



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: National Guard Full-Time Duty--
U.S. Magistrate

File: B-241926.2

Date: December 7, 1992

DIGEST

1. A National Guard member performing full-time National Guard duty under 32 U.S.C. § 502(f) may be appointed a part-time United States magistrate under 28 U.S.C. § 631, since such duty is performed under state control and the member is not considered as performing active duty in the service of the United States.

2. A reservist performing active duty under 10 U.S.C. 672(d) is not eligible for appointment as a United States magistrate under 28 U.S.C. § 631 since while on active duty he would be holding military office under the United States and Congress considered active duty and service as a United States magistrate incompatible since provision was made to grant leaves of absences when magistrates are called to active duty in the armed forces of the United States.

DECISION

We have been asked whether an officer of the Army National Guard ordered to full-time National Guard duty under 32 U.S.C. § 502(f) may be appointed and serve as a part-time United States magistrate. We have also been asked whether our answer would be the same if instead of National Guard duty, the situation involved a reservist ordered to active duty under 10 U.S.C. § 672(d).¹ It is our view that a National Guard member serving on full-time duty may be appointed as a part-time U.S. magistrate. However, a reservist on full-time active duty under 10 U.S.C. § 672(d) should not be appointed a part-time U.S. magistrate.

The Army National Guard is defined in part as that part of the organized militia of the several states and territories whose officers are appointed by state authorities and are

¹The question was presented by the Chief Counsel, National Guard Bureau, and assigned DFAS Item Number A-32, Control No. SS-A-1510, by the Defense Finance and Accounting Service.

federally recognized. See 32 U.S.C. § 101(4). The Army National Guard of the United States is defined as the reserve component of the Army all of whose members are members of the Army National Guard. 32 U.S.C. § 101(5). Thus, a member of the National Guard has a federally recognized status and is also a member of a reserve component of the Army.

Section 502(f) of title 32 provides that under regulations prescribed by the Secretary concerned, a member of the National Guard may be ordered to perform training or other duty in addition to other duties prescribed by law. Regulations promulgated by the Secretary of the Army provide that such duty will be from 1 to 6 years. See National Guard Regulation 600-5 para. 3-3, November 1, 1982.

A member of the National Guard ordered to duty under 32 U.S.C. § 502(f) is not considered to be on active duty in a military service of the United States. See 10 U.S.C. § 101(22). Additionally, 10 U.S.C. § 101(42) provides in part that:

"Full-time National Guard duty means training or other duty, other than inactive duty, performed by a member of the National Guard of the United States . . . in the member's status as a member of the National Guard of a State or territory . . . under Section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States. . . ."

This provision was added to 10 U.S.C. 101 to remove any doubt that Congress intended that such duty was to be performed under the control of state national guard authorities rather than the federal government.² Thus, members of the Active Guard/Reserve ordered to duty under 32 U.S.C. 502(f) remain under the command and control of state authorities although they may be paid out of funds appropriated by Congress.

Section 672(d) of title 10, U.S. Code, provides that a member of a reserve component may be ordered to active duty, or retained on active duty with the consent of the member. Active duty means full-time duty in the active military service of the United States.

The statute governing appointment of magistrates, 28 U.S.C. § 631(c), provides in part as follows:

²H.R. Rep. No. 691, 98th Cong. 2d sess. 242 (1984).

"A magistrate may hold no other civil or military office or employment under the United States: Provided, however . . . that retired officers and retired enlisted personnel of the Regular and Reserve components of the Army, Navy, Air Force, Marine Corps and Coast Guard, members of the Reserve components of the Army, Navy, Air Force, Marine Corps, and Coast Guard and members of the Army National Guard of the United States . . . and the Naval Militia and of the National Guard of a State, . . . except National Guard disbursing officers who are on full-time salary basis, may be appointed and serve as United States magistrates."

Section 631(j) of title 28, U.S. Code, provides in part as follows:

"(1) (1) A magistrate who is inducted into the Armed Forces of the United States . . . , or is otherwise ordered to active duty with such forces for a period of more than thirty days, and who makes application for a leave of absence to the district court or courts which appointed him, shall be granted a leave of absence without compensation for such period as he is required to serve in such forces."

Although a member of the National Guard of a state has a federally recognized status, when he is ordered to duty under 32 U.S.C. § 502(d) to perform full-time National Guard duty, which by definition is not active duty in the armed services and is under the control and supervision of state officials, he is not holding a civil or military office or employment under the United States as defined in 28 U.S.C. § 631(c). Additionally, 28 U.S.C. § 632(b) provides that part-time magistrates, subject to restrictions imposed by the judicial conference, may engage in any other business, occupation, or employment not inconsistent with their duties as judicial officers. Accordingly, assuming the member's appointment is authorized by state officials and judicial authorities, we see no legal bar to his appointment as a part-time United States magistrate.

With regard to members ordered to full-time active duty under 10 U.S.C. § 672(d), it is our view such members are not eligible to be appointed as part-time United States magistrates while they are serving on active duty. By serving on full-time active duty they are clearly holding military office under the United States as proscribed by 28 U.S.C. § 631(c). Subsection 631(c) of Title 28, U.S. Code is similar to 5 U.S.C. § 2105(d) which provides that a reserve of the Armed Forces who is not on active duty or who is on active duty for training is deemed not an employee or

an individual holding office under the United States. The obvious purpose of such statute is to authorize reserves not on active duty to accept appointments to positions in the civil service of the United States. The exceptions in 28 U.S.C. § 631(c) provide similar authority for reserves not on active duty to be appointed as magistrates. See 45 Comp. Gen. 405 (1966) where we interpreted similar language involving the appointment of referees in bankruptcy.

Additionally, 28 U.S.C. § 631(j), quoted above, provides authority to grant leaves of absence to magistrates who are inducted or otherwise called to active duty in the Armed Forces of the United States. This provision, we believe, supports the conclusions that an individual on active duty should not be appointed as a part-time United States magistrate.

Accordingly, a member of the National Guard ordered to full-time duty under 32 U.S.C. § 502(f) may be appointed a part-time United States magistrate, but a reserve member serving on active duty under 10 U.S.C. § 672(d) may not be appointed to such position.

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for Comptroller General
of the United States