Opinion No. 89-23

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OPINION OF: HAL STRATTON, Attorney General

BY: Kathrine Kinzer-Ellington, Assistant Attorney General

TO: Ken Iskow, Director, New Mexico Law Enforcement Academy, 4491 Cerrillos Road, Santa Fe, NM 87505

QUESTIONS

May a candidate for admission to the Law Enforcement Academy who received a general discharge from the military be certified as a police officer?

CONCLUSIONS

Yes.

ANALYSIS

The 1988 Legislature amended Sections 29-7-6 and 29-7-8 of the Law Enforcement Training Act, Sections 29-7-1 through 29-7-11 NMSA 1978. The new provisions require the Law Enforcement Academy to consider the type of discharge that an applicant for police officer certification received if the applicant previously served in the military. As amended, Section 29-7-6 reads: "The director shall determine that all applicants for certification ... have not been released or discharged under any other than an honorable discharge from any of the armed forces of the United States...." As amended, Section 29-7-8 reads:

Notwithstanding any provisions of any general, special or local law to the contrary, no person shall receive an original appointment on a permanent basis as a police officer to any law enforcement agency in this state unless he ... has not been released or discharged under any other than an honorable discharge from any of the armed forces of the United States....

These statutes affect candidates for police officer certification, and officers desiring appointment to any law enforcement agency. As military service is not a prerequisite for certification, this new requirement only applies to veterans and not to applicants who have never served in the armed forces.

A. MILITARY DISCHARGES

Federal law requires that each lawfully inducted or enlisted member of the armed forces receive a discharge certificate upon discharge. 10 U.S.C.§ 1168(a) (1983). Federal and

military regulations characterize and establish types of discharge certificates. 32 C.F.R. § 41.6, Appendix A, part 2(c)(2)(b) (1987). These categories include: Honorable, General (under honorable conditions), Under Other Than Honorable Conditions,[1] Bad Conduct and Dishonorable. See, e.g., Army Reg. No. 635-200.

Federal regulations state that: "The Honorable characterization is appropriate when the quality of the member's service generally has met the standards of acceptable conduct and performance of duty for military personnel, or is otherwise so meritorious that any other characterization would be clearly inappropriate." 32 C.F.R.§ 41.6, Appendix A, part 2(c)2(b)(1) (1987). General discharges are defined as follows:

If a member's service has been honest and faithful, it is appropriate to characterize that service under honorable conditions. Characterization of service as General (under honorable conditions) is warranted when significant negative aspects of the member's conduct or performance of duty outweigh positive aspects of the member's record.

32 C.F.R. § 41.6, Appendix A, part 2(c)(2)(b)(2) (1987). (emphasis added). Thus, general discharges are properly known as "General (under honorable conditions)," and are given for "honest and faithful service," although "negative aspects" of the discharged serviceman's record render him ineligible for an honorable discharge.

A person may be administratively discharged from the military for a variety of reasons. The kind or type of discharge a person receives depends on that person's record, the reason for discharge, and in some cases, the findings of an administrative discharge board. Administrative discharges, including honorable and general discharges, can occur when it is determined that a person is unsuitable for further service. A finding of unsuitability can be based, among other reasons, on the presence of a personality disorder, alcohol abuse, financial irresponsibility, apathy, "defective attitude" and "unsanitary habits." See Army Regulation 635-200; Beller v. Middendorf, 632 F.2d 788 (9th Cir., 1980). One individual administratively discharged for unsuitability may receive an honorable discharge, while another may receive a general discharge for similar conduct if his overall record contains sufficient "negative aspects." A person who has received a general discharge, in other words, has not necessarily engaged in conduct which would render him legally ineligible for certification as a police officer. Nor does an honorable discharge guarantee that a person is a fit candidate for police officer certification under the other criteria set forth in Sections 29-7-6 and 29-7-8 and the other criteria prescribed by the Board.

TITLE VII

Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000(e), et seq. (1983) specifically applies to governments, governmental agencies and political subdivisions. 42 U.S.C.A.§ 2000(e)(a).[2] Thus, if a state statute sets forth employment criteria that violate Title VII, the state law will be found invalid. Fitzpatrick v. Bitzer, 427 U.S. 445, 453 (1976).

