

MEMORANDUM

State of Alaska Department of Law

TO: Jim Chase
Deputy Commissioner
Department of Military and
Veterans' Affairs

FROM: Jan Hart DeYoung
Assistant Attorney General

DATE: October 13, 2000

FILE NO: 661-01-0086

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SUBJECT: Review of Exempt Status of
Alaska Military Youth Academy
Employees

You have asked for a legal review of the question whether the employees of the Alaska Military Youth Academy¹ were properly classified as exempt employees. This question came up in the context of a lawsuit filed by the program's kitchen staff in *Shelden, et al. v. State*, case no. 3AN 99-11530 CI. The Academy staff currently is in the exempt service, and the kitchen staff is challenging that classification.

The legislative history of an amendment to the statute defining the exempt service – AS 39.25.110 – shows that the legislature intended only to place program participants (rather than program staff) in the exempt service. Because AS 39.25.100 provides that all positions that are not in the exempt or partially exempt service are in the classified service, the Alaska Military Youth Academy staff should be in the classified service.

DISCUSSION

As you know, all state employees fall into one of three categories – exempt, partially exempt, and classified. The categories are set by statute and can affect pay, benefits, and employment protections. For example, exempt employees are exempt from the personnel rules. 2 AAC 07.005 – 2 AAC 07.999. Employees can also be categorized as regular or non-permanent, depending upon the expected duration of the work. These categories also can affect pay, benefits, and employment protections.

¹ It has also been known as the National Guard Youth Corps Challenge Program.

The Department of Military and Veterans' Affairs ("DMVA") set up the Alaska Military Youth Academy initially as a pilot program. Because the program was a pilot program, its duration was uncertain. The staff was therefore hired initially as nonpermanent employees,² except for the kitchen staff. The kitchen was staffed with active duty members of the Alaska State Defense Force and National Guard. In 1998, when the Academy became a regularly funded program, the DMVA changed the status of the program staff from nonpermanent to regular employees and employed the kitchen staff working on active duty. The DMVA placed them in the exempt service under AS 39.25.110(28), which provides exempt status for "persons engaged in employment or pre-employment training programs operated by the Department of Military and Veterans' Affairs." Some of the employees are challenging that decision.

Alaska Statute 39.25.110 sets out the employment positions that belong in the exempt service. Subsection (28) includes in the exempt service "persons engaged in employment or pre-employment training programs operated by the Department of Military and Veterans' Affairs." To determine whether AS 39.25.110(28) places the staff of the Alaska Military Youth Academy in the exempt state service, we must determine whether the Academy is an "employment or pre-employment training program" and whether the Academy staff are "persons engaged in" the program.

1. The Alaska Military Youth Academy is an "employment or pre-employment training program."

The legislative history for AS 39.25.110(28) indicates that the Alaska Military Youth Academy is the kind of program the legislators intended to cover but that they intended to provide "exempt" status to the participants in the program rather than to the staff members running the program.

Alaska Statute 39.25.110(28) was adopted in 1989, along with a section empowering DMVA to administer training and pre-employment training programs,³ as

² Nonpermanent employees can be hired for the duration of a special program. AS 39.25.195(c)(4). AS 39.25.200(4) defines "nonpermanent employee" as "a person who is employed in state service in a position that is not in the exempt or partially exempt service and who is not a permanent or an emergency employee."

³ SB 191 in section 12 amended the statute setting out the duties and powers of the DMVA to add authority "to administer training and pre-employment training programs." AS 44.35.020(b).

Jim Chase
Deputy Commissioner
A.G. file no: 661-01-0086

October 13, 2000
Page 3

part of a bill (SB 191) establishing the state training and employment program (STEP). Sections 11 and 14, ch. 95, SLA 1989.⁴ STEP is funded with employees' employment security contributions and is administered in the Department of Labor.

