Opinion No. 59-18

February 25, 1959

BY: FRANK B. ZINN, Attorney General

TO: Honorable Armando Larragoite State Representative Santa Fe, New Mexico

New Mexico National Guard is included as a part of the armed forces of the United States only during a period of federal service.

An "employee", who leaves a position to enter the armed forces of the United States, may remain in the service indefinitely and retain his re-employment rights.

No distinction is made between volunteers and draftees under the veterans' re-employment act.

No distinction is drawn between officers and enlisted personnel under the veterans' re-employment act.

A member of the New Mexico National Guard, who served under orders of the governor, is not a member of the "armed forces of the United States" and not entitled to re-employment rights.

OPINION

*{*25}* This is written in reply to your recent request for an opinion on the following questions:

To what extent and under what circumstances does the term "armed forces of the United States" include the New Mexico National Guard within the meaning of the Veterans Re-employment Act?

How long may an employee remain in service in the armed forces of the United States and still be entitled to reinstatement and employment upon release from such service under the provisions of the Veterans Re-employment Act?

Is there any distinction drawn under the provisions of the Veterans Re-employment Act between an individual who remains in the service voluntarily, though not required to do so, and an individual whose service is compulsory?

Is there any distinction drawn under the provisions of the Veterans Re-employment Act with respect to restoration of employment as between commissioned officers and men in enlisted grades?

It is my opinion that the New Mexico National Guard is to be considered as a part of the "armed forces of the United States" only during those periods subsequent to a congressional declaration of national emergency when the Guard has been called to federal service and is under the command of the president.

It is my opinion that a former employee may remain in the "armed forces of the United States" for an indefinite period and still be entitled to rights of re-employment.

It is my opinion that no distinction is drawn between persons who remain in the service voluntarily and those who serve only for a period as required by law or regulation.

It is my opinion that no distinction is made between officers and enlisted personnel with regard to re-employment rights.

And finally, it is my opinion that a person serving in the New Mexico National Guard during a period when the Guard is not a part of the armed forces of the United States, but rather is commanded by the governor, is not entitled to reinstatement as an employee under the provisions of the Veterans Re-employment Act.

The New Mexico National Guard is created by Article XVIII, Section 1, Constitution of New Mexico, which provides:

"The militia of this state shall consist of all able-bodied male citizens between the ages of eighteen and forty-five, except such as are exempt by laws of the United States or of this state. The organized militia shall be called the 'National Guard of New Mexico,' of which the governor shall be the commander-in-chief."

In keeping with this constitutional provision and those found in Sections 91-1-22 and 9-2-1, N.M.S.A., 1953 Compilation, the governor of the state shall organize the National Guard and shall serve as its commander in chief, ". . . except of such portions thereof, as may at times be in the service of the United States."

Both officers and enlisted personnel receive pay and allowances from the state when called to active duty by the governor, but when such persons are called for active service, with their respective units, by the United States, all state pay ceases. Section 9-6-1, N.M.S.A., 1953 Compilation.

A search of the decided cases from our Supreme Court does not reveal a ruling by which the New Mexico National Guard has been considered as a separate and distinct entity from the armed forces of the United States. However, in *{*26}* **Baker v. Baker,** 200 N.C. 232, 156 S.E. 917, the Supreme Court of North Carolina held, with respect to provisions similar to those governing in this state, that the National Guard is an organization of the state militia and does not become a part of the United States Army until Congress declares an emergency. (32 U.S.C.A., Sec. 1 et seq.; Code 1927, Sec. 6808 et seq.). See also **Blanco v. Austin,** 97 N.Y.S. 328, 204 App. Div. 34. And in **Williams v. United States,** 189 F.2d 607, a case arising under the Federal Tort Claims

Act against the United States, it was held that members of the Oklahoma National Guard were servants of the state since the particular unit of the Guard had not been ordered into active service of the United States.

Sections 74-5-1 to 74-5-3, N.M.S.A., 1953 Compilation, constitute the Veterans Re-employment Act of New Mexico, which follows the form and substance of similar provisions enacted by Congress and found as part of the Selective Training and Service Act of 1940. The New Mexico law provides in part, Section 74-5-1, that:

"Any person who, since July 1, 1940, has left or leaves a position, other than a temporary position, in the employ of any employer, to enter the armed forces of the United States, and who serves one (1) year or more and is honorably discharged, or is entitled to a certificate to the effect that he has satisfactorily completed his period of training and service of one (1) year (if enlisted man) or who terminates his or her service without dishonor (if an officer), and is still qualified to perform the duties of such position, and makes application for reemployment within ninety (90) days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one (1) year:

(a) If such position was in the employ of a private employer, such employer shall restore such person to such position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

(b) If such position was in the employ of the state of New Mexico, any political subdivision thereof, state institution, county or municipality, such person shall be restored to such position or to a position of like seniority, status, and pay."