Eligibility for certification under Sections 29-7-6 and 29-7-8 is a prerequisite to permanent employment as a police officer by all state and local police agencies. Pursuant to these statutes, the Law Enforcement Academy Board certifies officers. Hence, the Board controls access to employment as a police officer in New Mexico. Adherence to the criteria enumerated in the statutes thus constitutes an "employment practice" subject to Title VII. Sibley Mem. Hospital v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir., 1973) (Title VII applies to entities which "control access to . . . employment and who deny such access by reference to invidious criteria"), quoted with approval in Livingston v. Ewing, 601 F.2d 1110, 1114 (10th Cir., 1979) cert. denied, 444 U.S. 870 (1979) ("Employment practice [as defined in Title VII] must be given a broad scope. It is not restricted to a servant situation"). Title VII, therefore, regulates the relationship between candidates for police officer certification, their hiring agencies, and the Board.[3]

Studies have shown that members of minority groups receive a lower proportion of honorable discharges, and a higher proportion of general discharges than non-minorities of similar aptitude and education. Decision of EEOC No. 74-25 (September 10, 1973); Decision of EEOC No. 76-13 (August 15, 1975). Thus, it has been found that a policy of automatically excluding individuals who have received general discharges from the military has a disparate impact upon minorities. Hiring policies which have a disparate impact upon minorities may be prohibited under Title VII. If established job qualifications have a demonstrable adverse impact upon minorities, and are not "demonstrably a reasonable measure of job performance," they are prohibited. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

Hence, unless the Academy can show a business necessity behind the policy, it is possible that a court would find that Sections 29-7-6 and 29-7-8 violate Title VII. Since general discharges can be given for reasons that would not preclude an individual from either attending the New Mexico Law Enforcement Academy or becoming a certified police officer, it is reasonable to expect that a court would find that the honorable discharge requirement has no relationship to the duties of a police officer. Under the Griggs test, the honorable discharge requirement is not a demonstrable measure of job performance, and hence is violative of Title VII.

In Bailey v. DeBard, 10 EPD/P 10,389 (S. D. Ind. 1975) the United States District Court considered whether the Indiana State Police Department policy concerning military discharges violated Title VII. The policy in question provided for a background check on each applicant for admission. Applicants who had received a discharge other than honorable from the military were subject to department policy regarding good reputation, character, and physical, emotional and mental fitness. An investigation was performed through the applicant's military branch to determine the circumstances of discharge. The investigator was authorized by the applicant to conduct medical inquiries and look into other privileged matters. 10 EPD/P 10,389 at page 5679.

This policy was challenged on the basis that "the investigations of character including military services discharges have a disparate impact on [Blacks] because statistics show that [Blacks] receive a lower proportion of honorable discharges and a higher

proportion of the general and undesirable discharges than the Caucasians with similar educational levels and aptitudes." 10 EPD/P 10,389 at page 5680. However, the court found that the Indiana policy did not violate Title VII, because the hiring agency reviewed, on a case-by-case basis, the circumstances surrounding each discharge. The court found that such a review was permissible in order to determine whether applicants met reasonable established hiring criteria. 10 EPD/P 10,389 at page 5680.

In order to comply with Title VII, the Academy can use the existence of an applicant's general discharge to trigger further investigation into the reasons the applicant received this type of discharge. Although inquiry regarding the circumstances surrounding the discharge is appropriate, a blanket policy of rejecting applicants with general discharges is not.

FOURTEENTH AMENDMENT

Sections 29-7-6 and 29-7-8, as amended, also raise serious questions regarding the due process and equal protection clauses of the fourteenth amendment to the United States Constitution. The equal protection clause mandates similar treatment of persons in similar situations. When a statute causes different classes of citizens to be treated in different ways, that statute must bear some rational relationship to a legitimate state purpose or governmental objective. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957) (job qualifications imposed by state must have a rational connection with the applicant's fitness or capacity to perform the job).

