

March 30, 2012
OPINION 11-0224

Honorable Christopher L. Duncan
Mayor, City of Sulphur
P.O. Box 1309
Sulphur, LA 70664

58 LABOR LAWS
64-B MILITARY DEPARTMENT

La. R.S. 42:394.

Pursuant to La. R.S. 42:394, the City of Sulphur as a public employer is required to grant fifteen days of paid military leave to a City employee who voluntarily enlisted for a minimum of three years in the National Guard.

Dear Mayor Duncan:

You advise this office that the City of Sulphur is governed by the state fire and police civil service law applicable to municipalities with populations between 13,000 and 250,000. See La. R.S. 33:2471, *et seq.* You further state that a classified city employee voluntarily enlisted for a minimum of three years in the National Guard. At issue is whether the City must pay this employee for fifteen days of military leave under La. R.S. 42:394. You ask this office to address the following three questions, which we examine and answer, as indicated below.

I. Is this employee entitled to military leave with pay under La. R.S. 42:394?

Our response to your first question is "yes," this employee is entitled by state law to military leave with pay. La. R.S. 42:394 grants a right to fifteen days of paid military leave for those officers or enlisted men and women serving in the National Guard, Citizens Military Training Corps, Civil Air Patrol, or as a reservist in the Army, Navy, Air Force, or Marines. La. R.S. 42:394 provides the following:

All officers and employees of the state, or of any parish, city, town, political subdivision, unit, or any state institution thereof, who are members of the Officers' Reserve Corps of the Army of the United States, the National Guard of the United States, the Naval Reserve Corps, the Marine Corps Reserve, the Air Force Reserve, the Citizens Military Training Corps, or the Civil Air Patrol, either as officers or enlisted men, are entitled to leave of absence from their respective duties, without loss of pay, time, annual leave, or efficiency rating, on all days during which they are ordered to duty with troops or at field exercises, or for instruction, for periods not to

exceed fifteen days in any one calendar year; and when relieved from duty, they are to be restored to the positions held by them when ordered to duty.

La. R.S. 42:394 makes no distinction between whether an employee is ordered to active duty voluntarily or involuntarily, and for this reason, it is the opinion of this office that your City employee is entitled to the fifteen paid days of military leave notwithstanding that he voluntarily enlisted.

Further, we also point out the provisions of the Military Service Relief Act, La. R.S. 29:401, *et. seq.*, and specifically, the provisions of La. R.S. 29:405, stating in part:

A. (1) Except as otherwise provided in this Subsection, any private or public employer in this state is hereby authorized to pay compensation to any employee who leaves employment to perform service in the uniformed services. If the employer elects to pay the compensation, it shall be paid on a uniform basis to all such employees of that employer.

We attach La. Atty. Gen. Op. 01-0419, in which this office concluded "R.S. 29:405 supplements R.S. 42:394. For many years, R.S. 42:394 has allowed public officers and employees fifteen days of paid military leave. R.S. 29:405, by its terms, is intended to supplement those fifteen days by granting authority to a public, or private, employer to pay any number of military leave days."

Accordingly, it is the opinion of this office that pursuant to La. R.S. 42:394, the City of Sulphur as a public employer is required to grant fifteen days of paid military leave to their employees serving in the uniformed services. It is further the opinion of this office that the City of Sulphur is authorized under La. R.S. 29:405 to pay in excess of fifteen days.

II. Is this employee entitled to military leave with pay under the City of Sulphur's municipal fire and police civil service board rules?

Our response to your second question is "yes," the City's fire and police civil service board rules entitle this employee to military leave with pay. Rule XII of the Sulphur Municipal Fire and Police Civil Service Board Rules provides for both Military Leave with pay (§G of Rule XII) and Military Leave without pay (§H of Rule XII). While §G of Rule XII tracks the prior language of La. R.S. 42:394, the updated language in La. R.S. 42:394 would supercede any conflict within the provisions of Rule XII. See La. R.S. 33:2478, which governs the City's municipal fire and police civil service board regarding the adoption of rules, stating that "no

rule, regulation, or order shall be contrary to...any other provision of law.” §H of Rule XII provides:

...Any member of the classified service who is a member of the National Guard or in the Reserves of the Armed Forces, upon being ordered to active duty, shall be given any leave due the employee in Section G...

As §G of Rule XII cites and is considered to incorporate the current version of La. R.S. 42:394, it is the opinion of this office that Rule XII entitles this employee to military leave with pay.

III. If the employee is entitled to receive military pay under the City’s civil service rules, is the City entitled to deduct the difference between the military pay and the regular pay received by the employee from the City?

Our response to your third question is “no,” it is the opinion of this office that the City is not entitled to deduct the difference between any military pay received by the employee and regular pay received by the employee from the City. This office addressed this question relative to La. R.S. 42:394 in La. Atty. Gen. Op. 78-318, stating:

R.S. 42:394 is clear and explicit. State employees or officers who are members of the Officers' Reserve Corps of the Army of the United States, or the National Guard of the United States or the Naval Reserve Corp, or the Marine Corps Reserve, or Citizens Military Training Corps are entitled to leave of absence from their respective duties, while serving their military duty, without loss of pay, time, annual leave, or efficiency rating for a period not exceeding fifteen.

This statute provides no other reservations or limitations.

Therefore, we answer your question specifically. ***[The employee] must be paid his full salary during this kind of leave despite the fact he is paid for his military duty.***

[Emphasis added.]

Finally, we also refer you to the provisions of La. R.S. 29:402¹ and La. R.S. 29:406² of the Military Service Relief Act. Particularly, under La. R.S. 29:406, the City of Sulphur is required to grant this employee a military leave of absence and the employee is entitled to use any leave, including military leave, during the period of service. Federal law has similar provisions. The Uniformed Services Employment and Reemployment Rights Act of 1994, USERRA, 38 U.S.C. provides the following in Subsection 4316, which states, in part,

...(d) Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require such person to use vacation, annual or similar leave during such period of service.

¹ La. R.S. 29:402 provides:

A. In order to provide for, strengthen, and expedite the national security under emergent conditions which threaten the peace and security of the United States and to enable those citizens of this state who perform service in the uniformed services to more successfully devote their entire energy to the security needs of the nation and state, provision is hereby made to provide reemployment rights and other benefits for persons who perform service in the uniformed services of the United States. It is herein declared to be the policy of the state of Louisiana that its citizens who serve their country and state and who leave their employment, homes, and education shall not be penalized nor economically disadvantaged because of their uniformed service.

E. This Part supercedes any local law or ordinance, contract agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this Part, including the establishment of additional prerequisites to the exercises of any such right or the receipt of any such benefit.

² La. R.S. 29:406 provides:

A. Any employee who leaves employment in order to perform services in the uniformed services shall be treated as being on military leave of absence during the period of service in the uniformed services, provided that he notifies the employer in writing of the intent to return to a position of employment in accordance with La. R.S. 29:410.

B. The employee, at his option, may use any amount or combination of his accrued annual leave, paid military leave, vacation, or compensatory leave standing to his credit during the period of service in the uniformed services.

C. The employee shall continue to accrue sick leave, annual leave, vacation leave, military leave, holiday pay, and any paid leave, offered by the employer, pursuant to the employer's state leave of absence policy which would have accrued if continuously employed.

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We hope the foregoing is helpful to you. Should you have other questions with which we may provide assistance, please contact this office.

Very truly yours,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

BY: _____
KERRY L. KILPATRICK
ASSISTANT ATTORNEY GENERAL

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Date Received:

Date Released: March 30, 2012

KERRY L. KILPATRICK
ASSISTANT ATTORNEY GENERAL