From the requirements of this statute and in keeping with the classification of National Guard units as expressed in the authorities discussed, it must be concluded that only after the Guard has been called into federal service may its members be considered to have been in the "armed forces of the United States." And further, the National Guard is included as part of the federal force only for that period during which it is commanded by the president or his duly appointed or provided for executive and staff officers.

In support of my opinion and answer to your second question, the controlling statute (Sec. 74-5-1) merely provides that, "any person . . . who serves one (1) year or more and is honorably discharged, . . . shall be restored to such position or to a position of like seniority, . . ." This language is quite similar to that found in the Federal Selective Training and Service Act, which was continued by Section 7 of the Service Extension Act of 1941, and which was construed in White v. Boston & M. R. R., 79 F. Supp. 85. The question, in this case, involved a period of service served during more than one enlistment. The district court said:

"There is nothing in its language to show that Congress meant to discriminate in any manner between persons enlisting for the first or second time; neither does it refer to *{*27}* the rights of inductees as of any particular time.

As the respondent contends, the status of a man who has seen service in the armed forces and after subsequently reenlisting is restored to his former position without loss of seniority, would act adversely to faithful workers who during the meantime had acquired seniority rights. Nevertheless, Congress took no action to amend the act so as to deny the benefits of section 8 (b) (B) of the Selective Training and Service Act of 1940, 50 U.S.C.A. Appendix Sec. 308(b) (B), to such persons. I am, therefore, of the opinion that the court should not usurp the legislative function to correct any possible inequity that may exist by a strained interpretation of the clear language of Section 7 of the Service Extension Act of 1941, as amended."

Since there is no limitation of service found in our statute, it must be concluded that an "employee" may remain in the "armed forces of the United States" indefinitely and still be entitled to re-employment rights if application is made therefor within ninety days after he is discharged or otherwise honorably separated from the service.

Your third question, I believe, is answered in the negative by Attorney General's Opinion No. 4104, dated June 22, 1942. Mr. Houk wrote:

"Chapter 10 of the Laws of 1941, provides for the reinstatement in civil positions of persons who enter the armed forces of the United States. I do not find anything within this act which in any way intimates that a person who volunteers to serve his country would not be entitled to the same benefits as a person who is drafted.

This being true, I am of the opinion that a person who volunteers to serve in either the Army, Navy or Marine Corps is entitled to the same benefits as set forth under Chapter 10, Laws of 1941, as is a person who is drafted."

My opinion and answer to your fourth question is founded in the language of Section 74-5-1 wherein it is provided in part that, "Any person who . . . leaves a position . . . to enter the armed forces of the United States . . . and is honorably discharged . . . (if enlisted man) or who terminates his or her service without dishonor (if an officer), . . . shall be restored to such position. . ." I thus conclude no distinction may be drawn between officers and enlisted personnel under the considered act. Each has the same and equal rights.

Turning finally to the hypothetical situation posed in your inquiry, it must be concluded from the analysis of the governing law already presented that the guardsman suggested does not qualify for any future benefits under the New Mexico Veterans Re-employment Act.

Firstly, it is provided that a person shall be re-employed if he serves with honor for a year or longer with the armed forces of the United States. This requirement would be met in the instant case by showing two years with the navy. Secondly, the veteran must apply or request reinstatement in his old or similar job within ninety days. This appears to have been done and the "employee" was rehired. Next, however, it is stated that the "employee" associated himself with the New Mexico National Guard and thereafter was

ordered by the Adjutant General to full time duty. It is assumed, as concerns the reasoning in this opinion, that he became a full time guardsman, performed duties as a unit administrator or maintenance supervisor, and was paid from funds appropriated from the state treasury. In this last assignment, it must be concluded that the "employee" *{*28}* would not be leaving the "armed forces of the United States" as contemplated by Section 74-5-1, N.M.S.A., 1953 Compilation. This person's re-employment rights under the New Mexico law ceased to exist subsequent to the running of one year from the time of reinstatement in his old job after being discharged from the navy.

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