The DMVA provisions are not part of the STEP program. The DMVA provisions were added to the STEP bill (SB 191) in a Senate Finance Committee substitute for SB 191. The legislative history indicates that the DMVA provisions were added to facilitate a "possible" project within the Department of Military and Veterans' Affairs for a training and pre-employment program. Hearing on SB 191 before the Senate Finance Committee, 16th Legis. Sess., 1st Reg. Sess. (Alaska 4/21/1989; SFC-89, #42, side 2) (statement of Dave Gray, aide to Senate President Kelly). Whether the Alaska Military Youth Academy, which went into effect as a pilot program in 1993, is the specific program the legislators had in mind when they adopted the bill in 1989 is unclear. However, it certainly is the same type of program described in the legislative history:

Mr. Gray explained that Senator Kelly feels that the Dept. of Military and Veterans Affairs can provide an "educational boost" to people between the ages of 17 and 20. He stressed that for some young people, experience in a disciplined setting can be most influential. The department is well set up for this type of activity. Most villages have some national guard personnel. The department has also been encouraged to proceed with the effort by federal agencies (the U.S. Park Service and U.S. Fish and Wildlife were mentioned).

Hearing on SB 191 before the Senate Finance Committee, 16th Legis. Sess., 1st Reg. Sess. (Alaska 4/17/1989; SFC-89, #39, side 1) (statement of Dave Gray, aide to Senate President Kelly).

The committee heard testimony that the new sections would allow DMVA to receive federal funds for a youth training program:

The intent of the amendment is merely to provide Military Affairs authority to receive federal funds from the U.S. Dept. of Defense. Military and Veterans Affairs would then set up its own program

⁴ The subsection subsequently was amended by Ch. 17, SLA 1991; Ch. 17, SLA 1993; Ch. 116, SLA 1996; Ch. 85, SLA 1998; Ch. 132, SLA 2000. The amendments did not affect the DMVA provisions.

Jim Chase
Deputy Commissioner
A.G. file no: 661-01-0086

October 13, 2000
Page 4

using federal moneys. Senator Pearce next asked if the Dept. of Community and Regional Affairs supports the amendment, and Mr. Plasman answered affirmatively.

Hearing on SB 191 before the Senate Finance Committee, 16th Legis. Sess., 1st Reg. Sess. (Alaska 4/21/1989; SFC-89, #42, side 2) (statement of Jim Plasman, Deputy Dir./Juneau, Div. of Mun. & Reg'l Assistance, Dep't of Comm. & Regional Affairs).

The program was intended to provide employment services and life skills training to youth in a military-based program using federal funds:

DAVE GRAY, aide to Senate President Kelly, next came before committee. He explained that the Dept. of Military and Veterans Affairs' program would be aimed at young people between 17 and 20 years of age. It involves CCC-type projects in rural areas to bring young people into a disciplined organization. The department does not anticipate becoming heavily involved in job training and skill building. It has the ability, however, to steer young people into job training programs utilizing federal funds. There has been considerable congressional interest in this type of effort. Enabling language is needed to explore possibilities. That is the purpose of the amendment.

Hearing on SB 191 before the Senate Finance Committee, 16th Legis. Sess., 1st Reg. Sess. (Alaska 4/21/1989; SFC-89, #42, side 2) (statement, in part, by Dave Gray, aide to Senate President Kelly).

Following this discussion, the Senate Finance Committee added the DMVA sections to SB 191. The committee voted unanimously to adopt sections that would amend AS 44.35.020 to authorize DMVA to "administer training and pre-employment training programs" and to amend AS 39.25.110 to include in the exempt service "persons engaged in employment or pre-employment training programs." Hearing on SB 191 before the Senate Finance Committee, 16th Legis. Sess., 1st Reg. Sess. (Alaska 4/21/1989; SFC-89, #42, side 2) (statement of Senator Jim Duncan). The legislature did enact SB 191 in 1989.

The Alaska Military Youth Academy began operating as a federally funded pilot program in 1993. The authorizing legislation and federal funding agreement support the

conclusion that the Academy is an employment or pre-employment training program as contemplated in AS 39.25.110(28).

The initial authorizing legislation provided employment as an important goal of the program:

The purpose of the pilot program is to provide a basis for determining—

(1) whether the life skills and employment potential of civilian youth who cease to attend secondary school before graduating can be significantly improved through military-based training, including supervised work experience in community service and conservation projects, provided by the National Guard

National Defense Authorization Act of 1993, Pub. L. No. 102-484 § 1091(b), 106 Stat. 2315, 2519 (1992) (codified at 32 U.S.C. § 501 Notes) (amended 1993, 1994, 1997).

