

## **Opinion No. 57-271**

October 23, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,  
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**TO:** Mr. Manuel A. Armijo, Director, New Mexico Veterans' Service Commission, P. O.  
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### **QUESTION**

#### QUESTIONS

"1. What is the meaning of the term 'Honorably Discharged' member, etc? May we accept other than strictly 'Honorable' discharge or separation papers, since there are (a) Honorable, (b) General, (c) Undesirable, (d) Bad Conduct and (e) Dishonorable Discharge?

"2. How long must a veteran have lived in New Mexico prior to the delimiting dates, to qualify as resident, as required in Section 72-1-11.

"3. If an applicant who qualifies becomes a legal resident in another state, may he or she continue to receive tax exemption benefits in New Mexico?

#### CONCLUSIONS

1. See Opinion
2. No definite period.
3. No.

### **OPINION**

#### ANALYSIS

The so-called soldier exemption law first came into existence in 1921, Laws 1921, p. 470, as an amendment to Art. VIII, Section 5 of the New Mexico Constitution. Subsequent amendments were adopted at special elections in 1949 and 1953. In its present form, Article VIII, Section 5 provides as follows:

"The legislature may exempt from taxation property of each head of the family to the amount of two hundred dollars (\$ 200) and the property, including the community or joint property of husband and wife, of every honorably discharged member of the armed forces during any period in which they were or are engaged in armed conflict under

orders of the President of the United States, and the widow of every such honorably discharged member of the armed forces of the United States, in the sum of two thousand dollars (\$ 2,000). Provided, that in every case where exemption is claimed on the ground of the claimants having served with the armed forces of the United States as aforesaid, the burden of proving actual and bona fide ownership of such property upon which exemption is claimed, shall be upon the claimant.

In keeping with the permissive language of the aforementioned constitutional provision, the Legislature enacted, initially in 1923, the Soldiers' Exemption Act which provided generally for a tax exemption for ex-members of the armed forces who served for thirty days or more;

"at any time in which the United States was officially engaged in any war, including resident unmarried widows of such soldiers, sailors and marines."

In its present form the Act, in part, in § 72-1-11, N.M.S.A., 1953 Compilation, Pocket Supplement, provides:

"'Soldier' shall include every honorable discharged member, of either sex, of the armed forces, who served in the armed forces of the United States for ninety days at any time during any period in which the military forces are engaged in armed conflict under orders of the president of the United States, and shall include persons of either sex as such honorably discharged members of the armed forces. Provided, however, that World War I veterans shall have become residents of the state prior to January 1, 1934; that World War II veterans shall have become residents of the state prior to January 1, 1947; and Korean conflict veterans shall have been residents of the state prior to January 1, 1955; and Provided, further, that such honorably discharged members of the armed forces shall also include resident unmarried widows of such honorably discharged members of the armed forces; and Provided further, that the period of ninety days' service shall be waived in any instance where the soldier's discharge brought about by service connected disabilities. Provided further that soldiers who prior to January 1, 1947 lived in an area within the exterior boundaries of New Mexico which was then under the exclusive jurisdiction of the United States of America, who became and continued to be residents of New Mexico after cession of jurisdiction back to the state, may claim and be allowed such exemption."

In answer to the first question hereinabove put, the term "Honorable Discharge", with reference to the exemption act, is defined by § 72-1-12, N.M.S.A., 1953 Compilation, which states that:

"Excepting a dishonorable discharge, or one for misconduct any discharge, including furloughs to the reserve or order relieving a member of a reserve corps from active duty, shall constitute an honorable discharge for the purposes of this act."

From the language of this last quoted section, it becomes apparent that any discharge not founded on behavior as manifested by a court-martial conviction of violating any of

the punitive articles of war or a summary showing a misconduct, shall be considered honorable for the purposes of determining eligibility for the provided tax exemption.

The second query of your first question calls for a determination of the basis or findings on which each of the stated discharge classifications stand.

An **Honorable Discharge**, as provided for in AR 635-200, paragraph 8 a is awarded to an individual who meets the following qualifications:

- "(1) Has conduct ratings of at least 'good'.
- (2) Has efficiency (rating of) 'fair'.
- (3) Has not been convicted by a general court martial.
- (4) Has not been convicted more than once by a special court martial."

A **General Discharge**, as defined and provided for by paragraph 9, AR supra, is issued to:

"Individuals discharged under honorable conditions which do not qualify them for an Honorable Discharge. . . ."

From the implied reference to the fundamental qualifications stated for honorable discharges, the issuance of a General Discharge is determined by considering "the best interests of the Service or the individual." Stated in other words, a general discharge is not indicative of an imposed penalty applicable to the attributes of an honorable discharge, but rather a rating premised upon suitability according to military standards and needs.

With reference to § 72-1-12, supra, it is our opinion that both "Honorable Discharges" and "General Discharges" constitute honorable discharges for purposes of the exemption act.

