

1975 WL 29362 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

January 3, 1975

**\*1 Re: COL. John Paul DuPre—Eligibility for State pension.**

Major General Robert L. McCrady  
Adjutant General of South Carolina  
1225 Bluff Road  
Columbia, SC 29201

Dear General McCrady:

By letter dated November 27, 1974, this office has been asked for an opinion as to whether COL. John Paul DuPre, who was honorably retired from the South Carolina Army National Guard effective September 17, 1974, qualifies for the State pension authorized national guardsmen under the terms and conditions of Act No. 1580, 1972 S. C. Acts and Joint Resolutions. Act No. 1580 (codified as S. C. Code §§ 44-230, et seq.) provides:

'Section 44-230. Every member of the National Guard of South Carolina who meets the requirements hereinafter set forth shall receive, commencing at age sixty, a pension of fifty dollars per month for twenty years' creditable military service with an additional five dollars per month for each additional year of such service; provided, however, that the total pension shall not exceed one hundred dollars per month. The requirements for such pension are that each member shall:

(a) Have served and qualified for at least twenty years' creditable military service, including National Guard, Reserve and Active Duty, under the same requirement specified for entitlement to retired pay for nonregular service under Chapter 67, Title 10, United States Code.

(b) Have at least fifteen years of the aforementioned service as a member of the South Carolina National Guard and the final or last ten years of service immediately prior to retirement shall have been in the South Carolina National Guard.

(c) Have received an honorable discharge from the South Carolina National Guard.

...

The provisions of this act shall apply only to members of the South Carolina National Guard serving on the effective date of this act and thereafter.

This act shall take effect July 1, 1975, except that any person who has fully qualified for the pension and is involuntarily separated from the South Carolina National Guard for reasons other than misconduct between the date of ratification of this act and July 1, 1975, shall be eligible for the pension commencing at age sixty or July 1, 1975, whichever is later. Approved the 20th day of July, 1972.

It appears that COL. DuPre, until retirement, has served in the armed forces in varying capacities since September, 1940, and that he had served continuously as an officer in the South Carolina Army National Guard from August, 1947, until retirement. It further appears that COL. DuPre has fully qualified under the provisions of Act No. 1580 for the State pension in all particulars except one, that being the requirement that a person must be actively serving in the South Carolina National Guard on July 1, 1975, the effective date of the Act, in order to receive the pension benefits. This

final requirement is waived by law only if an otherwise qualified guardsman is 'involuntarily' separated from the South Carolina National Guard for reasons other than misconduct between the date the law was ratified, i.e., July 20, 1972, and July 1, 1975. Consequently, COL. DuPre's eligibility for this State pension turns on the voluntariness or involuntariness of his separation from the South Carolina Army National Guard.

\*2 Section 3848 of the Reserve Officers Personnel Act (ROPA) provides:

Section 3848. Twenty-eight years: reserve first lieutenants, captains, majors, and lieutenant colonels:

(a) After July 1, 1960, each officer in the reserve grade of first lieutenant, captain, major, or lieutenant colonel who is not a member of the Retired Reserve shall, 30 days after he completes 28 years of service computed under section 3853 of this title—

(1) be transferred to the Retired Reserve, if he is qualified and applies therefor; or

(2) if he is not qualified or does not apply therefor, be discharged from his reserve appointment.

(b) . . .

(c) Notwithstanding subsections (a) and (b) of this section, the Secretary of the Army may authorize the retention in an active status until age 60 of any officer of the Army National Guard of the United States who would otherwise be removed from an active status under this section and who—

(1) is assigned to a headquarters or headquarters detachment of a State or territory, the Commonwealth of Puerto Rico, the Canal Zone, or the District of Columbia; or

(2) is employed as a technician under [section 709 of title 32, United States Code](#), in a position for which Army National Guard membership is prescribed by the Secretary.

