

Opinion No. 16-1834

June 22, 1916

BY: FRANK W. CLANCY, Attorney General

TO: Honorable William C. McDonald, Governor of New Mexico, Santa Fe, New Mexico.

Upon the power of the governor to draft for the active organized militia of the state.

OPINION

{*397} I have before me your letter of yesterday asking for my opinion touching the power of the governor to draft for the active organized militia of the state, and how this can be exercised.

There is statutory power, to be found in Section 3815 of the Codification of the statutes, for the governor to order out for service the active militia, and if the number available is insufficient, he may order out such part of the reserve militia as he may deem necessary, and by Section 3816 it is provided that whenever it shall be necessary to call out any portion of the reserve militia for active duty, the governor shall direct his order to the mayor of any city or town, who shall forthwith proceed to draft by lot as many of the reserve in his city or town, or to accept as many volunteers as are required by the governor. By the next section it is provided that every member of the militia ordered out, or who volunteers or is drafted under the provisions of the law, who does not appear at the time and place designated, within twenty-four hours from such time, or who does not produce evidence of physical disability, shall be deemed to be a deserter and dealt with as prescribed in the Articles of War of the United States.

It will be seen that the drafting is to be from the reserve militia, and the statute seems to be limited to cities and towns, but the practical difficulty, as I understand the present condition, is that we have no reserve militia. The reserve militia, by Section 3814, consists of all those liable to service in the militia but not serving in the National Guard. The creation of the reserve militia appears to be by the method prescribed in Sections 3811 to 3813, by which, whenever the governor deems it necessary he may order an enrollment to be made, by officers designated by him, of all persons liable to service in the militia. When this enrollment is called for, the commanding officer of every organization in the National Guard and heads of the fire and police departments of each city or town, must file at the office of the county clerk a certified list of the names of all persons in his command or department. This is clearly for the purpose of distinguishing between the active militia, known as the National Guard, and the reserve militia, and also to have a record of firemen and policemen, who are exempt from militia service by the terms of sub-division 3 of Section 3810.

From this it would seem to be necessary, as a foundation for any draft, to have the required enrollment, and when such an enrollment is completed, Section 3816 points out how the draft, by lot, is to be made.