

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

CINDY W. KING

FILED

APPELLANT

AUG 01 2016

V.

DOCKET NO. 16-007

EMPLOYEE APPEALS BOARD

MISSISSIPPI MILITARY DEPARTMENT

RESPONDENT

ORDER

FACTS

On February 11, 2016, Cindy King (“Ms. King”) was terminated from her job with the Mississippi Military Department (“MMD”). The termination letter stated the following as the basis for Ms. King’s termination:

Based upon the findings of an investigation conducted at the direction of the Adjutant General it has been determined that you willfully and knowingly violated § 25-4-105 of the Mississippi Code of 1974 [sic] annotated. This investigation revealed that you used your position for personal gain. Your employment with the Mississippi Military Department Environmental Office is terminated for cause, effective immediately pursuant to § 33-3-1(a) [sic], Mississippi Code of 1972 annotated.

Ms. King’s position at MMD was an environmental officer. At the time of her termination, Ms. King was a member of the Mississippi National Guard.<sup>1</sup> In reaching its decision, this tribunal did not consider Ms. King’s status as a member of the National Guard. This tribunal’s decision is based solely on Ms. King’s status as an employee of the Mississippi National Guard.

On March 7, 2016, Ms. King filed an appeal of her termination from the MMD to the Mississippi Employee Appeals Board (“MEAB”). On March 8, 2016, MMD filed a Motion to

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<sup>1</sup>Throughout this opinion, the terms “Mississippi National Guard” and “Mississippi Military Department” and their acronyms are treated as the same entity.

Dismiss Ms. King's appeal on the ground that the MEAB lacked subject matter jurisdiction. MMD contended the MEAB lacks subject matter jurisdiction because Ms. King was not a state service employee, and that Mississippi statutes provided authority for the Mississippi National Guard Adjutant General to remove any MMD employee at his sole discretion.

In response to the MMD's Motion to Dismiss, Ms. King contested that she was a state service employee and was entitled to both procedural and substantive due process available to state service employees in the *Mississippi State Personnel Board Policy and Procedures Manual*. See *Mississippi State Personnel Board Policy and Procedures Manual* Section 2.1.1 and Section 9.0.

After considering each party's arguments, this tribunal finds that Ms. King was a non-state service employee and that the MEAB does not have jurisdiction. The reasons for this decision are set forth below.

Miss. Code Ann. § 33-3-11 (1972) is not ambiguous. It states:

The Adjutant General shall:

- (a) Appoint all of the employees of his department and he may remove any of them at his discretion.

(Emphasis added).

Miss. Code Ann. § 33-3-11 (1972) authorizes the Mississippi National Guard Adjutant General, in this writer's view, to terminate Ms. King, or other employees of his department, at his discretion. This tribunal's interpretation of Miss. Code Ann. § 33-3-11 comports with the June 9, 1994, opinion of the Mississippi Attorney General. The Mississippi Attorney General's Office, provided the opinion in a June 9, 1994, letter that MMD employees were non-state

service employees, held no state propriety rights in their employment and could be removed at the discretion of the Adjutant General of the National Guard. *See*, June 9, 1994, letter from the Mississippi Attorney General's Office attached hereto.

Further, a review of certain Mississippi statutes other than Miss. Code Ann. § 33-3-11 reflects that the Mississippi legislature employed the term "officers and members" in some statutes. Specifically, Miss. Code Ann. § 25-9-107(c)(viii) states "officers and enlisted members of the National Guard of the state." (Emphasis added)

Since the legislature used the term "employee" in enacting Miss. Code Ann. § 33-3-11 and utilized the terms "officer" or "members" in Miss. Code Ann. § 25-9-107(c)(viii), this tribunal concludes that the legislature intended to use the term "employee" in Miss. Code Ann. § 33-3-11 to allow the Mississippi National Guard Adjutant General to terminate an employee at his sole discretion. By doing so, MMD employees are non-state service employees and this tribunal lacks jurisdiction to consider Ms. King's appeal.

For the foregoing reasons, Ms. King's appeal is dismissed with prejudice.

