pay these volunteers wages.

Section 3 of the 1989 legislation amending AS 26.05.260 also amended the definition of the word "member" which is used throughout the section. *See* sec. 3, ch. 53, SLA 1989. As with the amendments to 260(d) and 260(e), the term "organized militia" replaced "Alaska National Guard or Alaska Naval Militia" in the definition of "member". Under AS 26.05.260 "member" means an active commissioned or warrant officer or enlisted man or woman in the *organized militia*." (Emphasis added). AS 26.05.260(i).⁵ Expanding the definition of "member" to mean an officer or enlisted person in the "organized militia" is consistent with the amendment to subsections 260(d) and 260(e).

An argument could be made that because the word "member" is also used in subsection 260(b), the ASM is by implication included in pay and allowances. However, we do not believe a court would give much credence to this argument. The language of 260(b) predates the 1989 legislation. The word "member" is used three times in 260(b). The pertinent language is quoted above. The first reference is specifically to "members" of the National Guard or Naval Militia. The second reference is to members of the Armed Forces. The third reference, read in context, relates to the National Guard or Naval Militia. To imply that the term is to be read in a broader sense would be a strained reading.

Further, legislative history supports the view that the 1989 amendments were not meant to alter the pay authorization in AS 26.05.260(b) but were intended to provide ASM members with workers' compensation and death benefits. Governor Cowper's transmittal letter to the legislature stated, "This bill expressly extends workers' compensation coverage to members of the ASM . . . this ensures adequate compensation for injuries incurred incident to state service and the bill limits the state's liability for injuries to the remedy provided in AS 23.30." 1989 Senate Journal 43.

⁵ Subsection (i) was enacted as (h) and renumbered in 1989.

Finally, viewing the Military Code as a whole, it is evident that when the legislature intended to provide benefits to members of the entire “organized militia” it said so. *See* AS 26.05.260(d) (workers’ compensation benefits); AS 26.05.260(e) (death benefits). When it intended for benefits to only be provided for the National Guard and Naval Militia the statute providing the benefit refers only to the “Alaska National Guard or the Alaska Naval Militia” and the ASM is not mentioned. *See* AS 26.05.222 – 26.05.229 (retirement benefits); AS 26.05.265 (reenlistment bonus); AS 26.05.295 (educational assistance); AS 26.05.296 (tuition assistance). Under AS 26.05.260(b), the legislature has not provided for the “organized militia” to receive pay and allowances, but only for the “Alaska National Guard or Naval Militia”. Therefore, we believe 260(b) means what it says and does not provide authorization for the ASM to receive active duty pay.

In addition to AS 26.05.260, there is only one other section in the Military Code that mentions “pay.” Alaska Statute 26.05.270 states that “If the organized militia, or any part of it, is called into active service of the state in case of war, disaster, insurrection, rebellion . . . vouchers for *legally allowed pay* and expenses for this services or compensation for injuries shall be drawn upon the general fund of the state treasury and paid out of money in that fund not otherwise appropriated.” (Emphasis added.) The use of the phrase “legally allowed” in AS 26.05.270 does not in itself authorize pay and expenses but merely provides that those amounts already “legally allowed” shall be drawn from the general fund. Therefore, AS 26.05.270 does not provide authority for payment of the ASM.

An argument was raised that to require members of the ASM to serve without compensation would be a “taking” in violation of the Alaska Constitution.⁶ Alaska’s “takings clause” prohibits the taking of private property for a public purpose without just compensation. Alaska Const., art. I, sec 18. The Alaska Supreme Court has held that “personal services” are private property. *Delisio v. Alaska Superior Court*, 740 P.2d 437 (Alaska 1987). In *Delisio*, the court determined that the government cannot require an attorney to represent an indigent person without paying just compensation because to do so would be an unconstitutional “taking” of the attorney’s services (*i.e.*, private property). *See Id.* at 443.

We do not believe *Delisio* is applicable. In *Delisio*, Delisio made his living as an attorney. The trial court ordered him to represent an indigent defendant for free or be sentenced to jail for contempt. In reversing the lower court, the Supreme court held that

⁶ *See* memorandum to Jim Chase from Leroy DeVaux dated December 10, 1998.

compelling *Delisio* to serve without just compensation was a “taking.” *Id.* Here, members of the ASM are volunteers. The government has not ordered them to provide their services for free. ASM members volunteer to be part of the ASM and thus are subject to the call of the Governor on an occasional basis when needed to supplement the National Guard or Naval Militia. *See* AS 26.05.030; 26.05.100; 26.05.070. If an ASM member did not answer the call to active duty, the member could be subject to demotion or discharge from the ASM, but it cannot be said that members are “compelled” to provide the service. Being available for call out to active duty is a condition of their volunteerism. If they do not answer the call out, they cannot be part of the organization, but unlike *Delisio* there is no government-imposed fine or jail time for failure to provide services. Based on *Delisio*, we do not believe a “takings” argument has merit in this situation.⁷

In sum, there is no authority under current law to pay ASM members pay equivalent to military active duty pay when they are called to active duty. Pay for state active duty is not authorized unless members are hired as emergency employees or some other class of employee. Pay would be based on the job class not on military rank. Notice should go out to the ASM members immediately. If your department needs assistance in drafting legislation to change current law, please do not hesitate to call.

MAG:vb

⁷ The DeVeaux memorandum also asserted that it would be a violation of due process to deprive ASM members of pay equivalent to that of the regular military. Due process is inapplicable here. The issue is whether ASM members are entitled to be paid for their volunteer services. The conclusion is that they are not. If there is no entitlement to a benefit there can be no “protected interest” and therefore no entitlement to due process if the benefit is discontinued.