

## **Opinion No. 57-197**

August 8, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,  
Assistant Attorney General

**TO:** Representative Anderson Carter, Chairman Legislative Finance Committee, State  
of New Mexico, P. O. Box 1651, Santa Fe, New Mexico

### **QUESTION**

#### QUESTION

Is the recent discharge of Colonel Sanford Caudill from the National Guard a legal and valid discharge?

#### CONCLUSION

No.

### **OPINION**

#### ANALYSIS

Lt. Col. Sanford Caudill on July 1, 1957 received Special Orders No. 73 from the Office of the Adjutant General of the New Mexico National Guard. These Orders purported to honorably discharge the named officer, and transfer him to the Army Reserve. The above Special Orders were promulgated pursuant to Section 9-1-19, N.M.S.A., 1953 Compilation, and transferred another officer to command Headquarters 804 AAA Bn., the organization which to that time had been under the command of Lt. Col. Caudill. Although Special Orders No. 73 contained the notation "BY COMMAND OF THE GOVERNOR" it is our understanding that Special Orders No. 73 have never, in fact, been approved or signed by the Governor.

Section 9-1-19, supra, directs the Governor of the State of New Mexico to issue such orders as may be necessary to conform the National Guard of New Mexico to that prescribed by the War Department. The Statute states:

"The governor is hereby authorized and it shall be his duty from time to time to make and publish such orders as may be necessary to conform the national guard of the state of New Mexico in organization, armament and discipline and otherwise, to that prescribed for the organized national guard of the states by the war department (department of defense or appropriated subordinate department) of the United States, and for this purpose the governor may alter, increase, consolidate, diminish, disband or discharge officers, enlisted men, departments, staff corps, retired lists, and

organizations. Provided: That no organization of the New Mexico national guard, which has been federally recognized, and has received the benefits provided in the National Defense Act, shall be disbanded or be permanently removed from one locality, city, town or county, to another city, town or county, without the approval of the secretary of war (secretary of defense or appropriate subordinate secretary)."

It should be noted that only the Governor of the State of New Mexico can authorize the reduction of forces, although this is normally done on the advice of the Adjutant General. Turning to the instant case, we understand that Special Orders No. 73 were never signed or approved by the Governor, and it follows, in our Opinion, that Special Orders No. 73 do not effect a legal or valid discharge of Lt. Col. Sanford Caudill.

In an effort to clarify procedure to be followed in the future, relative to the vacating of commissions of officers in the National Guard, this office is obligated to state that even if the Governor signed and approved Special Orders No. 73, it is our opinion that the order would not effect the discharge of Col. Caudill. Under the facts as we know them, and this knowledge is substantiated, to a large degree, by a personal investigation conducted by this office, the intended purpose of the orders was the specific discharge of Col. Caudill.

We are of the opinion that the Legislature, in drafting § 9-1-19, supra, did not intend that such use as stated above, i.e. the discharge of one specific officer, be ascribed to this particular Section. To interpret § 9-1-19 in the manner proposed by Special Orders No. 73 would deprive National Guard officers of the security in their commissions which the New Mexico Statutes intended to give them. In military law it is well understood that commissioned officers are not to be discharged without a hearing before an Efficiency Board, and without due process. We believe that the Governor may vacate a commission under § 9-1-19 supra when such action is taken to "issue such orders as may be necessary to conform the National Guard of New Mexico to that prescribed by the War Department" (see *State ex rel Charlton v. French*, 44 N.M. 169, 99 P. 2d. 715), and no attempt is made to limit the power of the Governor in this regard.

Section 9-2-13, N.M.S.A., 1953 Comp., provides that commissions of officers of the New Mexico National Guard may be vacated upon the recommendation of an Efficiency Board approved by the Governor, or pursuant to the sentence of a court marshal. In this case, Col. Caudill has not been court marshalled, nor has he faced an Efficiency Board. By virtue of the invalidity of Special Orders No. 73, Col. Caudill retains his present rank in the National Guard without break in service. Should the Adjutant General desire to attempt the removal Col. Caudill for acts allegedly committed by him, § 9-2-15, N.M.S.A., 1953 Comp., provides for an Efficiency Board of three commissioned officers to determine the moral character and the capacity of general fitness for military service of any officer of the New Mexico National Guard. Such a Board may be appointed upon recommendation of the Adjutant General, and the procedure of the Board may be prescribed by the Governor. If the findings of the Board be unfavorable, and such findings are approved by the Governor, the officer so investigated may be discharged from the National Guard.

By way of conclusion, we state that Special Orders No. 73 did not effect a legal and valid discharge of Lt. Col. Sanford Caudill; that the Governor may, by virtue of § 9-1-19 effect the vacating of an officer's commission if such is pursuant to conforming the National Guard of New Mexico to that prescribed by the War Department. It is our opinion, however, in those cases where the vacating of an officer's commission is based on alleged insubordination, general unfitness, or for other reasons as specified in § 9-12-13, supra, such must be done in accordance with the said Section or Section 9-2-15.