

Opinion No. 55-6315

November 10, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Major General Charles G. Sage, The Adjutant General, Santa Fe, New Mexico

We have your inquiry of November 8, 1955, requesting an opinion from this office on the following questions:

- (a) "Specifically, what effect does such a voluntary enlistment, under 18 years of age and with parental consent, have upon the provisions of the New Mexico Military Code?"
- (b) "Since the person concerned is under 18 years, is his enlistment voidable by him upon request, or at his desire?"
- (c) "In the event such person commits a military misdemeanor, can he be treated, under the New Mexico Military Code, like any other military person?"

We will answer the questions in the order above given.

(a) A voluntary enlistment is a contractual relationship between the person enlisting and the State. 57 C.J.S. (Militia) Section 12 b, page 1091. It is a contract which, in effect, changes the status of the party enlisting. In re Morrissey, 137 U.S. 157. In other words, by enlisting in the National Guard of the State of New Mexico, a party agrees to be bound by the New Mexico Military Code insofar as it applies to him in his duties as a National Guardman. The Legislature in this State has determined that for this purpose the civil rules concerning minors do not apply. Acker v. Bell, 57 So. 356. In the case presented by the letter, where both the enlistee and the parents joined in this contract of enlistment, there can be no doubt but that the enlistee is bound by the provisions of the New Mexico Military Code.

(b) We call your attention to Opinion No. 5314 of this office, addressed to your office under date of August 1, 1950, which answers question (b) above. We particularly call your attention to section (d) of this opinion.

(c) We are of the opinion that where any enlistee violates the Military Code, he is subject to the jurisdiction of the Military Courts, as provided by the Military Code. Where there is a valid enlistment, the fact that the enlistee was under 18 would not exempt the party from the Military Code. As pointed out in (a) above, this results from a matter of a change of status by contract. By agreement, the enlistee agrees to be bound by the Military Code. In the case of In re Kuchta, 8 Ohio N.P. NS613, the claim was made that where the father of the enlistee did not consent to the minor enlisting, that the enlistee could not be tried by the Military Court for a violation of the military offense. The court ruled that the enlistee could be tried and civil courts would not appear. Your particular

case does not involve the failure of the parents' consent, therefore there can be little doubt but that the voluntary enlistee is subject to the Military Code as any other military person. This change of status would be sufficient to remove the person from the authority of the Juvenile Court where a military offense is involved.

Trusting we have answered your questions, we remain

By Paul L. Billhymer

Assistant Attorney General