The cooperative funding agreement with the National Guard Bureau for the Alaska Military Youth Academy describes the program as

A 22 week residential program in which participants must be 16 through 18 years old, high school drop-outs, must be able to pass bio-chemical testing, and not currently on parole or probation for other than juvenile status offenses, not awaiting sentencing, and not under indictment, charged or convicted of a felony. The program will not be used by courts as an alternative to sentencing. The program is directed at citizenship, GED, life-coping skills, vocational training and education opportunities, personal development, community living, health and hygiene, group skills, work and personal values, and physical training.

Amendment/modification 6, cooperative funding agreement, attachment 1-9 (DAHA51-95-2-4000; 4/21/1995).

Based on the legislative history, federal authorizing legislation, and cooperative funding agreement, we conclude that the Alaska Military Youth Academy is an employment and pre-employment program within the meaning of AS 39.25.110(28).

2. The staff administering the program are not “persons engaged” in the program.

Alaska Statute 39.25.110(28) places in the exempt service “persons *engaged* in employment or pre-employment training programs operated by the Department of Military and Veterans’ Affairs.” (Emphasis added). Arguably, the use of the word “*engaged*” is ambiguous because it could mean both the participants and the staff. *Black’s Law Dictionary* provides,

Engage, vb. To employ or involve oneself; to take part in; to embark on.

Black’s Law Dictionary 549 (7th ed. 1999). See also, *Webster’s Third New International Dictionary* 751 (G. & C. Merriam Co. 1971).

Without access to the legislative history, it would be reasonable to conclude that the language of the exemption in AS 39.25.110(28) covered program staff. The reason is that the participants are not state employees⁵ and there is no need to address their employment status. Neither are the participants federal employees except for the limited purposes of federal tort liability and workers’ compensation coverage. Cooperative funding agreement 14 (DAHA51-94-H-4004)(1994). On the other hand, program personnel can be state civilian employees. (They can also be under contract with the state or members of the National Guard.) Cooperative funding agreement, pilot program appendix A, at 69 (staff criteria) (DAHA51-94-H-4004) (1994).

Nevertheless, the legislative history plainly shows that the Senate Finance Committee intended the *youth* participating in a DMVA employment or pre-employment training program to be in the exempt service and did not intend that the program staff would be in the exempt service. As the program was contemplated at the time the Senate Finance Committee was considering the legislation, the youth in the program were to be paid minimum wage to work in crews on conservation corps-type work. Members of the National Guard on state active duty would supervise the work crews. Maj. P.L. Antle, Proposal for the Operation of a Pilot Youth Training Program (Mar. 23, 1989). Major General John Schaeffer states that “Legislation will be required to classify participants in this program as ‘exempt.’ This is necessary so we can pay those participants

⁵ The program participants (“cadets”) do receive a stipend after completing the program. National Defense Authorization Act of 1993, Pub. L. No. 102-484 § 1091(f)(I), 106 Stat. 2315, 2520 (1992) (codified at 32 U.S.C. § 501 Notes) (amended 1993, 1994, 1997).

commensurate with the work they are actually performing.” Maj. Gen. John Schaeffer, letter to Senator Tim Kelly (April 10, 1989). Senator Kelly in a memorandum states that a new section needs to be added to AS 39.25.110 to make the youth “trainees” exempt employees. Senator Tim Kelly, Memo to Senator Rick Uehling (April 20, 1989). The clear purpose of the amendment to AS 39.25.110 was to place trainees of the DMVA employment program in the exempt service. Absent from the legislative history is any mention of a need or concern to place the program staff in the exempt service.

Furthermore, placement of program participants in the exempt service is consistent with placement of students and interns in other programs in the exempt service. *See* AS 39.25.110(22) (youth employed by the Department of Natural Resources under the Youth Employment and Student Intern programs) & (24) (students employed by the state institutions in which the students are enrolled). We therefore conclude that the legislature intended in AS 39.25.110(28) to place only the participants of the program in the exempt service.

Thus, the amendment to AS 39.25.110 adding to the exempt service “persons engaged in employment or pre-employment training programs operated by the Department of Military and Veterans’ Affairs” was intended to cover only the participants of the program. The legislature has directed that “[t]he classified service consists of all positions in the state service not included in the exempt service or in the partially exempt service.” AS 39.25.100. Because there is no evidence that the legislature intended to include the Academy staff in the exempt service when it enacted AS 39.25.110(28), we conclude that the staff are members of the classified service unless another subsection justifies “exempt” status.