(d) . . . ([10 USCA § 3848](#))

COL. DuPre, a lieutenant colonel prior to retirement, under ordinary circumstances would have been forced to retire from the National Guard under the provisions of [Section 3848\(a\)](#) on November 22, 1970, which was 30 days after the date on which he attained 28 years of commissioned service. However, it appears that COL. DuPre, upon submission of special requests by the Adjutants General of South Carolina, was approved for retention in the National Guard through July 31, 1975, under the permissive provisions of [Section 3848\(c\)](#). The approval for this special retention was obtained in two increments, the first being approval for retention from November 22, 1970, through July 16, 1974, in order to allow COL. DuPre to qualify for an immediate federal civil service annuity. The second approval for special retention was obtained, by a second request, for the period from July 16, 1974, through July 31, 1975. This request was justified on grounds of COL. DuPre's civilian position as a National Guard technician, to wit, Deputy Military Support Plans and Operations Officer for the South Carolina National Guard State Headquarters ([see 10 USCA § 3848\(c\)\(2\)](#)), and also due to his value to the National Guard in terms of background experience and demonstrated ability.

On September 4, 1974, COL. DuPre voluntarily resigned from the technician program. In that his participation in the technician program was the primary ground for the latest approval of COL DuPre's retention in the National Guard past his date of mandatory removal, this resignation from the technician program caused National Guard Bureau to terminate recognition of COL. DuPre's commission. Consequently, COL. DuPre was mandatorily retired from the South Carolina Army National Guard on September 17, 1974. COL. DuPre apparently was aware of the possibility of this result at the time of his voluntary resignation as a technician. However, COL. DuPre did then, and does now, maintain that he did

not wish to be retired from the National Guard. The question presented, therefore, is whether the voluntariness of the resignation from the technician program can be attributed to its causal result of retirement from the National Guard.

\*3 The term 'involuntary' as defined by Webster's New World Dictionary, The World Publishing Co. (1964), denotes an act which occurs not of one's own free will or choice. Normally this is simply a question of fact. However, under some legal doctrines, particularly in the area of criminal law, the wilfulness of the commission of one act which then results in a secondary occurrence can be imputed to that secondary occurrence even though the actor had not wanted the secondary occurrence to happen. In this case, however, it is the opinion of this office that the express language of Act No. 1580 precludes such an interpretation. This is because the language dealing with involuntary separation clearly implies that 'misconduct' can lead to being 'involuntarily separated'. Such misconduct, in most instances, would involve some intentional act which through normal judicial procedures would become causally related to the separation. So, for example, a soldier who unlawfully shoots his platoon sergeant would certainly be subsequently discharged from the National Guard. In such a case, even though the causal relationship between the act of misconduct and the subsequent separation from service would be certain enough at all times to be foreseeable to a man of reasonable intelligence, Act No. 1580 would appear to term the discharge to be 'involuntary', notwithstanding the fact that no pension benefits would be allowed. Similarly, COL. DuPre may well have expected that his voluntary resignation as a technician would result in a forced retirement. However, no substantive difference is seen between COL. DuPre's case and the example aforesaid, and consequently such a voluntary resignation from the National Guard technician program, in the opinion of this office, does not legally become imputed to a resignation from the National Guard itself, since the apparent intent of the Legislature is otherwise. Nor is there any legal basis for applying the Act differently either because an officer was formerly a technician or because an officer's service in the National Guard past the later of enactment of Act No. 1580 was because of a [Section 3848\(c\)](#) waiver. Rather, for a 'voluntary' separation to occur in terms of Act No. 1580, the affected party would have to expressly request the separation.

Therefore, the question is reduced to one of whether or not COL. DuPre expressly requested that he be retired.

In this respect, all evidence indicates that he did then and does now wish to be able to continue to serve in the South Carolina Army National Guard and has at no time requested that he be retired. Consequently, in the opinion of this office, COL. DuPre is qualified to receive State pension benefits at age 60 under the provisions of Act No. 1580.

Very truly yours,

John B. Grimbail  
Law Clerk

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