SO ORDERED, THIS THE 1 DAY OF August, 2016.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By:   
MICHAEL N. WATTS  
Chief Hearing Officer

121-A STATE PERSONNEL BOARD

STATE OF MISSISSIPPI



OFFICE OF THE ATTORNEY GENERAL

OFFICIAL ATTORNEY GENERAL'S OPINION

MIKE MOORE  
ATTORNEY GENERAL

June 9, 1994

Edward O. Pearson  
Major, Mississippi Army  
National Guard  
Staff Judge Advocate  
Post Office Box 5027  
Jackson, MS 39296-5027

RE: Request for Opinion on the Status of Employees  
of the Mississippi Military Department

Dear Major Pearson:

# OFFICIAL OPINION

Attorney General Mike Moore is in receipt of your request for an Official Opinion of this office and has assigned it to me for research and reply. Your letter states in part:

*On behalf of Major General James H. Garner, the Adjutant General of the Mississippi National Guard and the executive head of the Mississippi Military Department, we respectfully request the assistance of your office in rendering an Attorney General's opinion as to the following:*

*The Mississippi Code Annotated Section 25-9-107(c) (viii) states in part that:*

*"Non-state" service shall mean the following officers and employees excluded from the state service by this chapter. The following are excluded from the state service:*

*(viii) Officers and Enlisted members of the National Guard of the State.*

*Also, Section 33-3-11(1) of the Mississippi Code, Annotated states that:*

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*The Adjutant General shall:*

*(1) Appoint all of the employees of his Department and he may remove any of them at his discretion.*

*It is our position that Section 33-3-3 of the Mississippi Code, Annotated created the Mississippi Military Department as a non-state service entity subject only to rules and regulations as prescribed by the governor. As such, all officers and employees of the Agency are employed in a "non-state" service status. In accordance with the rules and regulations governing non-state service employees, the employees of the Mississippi Military Department do not hold "property rights" to their positions as state service employees do and therefore can be terminated at any time by the Adjutant General.*

*Attached is a copy of a memorandum dated January 20, 1994 from the Mississippi State Personnel Board concurring with our position. We would like to know if you also concur.*

**OFFICIAL OPINION**  
In response to your request, I call your attention to Section 25-9-123, Mississippi Code Annotated of 1972, as amended, which provides in pertinent part:

*The non-state service, as defined by Section 25-9-107, shall consist of all positions in the departments, agencies and institutions of state government not included in the state service under this chapter and shall not be subject to the rules and regulations of the state personnel system...*

Further, the Governor is Commander-in-Chief of the Militia. In accordance therewith, Section 33-3-3 provides:

*There shall be in the executive branch of the state government a military department. The adjutant general shall be the executive head of the department and, as such, subordinate only to the governor in matters pertaining thereto. There shall be in such department at least one (1) assistant adjutant general for army, at least one (1) assistant adjutant general for air, such other assistant adjutants general as may be authorized by rules and regulations of the National Guard Bureau of the United States of America, and such other officers, enlisted men and civilian employees as the adjutant general shall, from time to time, determine.*

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Section 33-3-11(1) states with specificity "The Adjutant General shall appoint all of the employees of his department and he may remove any of them at his discretion."

Based on the aforementioned statutory provisions, it is the opinion of this office that the Military Department is a non-state service agency which is not subject to the rules and regulations of the State Personnel System.

In response to your statement that employees of the Mississippi Military Department do not hold property rights to their positions as state service employees do, I call your attention to Section 33-3-11(1), supra which authorizes the adjutant general to both appoint and remove employees of his department at his discretion. Further, I call your attention to the attached opinion issued to E. Kevin Bennet, Esquire on October 25, 1988 which states in part:

In Mississippi, the state law which grants such a property right to certain state government employees is found at Mississippi Code Annotated §25-9-127 (Supp. 1987). That statute provides, in part:

**OFFICIAL OPINION**

No employee of any department, agency or institution who is included under this chapter or hereafter included under its authority, and who is subject to the rules and regulations prescribed by the state personnel system may be dismissed or otherwise adversely effected as to compensation or employment status except for inefficiency or other good cause, and after written notice and hearing within the department, agency or institution as shall be specified in the rules and regulations of the state personnel board complying with due process of law;....

It is clear from the plain language of Mississippi Code Annotated §25-9-127, that for state employees in Mississippi to have a property right, two (2) conditions must be present: (1) the person must be an employee of a department, agency or institution, and (2) be subject to the rules and regulations prescribed by the state personnel system....Therefore, based on the above, the Executive Director...has the authority to make any personnel decisions, including termination of any present employee, without affording the employee any further due process.

It is the Opinion of this office, therefore, that officers and

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enlisted members of the National Guard of the State and employees of the Mississippi Military Department have no property rights in such positions and/or employment under state law.

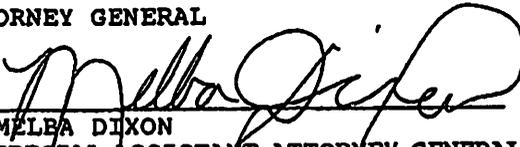
Since this office does not render opinions on federal law, this opinion does not speak to the applicability of federal employment law.

Please feel free to contact this office if we can be of further assistance.

SINCERELY YOURS,

MIKE MOORE  
ATTORNEY GENERAL

BY:

  
MELBA DIXON  
SPECIAL ASSISTANT ATTORNEY GENERAL

**OFFICIAL OPINION**