Opinion No. 46-4832

January 10, 1946

BY: C. C. McCULLOH, Attorney General

TO: Mr. F. G. Healy State Highway Engineer State Highway Department Santa Fe, New Mexico

*{*169}* Replying to your request of January 3, 1946, for an opinion on various problems confronting the Highway Department on re-instatement of former employees who resigned to enter the service of the armed forces, to-wit: Right to be re-instated to "old position", salary status and interpretation of the re-employment of persons in armed forces act, being Sections 57-701-702-703 of the 1941 Compilation.

I find no court interpretation of Sections 57-701-702-703 as amended by Chapter 24, Laws of 1945 and, therefore, turn to the only two federal *{*170}* decisions I have found on the federal act from which our law was taken.

Fishgold v. Sullivan Dry Dock & Repair Corporation, 62 F. Supp. 25:

"Under Selective Service Act of 1940, honorably discharged veteran of World War II, who had left steady employment as first-class welder for induction into armed forces, was entitled, upon application therefor, to re-employment for one year as a first-class welder at same rate of pay in preference to any other worker except a veteran in his own category. Selective Training and Service Act of 1940, Sec. 8 (b) (B), (c), 50 U. S. C. A Appendix Sec. 308 (b) (B), (c)."

Kay v. General Cable Corporation, 144 F.2d, 653, while not in point as to facts, makes the following conclusion and interpretation of the federal act:

"Men and women returning from military service find themselves, in countless cases, in in competition for jobs with persons who have been filling them in their absence. Handicapped, as they are bound to be by prolonged absence, such competition is not part of a fair and just system, and the intention was to eliminate it as far as reasonably possible. The Act intends that the employee should be restored to his position even though he has been temporarily replaced by a substitute who has been able, either by greater efficiency or a more desirable personality, to make it desirable for the employer to make the change a permanent one."

It is my opinion that Section 57-701 indicates a legislative policy that one to whom the act applies shall be restored to his old position preferably, and, secondly, to a position of like seniority, status and pay if adequate reason exists which renders the former position unavailable. It would seem that under Section (b) it is the duty of the "State of New Mexico, any political subdivision thereof, state institution, county or municipality" to

carry out such legislative policy in good faith, and that in making decisions they have the burden of justifying their acts.

Section 57-702 of the 1941 Compilation provides:

"Any person who is restored to a position in accordance with the provision hereof shall be considered as having been on furlough or leave of absence during his service in the armed forces of the United States, and shall be restored without loss of seniority, etc. * * *"

The Legislature uses the word "restored" in connection with this matter and certainly Rif a person is to be restored to his same position or one of like seniority, status, and pay, his minimum pay would be the same as that which he received at the time he entered the armed forces. However, in using the phrase "like seniority, status, and pay," I am of the opinion that the Legislature contemplated that a returning serviceman should be placed in the same comparative position relative to other employees in the department as that which he held at the time of leaving the employment to enter the armed forces. Thus, if salary reclassifications and increases have been made generally to other employees, the returning veteran should be entitled to proportionate salary increases and other benefits, if any, which would place him on the same relative basis in comparison with the employees who continued in service.

By THOS. C. McCARTY,

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