

Opinion No. 69-108

September 15, 1969

BY: Ray Shollenbarger, Assistant Attorney General

TO: Mr. Ricardo M. Montoya, State Labor Commission, 137 East DeVargas Street, Santa Fe, New Mexico

QUESTIONS

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1. If a person leaves the employ of the State of New Mexico in order to enter the armed forces must he be tested, qualify and meet the standards of the State personnel Act upon returning before he is entitled to re-employment under Section 74-5-1, N.M.S.A., 1953 Compilation?
2. If a person leaves the employ of the State of New Mexico in order to enter the armed forces prior to the time his probationary period is ended is he entitled to re-employment upon returning under Section 74-5-1, supra?
3. If the returning veteran is denied re-employment can the State Labor and Industrial Commissioner bring an action to have the person reinstated?

CONCLUSIONS

1. No.
2. Yes, but see analysis.
3. No.

OPINION

{*174} ANALYSIS

In Attorney General's Opinion No. 64-31 dated March 10, 1964, this office interpreted Section 74-5-1, N.M.S.A., 1953 Compilation, as it read at that time, as requiring returning veterans seeking re-employment to meet the standards prescribed under the Personnel Act. However, Chapter 260 of the Laws of 1969 has amended Section 74-5-1, supra, so as to eliminate this requirement and thereby make our former opinion inapplicable.

Section 74-5-1, supra, as far as it is pertinent, now reads as follows:

"Any person who, since July 1, 1940, has left or leaves a position he has held for six (6) months, other than a temporary position, in the employ of any employer, to enter the armed forces of the United States, national guard or organized reserve, and who serves six [6] months 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 six [6] months, if an 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 reemployment 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:

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 deemed to meet all the requirements of the Personnel Act [5-4-28 to 5-4-46]** as well as all residency requirements or other provisions of law and shall be restored to such position or to a position of like seniority, status and pay." (Emphasis added).

The above emphasized language in the statute which was part of that added by the 1969 amendment makes it clear that the legislature does not intend for returning veterans seeking re-employment with the State to meet the standards of the Personnel Act.

In response to your second question the discussion up to this point would be the same whether the person was an employee or a probationer. Section 74-5-1, supra, applies to "any person". However, it should be noted that if the person has gained the status of an "employee", as that term is defined by Section 5-4-30, N.M.S.A., 1953 Compilation, and Section 121 of the Personnel Board Rules he will have additional rights under the State Personnel Board Rules that a "probationer" would not. Section 607 of the State Personnel Board Rules provide in part:

"REINSTATEMENT AFTER MILITARY SERVICE -- An employee (Ref. Sec. 121) returning from Military Leave Without Pay (Ref. Sec. 911) who applies for reinstatement within 90 days after discharge or completion of original enlistment, and who is discharged under conditions other than dishonorable, shall be reinstated in his former agency to the classification occupied when military leave was {**175*} granted, provided the employee is physically able to perform the duties of the classification. In the event that the classification no longer exists in the agency in which he was previously employed, he shall be reinstated to a comparable classification in that agency. If all positions in the appropriate classification are occupied, a vacancy will be created following lay-off procedures as set forth in Section 802."

Under Section 607 of the Personnel Board Rules if the person has attained the status of "employee" a vacancy must be created in order to re-employ the returning veteran. If the person is a "probationer" and there is no vacancy then he must be placed on the personnel board employment list for such position and he will then be employed in the first available opening for such covered position. (Attorney General Opinion No. 64-31).

An "employee" is defined as a person in a position in the service who has completed his probationary period. Section 136 of the Personnel Board Rules defines a probationary period as "A working test period of one year following a probationary appointment during which an appointing authority determines the fitness of the appointee to perform his duties satisfactorily."

In answer to your third question we feel that only the returning veteran or the district attorney of the appropriate district can bring an action to have the veteran restored to his prior position if employment is refused. In support of this position we rely on Section 74-5-3, N.M.S.A., 1953 Compilation, which provides:

"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 if 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."