

No. 260

**NATIONAL GUARD—COMMISSIONED OFFICERS,
status of.**

Held: Where Montana National Guard commissioned officers were ordered into Federal Service by the President under the "National Defense Act" and then resign or are found physically disqualified, such officers revert to former status in Montana National Guard. Only authority to change such status is the appointive authority of the Governor of Montana.

October 8, 1941.

Colonel Everett M. Birely
Brigadier General (Mont.)
Adjutant General
Capitol Building
Helena, Montana

Dear Colonel Birely:

You have submitted the following:

"I would greatly appreciate an opinion from your office regarding the State status of Montana National Guard officers who were inducted into Federal Service and have since had their War Department Federal Recognition terminated by reason either of Resignation or Physical Disqualification. Do such officers still retain their commissions in the Montana National Guard?"

In answering your inquiry, it is well to keep in mind the law pertaining to the state military establishment is found in Chapter 122, Volume 1, Revised Codes of Montana, 1935, wherein the Governor of Montana is designated as the commander in chief of such military while it is not in the service of the United States. Section 1350, Revised Codes of Montana, 1935, provides all commissioned officers of the military establishment shall be appointed and commissioned by the Governor and every commissioned officer shall hold office under his commission until he shall have been regularly appointed and commissioned to another grade or office, or until he shall have been regularly retired, discharged, dismissed or placed in the reserve. The Governor may dismiss any commissioned officer for any of the causes set forth in Section 1364, Revised Codes of Montana, 1935, and may retire any commissioned officer for the reasons set forth in Section 1366, Revised Codes of Montana, 1935.

We now turn to the Federal law defining the "National Guard" and the "National Guard of the United States," as found in 11 Fed. Codes Ann. 182, Title 32; 48 Stat. 157, Chapt. 87, as follows:

"4b. Definitions. In this Act (title), unless the context or subject-matter otherwise requires

"(a) 'National Guard' or 'National Guard of the several States, Territories, and the District of Columbia' means that portion of the Organized Militia of the several States, Territories, and the District of Columbia, active and inactive, federally recognized as provided in this Act (title) and organized, armed, and equipped in whole or in part at Federal expense and officered and trained under paragraph 16, section 8, Article I of the Constitution.

"(b) 'National Guard of the United States' means a reserve component of the Army of the United States composed of those federally recognized units and organizations and persons duly appointed and commissioned in the active and inactive National Guard of the several states, Territories, and the District of Columbia, who have taken and subscribed to the oath of office prescribed in section 73 of this Act (Par. 112 of this title), and who have been duly appointed by the President in the National Guard of the United States . . . and of those persons duly enlisted in the National Guard of the United States and of the several States, Territories, and the District of Columbia who have taken and subscribed to the oath of enlistment prescribed in section 70 of this Act. . . ."

It will thus be seen the commissioned officers of the state establishment, when federally recognized, may then be appointed by the President of the United States in the National Guard of the United States, so in reality each commissioned officer of the federally recognized National Guard may have two appointments and commissions, one from the Governor of the state and one from the President of the United States.

The National Guard of this state was brought into federal service by an order of the President of the United States under the National Defense Act of June 3, 1916, as amended, and all persons so ordered into the active military service of the United States from the date of such order stand relieved of duty in the National Guard of their respective states so long as they remain in the active military service of the United States.

"Commissioned officers and warrant officers appointed in the National Guard of the United States and commissioned or holding warrants in the Army of the United States, ordered into Federal service as herein provided, shall be ordered to active duty under such appointments and commissions or warrants: Provided, That those officers and warrant officers of the National Guard who do not hold appointments in the National Guard of the United States and commissions or warrants in the Army of the United States may be appointed and commissioned or tendered warrants therein by the President, in the same grade and branch they hold in the National

Guard. . . Upon being relieved from active duty in the military service of the United States all individuals and units shall thereupon revert to their National Guard status."

48 Stat. 161, Chapter 87, 11 F. C. A. 191, Title 32, Par. 81.

"Whenever the appointment of an officer or warrant officer of the National Guard of a state . . . has been vacated or terminated or upon reaching the age of sixty-four, the Federal recognition of such officer shall be withdrawn and he shall be discharged from the National Guard of the United States."

49 Stat. 391, Chapter 277, 11 F. C. A. 211, Title 32, Par. 114.

It will be observed the "National Guard" of the state is the military establishment of such state and its commissioned officers are appointed and commissioned by the Governor of such state. The Federal Government through the War Department may then recognize such unit and incorporate such unit into the National Guard of the United States and the President of the United States may then appoint and/or commission such officers into the National Guard of the United States.

When such federally recognized units of a state's National Guard are ordered into federal service by the President under the National Defense Act, as amended, such unit and commissioned officers are ordered in and serve as a part of the National Guard of the United States, and such commissioned officers serve under the appointment or commission of the President of the United States. When such commissioned officers of the National Guard of the United States in active federal service resign or are relieved of duty or discharged for physical disability by or under the regulations of the War Department, such commissioned officers revert to their "National Guard" status. No authority may take away said officers' state "National Guard" status except the appointing authority, in such cases the Governor of the state, which is provided for in Sections 1364 and 1366 of the Revised Codes of Montana, 1935.

"An officer, so long as he retains his commission, retains his office."

126 N. Y. 497, 50 Am. Rep. 424, 18 R. C. L. 1059.

"The mere fact that the War Department of the United States withdrew its recognition theretofore accorded to respondent does not make it mandatory upon the part of the Governor to relieve him of his command. The withdrawal of federal recognition involved no cancellation of respondent's commission as a brigadier general in the New York National Guard; nor does it effect it. Respondent's commission from the Governor was not cancelled, and could not be cancelled, by any act of the War Department."

People ex rel. Gillett v. De Lamater (N. Y.), 287 N. Y. S. 979, 984.

From the foregoing it is my opinion any commissioned officer in the National Guard of Montana who has been duly appointed and commissioned by the Governor of Montana, federally recognized and appointed or commissioned by the President and ordered into federal service by the President of the United States under the "National Emergency Act," and who thereafter either resigns or is relieved or discharged from the federal service for physical defects, reverts to his former status in the National Guard of Montana and retains such status until changed by the Governor, as provided by our State Constitution and statutes.

Sincerely yours,

JOHN W. BONNER
Attorney General