The statutes at issue here create two classifications. Veterans under these statutes are subject to standards to which non-veterans are not subject, i.e. a veteran must prove he received an honorable discharge to be eligible for employment. Further, veterans who received a general discharge are treated differently than veterans who received an honorable discharge. These classifications must be examined to determine whether they are rationally related to the state's goal of maintaining the quality of its police officers.

In Thompson v. Gallagher, 489 F.2d 443 (5th Cir. 1973), the United States Court of Appeals applied an equal protection analysis to a city ordinance which barred municipal employment of veterans not having an honorable discharge. The plaintiff, a custodian at the city diesel plant, was terminated because he had not received an honorable discharge. He sued under 42 U.S.C.A. § 1983. The ordinance created the two classifications described above: it distinguished veterans from non-veterans, and veterans honorably discharged from other veterans. 489 F.2d at 447. The court, finding that the ordinance violated the equal protection clause, held:

Numerous factors which have absolutely no relationship to one's ability to work as a custodian in a power plant may lead to other than honorable discharges from the military, including security considerations, sodomy, homosexuality, financial irresponsibility and bed-wetting. The point is not that some or all of these considerations

must, as a matter of due process, be excluded from consideration of fitness to hold the position of power plant custodian. However, a general category of "persons with other than honorable discharges" is too broad to be called "reasonable" when it leads to automatic dismissal from any form of municipal employment. We have no hesitancy in calling the ordinance which bars that class of persons from city employment, without consideration of the merits of each individual case, irrational.

489 F.2d at 449. Similarly, a prior instance of financial irresponsibility, homosexuality or bed-wetting could be found by a court to bear no reasonable relationship to the job of police officer. Under Gallagher, excluding a veteran from employment solely because he has received a general discharge is impermissible under the equal protection clause.

The Gallagher court also held that the second classification, civilians versus veterans, has no rational basis:

In addition, the statute distinguishes between veterans and non-veterans. By eliminating veterans with other than honorable discharges, the city eliminates veterans with those characteristics which lead to other than honorable discharges. Yet there is no effort to "weed out" civilians who have the same characteristics. We have been directed to no ordinance limiting city employment to those who are financially responsible, or who are good security risks, or have never committed sodomy, or who do not wet their beds ... This is not to imply that any or all of these restrictions would be valid. On that question we express no opinion.

489 F.2d at 449. Similarly, the New Mexico statutes in question distinguish between veterans and non-veterans. Because non-veterans have not received any discharge, they are not subject to elimination on the same basis as veterans. As in Gallagher, these statutes require no scrutiny of the basis of the less than honorable discharge. On that failure, the risk exists that otherwise qualified veterans who have general discharges may be unreasonably and arbitrarily excluded from police certification on grounds not applied equally to civilian candidates. Such exclusion, under the Gallagher rationale, violates the equal protection clause.

In order to comply with constitutional and statutory requirements, we recommend that the Academy evaluate candidates who have received general discharges on an individual basis. The circumstances surrounding the discharge should be evaluated to determine if the discharge was predicated on reasons which would render the applicant ineligible for certification. In the absence of such circumstances, applicants with general discharges should not be excluded solely because they received a general discharge.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

n1 The "Under Other Than Honorable Conditions" discharge was formerly known as the "Undesirable" discharge. Although we recognize that the analysis herein might have some application to other kinds of discharges, this Opinion is limited solely to the general discharge question.

n2 See United States v. Commonwealth of Virginia, 620 F.2d 1018, 1023 (4th Cir., 1980), cert. denied, 449 U.S. 1021, 101 S. Ct. 589 (1980) (Title VII applicable to Virginia State Police); Dothard v. Rawlinson, 433 U.S. 321, 331, 97 S. Ct. 2720, 2728 (1977) ("Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike").

n3 See Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089, 1092 (D.N.H., 1974) (racing commission "employer" subject to Title VII because it exercised sufficient control over driver-trainer's access to employment), quoted with approval in Livingston v. Ewing, supra, 601 F.2d at 1115; Curran v. Portland Superintending School Committee, 435 F. Supp. 1063 (D. Me., 1977); Manley v. Mobile County, 441 F. Supp. 1351 (S.D. Ala., 1977).