

Opinion No. 58-209

October 23, 1958

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

TO: Mr. C. W. Burrell, State Labor Commissioner, Santa Fe, New Mexico

QUESTION

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May a veteran who was employed within the State of New Mexico as a Locomotive Fireman and Locomotive Engineer on January 27, 1951, at which time he was called to active service with the United States Air Force, upon his discharge from military service on January 31, 1958, secure re-employment under §§ 74-5-1 through 74-5-3, N.M.S.A., 1953 Compilation?

CONCLUSION

Yes.

OPINION

ANALYSIS

We are informed of the discharge of a person by the Atchison, Topeka and Santa Fe Railway Company who had returned from duty in the United States Air Force to his former employment with this Railway Company. The reason stated for his discharge was that he had no re-employment rights under the Universal Military Training Service Act.

This person was employed exclusively within the State of New Mexico by the Atchison, Topeka and Santa Fe Railway Company as Locomotive Fireman and Locomotive Engineer, in addition to prior dates of employment, from July 23, 1949 to January 27, 1951 at which time he was called to active service by the United States Air Force.

This person was released from military service on January 31, 1958 and was re-employed by the above mentioned railroad on February 11, 1958 and continued his employment until discharged on June 10, 1958 for the reason as stated above.

In view of the foregoing we are called upon to give our opinion as to whether or not this person can be re-employed as provided for under §§ 74-5-1 through 74-5-3, supra, which Act provides for reinstatement in civil positions of persons having entered the armed forces.

Sections 74-5-1 through 74-5-3, supra, relate as follows:

"Re-employment of armed forces personnel. -- Any person who, since July 1, 1940, has left or leaves a position, other than a temporary 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 re-employment 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.

74-5-2. Status on reinstatement -- Restriction on discharge. -- Any person who is restored to a position in accordance with the provisions hereof shall be considered as having been on furlough or leave of absence during his services in the armed forces of the United States, and shall be restored without loss of seniority, and shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person entered the armed forces of the United States, and shall not be discharged from such position without cause within one year after such restoration.

74-5-3. Enforcement in district court -- Procedure. -- 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 official's unlawful action. The court shall order a speedy hearing in any such case, and shall advance it on the calendar. Upon application to the district attorney for the pertinent district by any person claiming to be entitled to the benefits of such provisions, such district attorney, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate

pleading and the prosecution thereof to specifically require the compliance with such provisions: Provided, that no fees or court costs shall be taxed against the person so applying for such benefits."

As indicated in our factual situation above, the veteran originally sought and obtained re-employment under the Federal Universal Military Training Act. He was discharged, however, when the union in which the said veteran belonged pointed out to the company that the said veteran had apparently re-enlisted after his initial call to duty, contrary to the provisions of the Universal Military Training Act, which limits service time to four years unless the veteran's continued service is mandatorily required. Under New Mexico's Veterans Re-employment Act, there is no such service time limitation. In the instant case, the veteran sought re-employment after serving a year or more and after receiving an honorable discharge. He applied for re-employment within ninety days after discharge and was actually re-employed. Hence, it is our opinion that the veteran in the instant case qualified in every way for re-employment under the New Mexico Act.

It is suggested, however, that perhaps the Federal Act supersedes the State Act in this case. We have carefully reviewed the authorities and have found no cases which indicate that the Federal Act supersedes State Acts or that the various State Acts merely supplement the Universal Military Training Act. True, the employer in this case is a carrier in interstate commerce. The veteran in this instance, however, is employed exclusively within the State of New Mexico. We, therefore, conclude that the veteran who is the subject of this opinion should be re-employed. If employment is refused, he may bring action to compel his re-employment with the assistance of the District Attorney's Office, as provided in § 74-5-3, supra, or by employing private counsel, should he so desire.