An **Undesirable Discharge** is recommended, in accordance with AR 635-208, paragraph 1. c., upon a showing of one or more of the following:

- "(1) Gives evidence of habits and traits of character manifested by antisocial or a moral trend, chronic alcoholism, criminalism, drug addiction, pathological lying or misconduct.
- (2) Possesses unclean habits, including repeated venereal infection.
- (3) Repeatedly commits petty offenses not warranting trial by courts martial.
- (4) Is an habitual shirker.

(5) Is recommended for discharge by a disposition or other board of medical officers because he possesses a psychopathic (anti-social) personality, disorder or defect, or is classified as having "no disease" by the board and his record of service reveals frequent disciplinary actions because of infractions of regulations and commission of offenses, or it is clearly evident his complaints are unfounded and are made with the intent of avoiding service.

(6) Demonstrates patterns in activities or associations which tend to show that he is not reliable or trustworthy."

Based upon the theory that the soldiers' exemption is a public gesture of appreciation and award for services and duties intentionally well performed, it must be concluded from the bases aforequoted that an Undesirable Discharge is not contemplated in the language defining an Honorable Discharge as is herein considered.

A **Bad Conduct Discharge**, by its own descriptive nomination does not purport honorability in the sense intended by the Statute; on the contrary, there is in the case of this termination certificate a decided cloak of "misconduct." AR 635-204, paragraph 5, specifically provides:

"The reason and authority for discharge ( **Bad Conduct**) will be:

(a) When discharge is for reason of desertion, . . .

(b) When discharge is for reason other than desertion, . . ."

A **Dishonorable Discharge**, as indicated by AR 635-204, paragraph 1. a., provides generally for a discharge pursuant only to approved sentence of a General Court Martial. In such case, there must be a recorded showing and finding of a violation of one or more of the punitive articles as are set out in The Uniform Code of Military Justice, 1951.

Accordingly, it is our further opinion that persons holding Undesirable, Bad Conduct and Dishonorable Discharges are not entitled to, nor eligible for, the tax exemption herein considered.

To answer the second stated question, reference must again be made to § 72-1-11, supra. Here we find consistent language in the instance of each date specified, ". . . shall have become residents of the state prior to . . . ."

Generally, residence as contemplated by the Statute herein considered has reference to an area or political subdivision as distinguished from an actual abode or residence. Acquisition of residence, in this sense, is discussed in 79 C. J.S. at 294 as follows:

"A residence may be acquired in a very short time, and . . . . at the very moment there is a concurrence of bodily presence and the requisite intent a residence is created.

Residence is a quality which endures when once acquired, and when once it is established it is presumed to continue, without intermission, until it is shown to have been changed, abandoned, or a new one gained."

And, in pointing up the elements of residence the aforesaid authority continued at page 295:

"Two fundamental elements are essential to create a residence, and these elements are: (1) Bodily presence in a place. (2) The intention of remaining in that place. Residence is thus made up of fact and intention, the fact of abode and the intention of remaining, and is a combination of acts and intention. Neither body presence alone nor intention alone will suffice to create a residence. There must be a combination and concurrence of these elements, and when they occur, and at the very moment they occur, a residence is created."

Under the statutory provisions of this state, residence is specifically defined, as the requirements stated therefor, under the election code (§ 3-1-1), for purposes of divorce actions (§ 22-7-4), and for public officials and employees. (§ 5-1-6). These definitions or requirements are for stated purposes and are not binding on any other statutory requirement or legislative purpose. We find no specific time element requirement to establish residence in the case of an honorable discharge veteran. Accordingly, it must be concluded and stated as our opinion that residence, for purposes of the exemption act considered, is a matter of intent and presence. Thus, any honorably discharged veteran, who, as a matter of intent and fact, did become a resident of New Mexico prior to the dates stated in Section 72-1-11, supra, may be considered as having met the residence requirement of the exemption act.

In keeping with the theory aforesaid, that of physical presence and intent, a person may legally have but one residence at any given time. As noted in 77 C. J.S. 293,

"Residence ordinarily implies something of permanence or continuity at least for an indefinite period, to the exclusion of another contemporaneous residence." In Re Dusen, 355 Mo. 1222, 200 SW 2d 343.

Further, a search of the provisions of the present law reveals a residence requirement in the following:

"The county assessors shall annually prepare a list of soldiers **resident** in their respective counties entitled to the exemption . . ." Section 72-11-11, N.M.S.A., 1953 Compilation. (Emphasis supplied.)

and

" **Each resident soldier in New Mexico** entitled to claim a soldier's exemption shall obtain from the Veterans Service Commission a Certificate of Eligibility which shall show: . . ." Section 72-11-20, N.M.S.A., 1953 Compilation. (Emphasis supplied.)

Accordingly, it is our opinion that any veteran who, although previously qualified for an Exemption Certificate, moves to another state, and does as a matter of fact establish a legal residence in such state, will lose the exemption benefits herein discussed.