



STATE OF KANSAS

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April 10, 1987

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ATTORNEY GENERAL OPINION NO. 87- 67

John E. Lang
Pottawatomie County Counselor
Pottawatomie County Courthouse
Westmoreland, Kansas 66549

Re: Veterans, Wives, and Widows Employment Assistance
and Preference and Veterans' Reemployment Rights --
Veterans' Reemployment Rights -- Enlistees Right to
Reemployment

Synopsis: If a veteran satisfies the requirements set forth
in the Veterans' Reemployment Rights Statute (38
U.S.C. § 2021 et seq.) for establishing his or
her right to be rehired, an employer is required to
reemploy the veteran to the same or a similar
position as that which the veteran held before
service in the military, with all the rights and
benefits that have accrued. Cited herein: 38
U.S.C. §§ 2021(a)(A)(B); 2021(b)(1); 2024(a).

* * *

Dear Mr. Lang:

As Pottawatomie County Counselor, you ask whether the
Veterans' Reemployment Rights Statute requires the county to
rehire a former employee upon his honorable discharge from the
military. You inform us that the veteran voluntarily enlisted
in the Navy, and further, that he did not communicate his
intent to return to the sheriff's office at the time he
resigned his position as deputy sheriff.

Previous correspondence with Sheriff Dean Taylor on this matter, dated January 22, 1987, addressed the issue of whether the sheriff was required to rehire a former deputy under K.S.A. 73-213 et seq. Our informal opinion was that the Kansas statutes did not apply to persons voluntarily entering into military service, and accordingly, that the sheriff was not required to rehire the deputy. However, federal law relating to veterans' reemployment rights commands a contrary conclusion. Thus, we withdraw our informal letter opinion of January 22, 1987, to the extent that it is inconsistent with this opinion.

Section 2024(a) of the Veterans' Reemployment Rights Statute (38 U.S.C. § 2021 et seq.) specifically relates to people who voluntarily enlist in the Armed Forces of the United States. The statute provides at subsection (a) that:

"Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enlists in the Armed Forces of the United States (other than in a Reserve component) shall be entitled upon release from service under honorable conditions to all of the reemployment rights and other benefits provided for by this section in the case of persons inducted under the provisions of the Military Selective Service Act. . . if . . . the total of any service . . . performed by such person after August 1, 1961, does not exceed five years
. . . ."

Federal law thus provides that an enlistee who receives an honorable discharge from military service is entitled upon release to all of the reemployment rights and benefits to which an inductee is entitled. 38 U.S.C. § 2021(b)(1) outlines the reemployment rights and benefits to which inductees and enlistees are entitled:

"Any person who is restored to or employed in a position . . . shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without

loss of seniority, 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 was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment."

38 U.S.C. § 2021(a) (A) describes two procedural requirements by which a veteran establishes his or her right to reemployment. First, the veteran must produce proof of an honorable discharge, and second, he or she must reapply for the position sought within 90 days of the discharge. Finally, 38 U.S.C. § 2021(a) (B) requires the veteran to demonstrate that he or she is still qualified to perform the duties of such position.

In our opinion, a veteran who has met the aforementioned statutory requirements is entitled to reemployment, and to back wages which have accrued since the date on which his or her request to be rehired was denied. You inform us that the veteran in question received an honorable discharge from the Navy, that his period of service was less than five years, and that he applied for reemployment within 90 days of discharge. Thus, assuming the veteran can demonstrate he is still qualified to perform the duties of the position he is seeking, we believe the sheriff is obligated to rehire him.

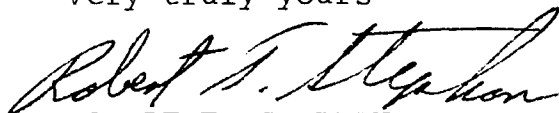
The Veterans' Reemployment Rights Statute does not require that an employee indicate an intent to return when he or she submits a resignation to enter the military. Nor does it outline a specific reapplication procedure which must be observed. Therefore, we believe the reapplication requirement contained in 38 U.S.C. § 2021(a) (A) is satisfied if a veteran makes known to the previous employer, by whatever means, his or her desire to be reemployed. The day on which this communication is made, be it oral or written, becomes the operative date for purposes of ascertaining whether the ninety-day time limit has been observed. Trulson v. Trane Co., 738 F.2d 770, 772 (7th Cir. 1984).

While there is one exception to the requirement that a veteran be reemployed, we feel this exception does not apply to the situation at hand. An employer is not required to rehire a

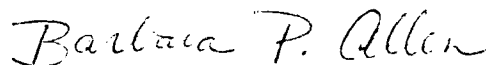
veteran if the employer has undergone a change of circumstances which would make it impossible or unreasonable to do so. However, this is "a very limited exception to be applied only where reinstatement would require creation of a useless job or where there has been a reduction in the work force that would reasonably have included the veteran. It is not sufficient excuse that another person has been hired (or promoted or transferred) to fill the position vacated by the veteran nor that no opening exists at the time of reapplication." Davis v. Halifax County School System, 508 F. Supp. 966, 968 (E.D.N.C. 1981) citing Bury v. General Motors Corp., 476 F.Supp. 1262, 1267 (N.D. Ohio 1979) ("It is of course, immaterial that the opening had been filled by another and that there were no openings when plaintiff returned")

In summary, if a veteran satisfies the requirements set forth in the Veterans' Reemployment Rights Statute (38 U.S.C. § 2021 et seq.) for establishing his or her right to be rehired, an employer is required to reemploy the veteran to the same or a similar position as that which the veteran held before service in the military, with all the rights and benefits that have accrued.

Very truly yours



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RTS:JLM:BPA:bas