

## Opinion No. 73-75

December 3, 1973

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Filberto Ruiz, Jr. Director, New Mexico Veterans Commission P.O. Box 2324 Santa Fe, New Mexico 87501

### QUESTIONS

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Is a member of the National Guard entitled to tax exemption benefits if called to active duty for training purposes?

#### CONCLUSION

See analysis.

### OPINION

#### {\*146} ANALYSIS

Section 72-1-13, N.M.S.A., 1953 Comp. (1971 P.S.) creates a tax exemption {\*147} for "soldiers." "Soldier" is defined by Section 72-1-11, N.M.S.A., 1953 Comp., as amended by Laws of 1973, Chapter 282 as:

". . . every honorably discharged member of either sex, of the armed forces, who served in the armed forces of the United States on active duty continuously for 90 days at any time during any period in which the military forces were engaged in armed conflict under orders of the president of the United States, or who served in the armed forces of the United States on active duty continuously for 90 days, any part of which occurred during a period in which the military forces were 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 who were or became residents of the State of New Mexico as hereinafter provided."

What is "service in the armed forces of the United States?" It is evident from such federal law as Title 10 U.S.C. Section 263 that the United States armed forces have two components: regular and reserve. Title 10 U.S.C. Section 261 (a)(1)(5) names the Army National Guard and the Air National Guard as reserve components of the armed forces. Service in either organization would therefore be considered service "in the armed forces of the United States." Moreover, it appears that members of the National Guard perform their Title 10 U.S.C. Section 511 (d) training as members of the United States Army or Air Force and at the conclusion of training receive a "release from active duty."

Is the term "service in the armed forces," as applied to the National Guard, limited in any way to periods during which the Guard is called into "active Federal service" as used in Title 10 U.S.C. Sections 3493, 8495, and 3500 having to do with national emergencies? We do not believe so. The term "active Federal service" appears to be a special term which is to be distinguished from "active duty." The distinction is observed in **Spangler v. United States**, 185 F. Supp. 531 (1960), a case which was concerned with a different question from that in this case. That part of the **Spangler** case which is here instructive reads as follows:

". . . The Court answers plaintiffs' argument by noting that Title 10 U.S.C.A. §§ 3495 and 3500 and Title 50 U.S.C.A. Appendix, § 451 speak of 'active Federal service' and 'Federal service' and not 'active duty.' The fact that plaintiff was on active duty is not equivalent to being in 'active Federal service.'"

It now becomes necessary to determine what constitutes "active duty" in the armed forces of the United States. Active duty is defined a number of times in federal law applicable to National Guard, armed forces, and veterans' benefits. According to Title 10, U.S.C. Section 101 (22):

"'Active duty' means full-time duty in the active military service of the United States. It includes duty on the active list, full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned."

In Title 32 U.S.C. Section 101 (12), a federal law which concerns the National Guard specifically, the definition of active duty is essentially the same:

"'Active duty' means full-time duty in the active military service of the United States. It includes such Federal duty as duty on the active list, full-time training duty, annual training duty, and attendance, while in the active military service, as school designated as the service school by the Secretary of the military department concerned."

Title 38 U.S.C. Section 101 (21) deals, however, with Federal veterans' benefits and excludes active duty for training from the definition of active duty. In addition, for Federal education benefits in particular, active duty for training established in Section 511 (d), above, is excluded from the term "active duty" in Title 38 Section 1652 (a)(1) and so an individual who performed service under Section 511 (d) would not be an "eligible veteran." However, definitions used in determining Federal veterans' benefits do not govern distribution of state veterans' benefits. We find no exclusions in state law similar to those in Title 38, above. Therefore, the definitions of active <sup>{\*148}</sup>duty in Title 38 should not apply. Under Title 10 and Title 32 definitions, previously quoted, full-time training duty is considered to be active duty and thus a member of the National Guard undergoing such training is on active duty. We wish to make it clear that the exemption is available only if the National Guard member's service is (1) in the armed forces of the United States, (2) active duty, (3) is for a continuous, unbroken 90 day period, (4) for a period at least part of which occurred during a period in which the military forces were

engaged in armed conflict under orders of the President of the United States. Also, the National Guard member must have been honorably discharged and must have been or become a resident of the State of New Mexico as provided in Section 72-1-11, **supra**.

The answer to your question is that a member of the National Guard is entitled to tax exemption benefits if called to active duty for training purposes and if all other requirements of Section 72-1-11, above, are met.

By: Bill Primm

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