

## **Opinion No. 64-31**

March 10, 1964

**BY:** OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

**TO:** Col. Harold S. Bibo, State Personnel Director, Santa Fe, New Mexico

### **QUESTION**

#### QUESTION

What are the conditions, if any, under which it is mandatory that a returnee from the armed services, who left state employment for such service, be reinstated to his former position?

#### CONCLUSION

See analysis.

### **OPINION**

#### ANALYSIS

The question presented above is in part dealt with by the provisions of Section 74-5-1, N.M.S.A., 1953 Compilation, which sets out in applicable provision as follows:

"Any person who, since July 1, 1940, has left or leaves a 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 or to a 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."

Section 74-5-3 N.M.S.A., 1953 Compilation, sets out that in case any person acting either in a "public or private capacity fails or refuses to comply with the provisions hereof the district court of the district in which such person maintains a place of business (if such person is a private employer), or in which such person is a public official, shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer or public officials to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reasons of such employer's or officials' unlawful action."

The above statutory provisions regarding the re-employment of veterans were enacted by the New Mexico State Legislature by Laws 1941, Chapter 10, and have never been subsequently expressly amended. A question however does arise as to whether the state legislature by the enactment of the Personnel Act (Laws 1961, Chapter 240) impliedly abrogated in part the provisions of the veteran's rehiring law.

Section 5-4-31, N.M.S.A., 1953 Compilation, contained in the state personnel act declares which positions of state employment are subject to the provisions of the state personnel act. Section 5-4-36 N.M.S.A., 1953 Compilation, provides for competitive entrance and promotion tests to determine the qualifications, fitness and ability of individuals for covered state positions.

Section 5-4-29 N.M.S.A., 1953 Compilation, declares that:

"The purpose of the Personnel Act is to establish for New Mexico a system of personnel administration **based solely on qualification and ability, which will provide greater economy and efficiency in the management of state affairs.** The Personnel Act is enacted under and pursuant to the provisions of article 7, section 2 of the Constitution of New Mexico, as amended." (Emphasis supplied).

Subsequent to the enactment of the veteran's rehiring act (1941), the people approved an amendment to Article 7, Section 2, of the New Mexico State Constitution. This constitutional provision as amended provides in applicable part:

"\* \* \* \*

B. The legislature may provide by law for such qualifications and standards as may be necessary for holding an appointive position by any public officer or employee.

\* \* \* \*"

By rule of statutory construction an earlier statute is repealed by a later legislative enactment to the extent of any incompatible conflict between the two enactments. **Stokes v. New Mexico State Bd. of Ed.**, 55 N.M. 213, 230 P. 2d 243; **State v. Valdez**, 59 N.M. 112, 279 P. 2d 868. If the Legislature has clearly expressed legislative intent

the courts are bound by such statement. **Rapp v. Venable**, 15 N.M. 509, 110 P. 834; **Montoya v. McManus**, 68 N.M. 381, 362 P. 2d 771:

From a careful examination of the provisions of the veteran's rehiring law (Laws 1941, Chapter 10) and the personnel act (Laws 1961, Chapter 240, as amended) it is apparent that a conflict exists between the provisions of the earlier law requiring reemployment of certain veterans who have left state employment for military service, and the provisions of the personnel act which require that hiring for covered state positions be based " **solely on qualification** and ability, which will provide greater economy and efficiency in the management of state affairs." The personnel act by reason of express constitutional amendment is a later act which controls to the extent of any conflict over the provisions of an earlier act and to the extent that the two laws may not be harmonized. The state constitution by recent amendment, (Article 7, Section 2) authorizes the legislature to impose by law qualifications and standards for holding an appointive state position.

In light of the above, it is our opinion that a veteran seeking reemployment by the state for a position which is covered under the state personnel act must be **tested, qualify and meet such standards as are prescribed under the personnel act** for the position in question. Once a veteran has met the requirements of the personnel act for holding a covered position or a similar covered state position he must be placed on a personnel board employment list for such positions (if he meets the requirements also of the veteran's rehiring law) and such individual must then be employed in the first available opening for such covered position. If no opening currently exists, no qualified person then employed is subject to dismissal to create an opening.

We stated in our prior Attorney General's Opinion No. 59-18, an employee who leaves a position to enter the armed forces may remain in the service indefinitely and retain his re-employment rights and no distinction is made between volunteers and draftees under the act.

As to those positions which are not subject to the personnel act, the provisions of the veteran's rehiring law are applicable.