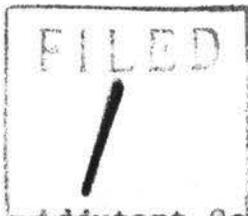


ADJUTANT GENERAL: Commissions in force prior to the enactment
COMMISSIONS of House Bill 133, 1951, have either been
MISSOURI NAVAL terminated by administrative action or have
MILITIA: lapsed by operation of law.



November 29, 1955

Adjutant General
State of Missouri
State Office Building
Jefferson City, Missouri

Attention of Richard F. Shelley
Captain, MoANG
Administrative Assistant

Dear Sir:

You stated your recent request for an official opinion
from this office as follows:

"This office has received a request for
information concerning the status of of-
ficers appointed in the Missouri Naval
Militia and we feel that it involves a
legal decision to clarify the status of
these officers. The question was worded
as follows:

" 'I am requesting information concern-
ing the status of officers of the Missouri
Naval Militia whose commissions ante-dated
the enactment of House Bill 133 in 1951
repealing Chapter 41, Revised Statutes of
Missouri 1949. In reading the newly en-
acted statute I find no reference to what
has happened to the commissions issued in
the Missouri Naval Militia prior to the
date House Bill 133 became law, and I
would appreciate very much any information
you might have which would inform me as
to whether or not the commissions previously
awarded have lapsed or whether or not those
commissions were continued by executive or-
der or some other legal means.'

"There is no record of the commissions in
question having been terminated or extended
in the records of this office. As well as
can be determined from the commission, it
was for an indefinite term unless terminated

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by resignation, retirement, death, etc.

We respectfully request an opinion as to whether or not the commissions are still in force as quoted above."

The determination of the question as to whether or not a commission in a military organization is indefinite or for a specific period, when the letter of appointment does not state, depends upon the type of organization in which the commission is given. As you know, for many years commissions in the National Guard have been considered indefinite. Because of the provisions of federal statutes, we have considered that the commissions continued in effect until the withdrawal of federal recognition. We adhered to this concept in the state notwithstanding the fact that from 1919 until the 1951 enactment, House Bill 133, now Chapter 41 V.A.M.S., our statutes provided:

"Commissions of officers of the National Guard may be vacated upon resignation, absence without leave for three months, upon the recommendation of an efficiency board or pursuant to the sentence of a court-martial. Officers rendered surplus by the disbandment of their organizations shall be placed in the reserve. Officers may upon their own application be placed in said reserve."

Section 41.440, RSMo 1949.

The reserve alluded to was created in 1917. Section 8375, page 338, 1917 Laws. That section was continued and became Section 41.520 in the 1949 Revision.

The 1951 enactment omitted all reference to a reserve, and added the words "or withdrawal of federal recognition." Our state legislature has been somewhat tardy in keeping our state amendments current with National Guard Laws and Regulations of the Federal Government. The National Guard Reserve was discontinued by federal statute in 1933, when the National Guard of the United States was created. Since that time there has been an inactive national guard but no national guard reserve in which an officer could be placed. It will be noted that

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the reserve mentioned in Sections 41.440 and 41.520 applied only to the National Guard; not to the militia as a whole, and not to the naval militia.

For a good many years the legislature has spoken of a "reserve" that could be created by the governor, under certain circumstances, from the nebulous and undefined "unorganized militia." See Section 41.190 of the 1949 Revision. Since this reserve could be created only under certain circumstances, that is not the reserve intended in Section 41.440.

Until the 1951 act the provisions of the naval militia remained separate from those pertaining to the National Guard and Air National Guard. At no time in the history of our state has there been a naval militia reserve. There has been, for a good many years, a provision in the naval militia sections, that "When not otherwise provided for, the government of the naval militia shall be controlled by the provisions of the military code of this state as now applied to organized militia." See Section 41.580 of the 1949 Revision. In view of the fact that there has been, since the creation of the federal constitution (See Art. I, Sec. 8, Par. 16, Const. of U.S.), a distinction between organizing and governing the militia, and in view of the fact that, as pointed out above, there is a question as to the validity of the National Guard Reserve as a legal entity for the eighteen years from 1933 to 1951, we do not believe that Section 41.580 could be used in conjunction with Section 41.440 so that we could say that an officer of the naval militia rendered surplus by the disbandment of his organization could be placed in a "Naval Militia Reserve." We therefore conclude that a commission in the Missouri Naval Militia can continue only so long as there exists some unit or organization constituting a part or the whole of the Missouri Naval Militia. The question then arises: Is there now, or was there immediately prior to the 1951 act, a Missouri Naval Militia in existence?

We find neither federal nor state statute which specifically created such. We find only that the federal statutes, until 1938, stated:

"Of the organized militia as provided by law, such part as may be duly prescribed

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in any state, territory or the District of Columbia shall constitute a naval militia."

Currently, the federal statute states:

"The Naval Militia consists of the Naval Militia of the States, Territories, and the District of Columbia."

See 50 U.S.C., Section 1071. The Missouri Naval Militia provision, until 1951, merely stated:

"There shall be allowed in addition to the companies of the military code of Missouri, as now provided by law, not more than ten divisions of naval militia, to be known as 'The Missouri Naval Militia.'"

See Section 41.530 of the 1949 Revision.

Obviously, then, some positive administrative acts have been necessary for the creation of a Missouri Naval Militia. It is our understanding that such actions have been taken in the past, and that for a number of years the state legislature appropriated money for the support of our naval militia. However, as we have further learned from you informally, the Adjutant General's office took the positive administrative action of dropping the membership of the Missouri Naval Militia from the rolls upon the entry of those members to active duty in World War II. Since, at that time, under Section 15098 of the 1939 Revision, the governor had the power to alter, divide, annex, consolidate or disband the organization of the naval militia if, in his judgment, the efficiency of the forces could be increased, such action constituted a termination of the commission of any individual in the Missouri Naval Militia.

We are not informed as to whether or not all of the members of the Missouri Naval Militia entered active duty. However, the old provisions of the statutes pertaining to the Missouri Naval Militia were expressly repealed by House Bill 133, Laws of 1951, as were all sections pertaining to the military forces of the state, and ninety-four new sections were

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enacted in lieu thereof. Since the 1951 law provides only that the naval militia of the state shall consist of "such elements of the reserve naval forces of the United States as are allocated to the state by the President or the Secretary of the Navy, and accepted by the state" (Section 41.050), this, of necessity, terminated the commissions of all persons in the Missouri Naval Militia even if it could be argued that the previous administrative action by the adjutant general, as mentioned above, did not terminate a part of them. We are informed that no elements of the naval reserve have been allocated to and accepted by the state since World War II. The legislature has refused to acknowledge the existence of or to make appropriations for such an organization since World War II. No action has been taken that can be considered as a revival or continuation of or the creation of a new naval militia as has been taken with regard to the rest of the organized militia. Whatever might have been considered the status of the naval militia commissions immediately prior to the 1951 repeal of the old statute, certainly the naval organization in which any person held his commission ceased to exist following the repeal.

CONCLUSION

It is, therefore, our conclusion that: (1) the Missouri Naval Commissions awarded prior to the 1951 act were either terminated by administrative action or lapsed by operation of law; (2) that positive administrative action is necessary before they may be reinstated or new ones created.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Russell S. Noblet.

Very truly yours

John M. Dalton
Attorney General