

4260.

APPROVAL, LEASE FOR OFFICE SPACE FOR USE OF AUDITOR OF STATE—
WESTERN AND SOUTHERN LIFE INSURANCE COMPANY.

COLUMBUS, OHIO, May 14, 1935.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval as to form, a lease which grants to you, for the use of the Auditor of State, certain office rooms as follows:

Lease from the Western and Southern Life Insurance Company, of Cincinnati, Ohio, for office space 28½ feet wide and 36 feet deep at the southeast corner of the third floor of the Peters Building located at 62-68 East Gay Street, Columbus, Ohio. This lease is for a term of one year and nine months, beginning on the first day of April, 1935, and ending on the 31st day of December, 1936, by the terms of which the State will be required to pay two hundred and twenty-two dollars and sixty-three cents (\$222.63) on April 1, 1935, one hundred dollars (\$100.00) on April 30, 1935, and one hundred dollars (\$100.00) at the end of each month thereafter of said term.

You have submitted encumbrance estimate (No. 2) of the Director of Finance, made in pursuance of section 2288-2, General Code. In addition a copy of a by-law of the lessor corporation is submitted showing that the vice-president and secretary of such corporation have authority to execute leases to bind the company.

Finding said lease in proper legal form, I hereby approve it as to form and return it herewith, together with all papers submitted in this connection.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4261.

WAR VETERAN—"HONORABLE DISCHARGE" DEFINED—APPLICATION TO
SECTION 486-10, GENERAL CODE DISCUSSED.

SYLLABUS:

1. *An ex-service man who was discharged from the United States Marine Corps or the United States Navy during the period between April 6, 1917 and November 11, 1918, solely on the ground of fraudulent enlistment on account of misrepresentation of his age, if his service was otherwise such as would have entitled him to discharge under honorable conditions, is by virtue of Section 204, Title 34, United States Code Annotated, "honorably discharged" within the meaning of section 486-10, General Code.*

2. *Such discharge reading "Discharged as undesirable, by reason of inaptitude" is not an "honorable discharge" within the meaning of section 486-10, General Code, where other elements caused such discharge in addition to such fraudulent enlistment.*

COLUMBUS, OHIO, May 14, 1935.

The Civil Service Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge your recent communication, reading as follows:

"Recently this Commission refused Military credit in accordance with the provisions of Section 486-10 G. C. to an ex-service man whose certified copy of discharge from the United States Marine Corps after serving from the 24th

day of November, 1917, to the 25th day of September, 1918, read—"Discharged as undesirable, by reason of inaptitude."

His contention is that such discharge is an honorable discharge within the meaning of the provisions of Section 486-10 G. C., and that the reason for same being given as undesirable by reason of inaptitude, was due to his enlistment while under age, and to the efforts of his family to effect same at a time when he was still under age, and that the procedure of the Navy and War Departments under such circumstances was to issue such discharge for the reasons stated.

Will you kindly inform us your opinion regarding same?"

Section 486-10, General Code, referred to in your communication, reads in so far as pertinent as follows:

"All applicants for positions and places in the classified service shall be subject to examination which shall be public, and open to all, within certain limitations, to be determined by the commission, as to citizenship, residence, age, sex, experience, health, habit and moral character: provided, however, that any soldier, sailor, marine, member of the army nurse corps or red cross nurse who has served in the army, navy or hospital service of the United States in the war of the rebellion, the war with Spain, including the Philippine insurrection and the Chinese relief expedition, or from April 21, 1898 to July 4, 1902, or the war with the central powers of Europe between the dates of April 6th, 1917 and November 11th, 1918, who has been *honorably discharged therefrom* and is a resident of Ohio, may file with the civil service commission a certificate of service and *honorable discharge*, whereupon he shall receive additional credit given in the regular examination in which he receives a passing grade of twenty per cent of his total grade. * * *" (Italics mine).

In the case of *Horylew vs. New York State Bonus Commission*, 221 New York Supplement, 548; 220 Appellate Division, 345, decided by the Supreme Court, appellate division, Third Department of New York, on May 4, 1927, the court was considering section 5 of the Bonus Act of 1924, as amended by Chapter 26 of Laws of New York, 1925, reading so far as pertinent as follows:

"Every person * * * who was enlisted, * * * and who served in active duty in the army * * * of the United States at any time between the sixth day of April, nineteen hundred and seventeen and the eleventh day of November, nineteen hundred and eighteen and * * * *who was honorably separated or discharged from such service*, * * * is entitled to a soldier's bonus." (Italics mine)

The court stated at page 550:

"We think that * * * the words 'honorably discharged', as used in our statute, have the same meaning as when used by the War Department; * * *"

Hence, it is believed that where the words "honorably discharged" are used in a state statute, they should be given the meaning placed upon them by the War Department or the Navy Department of the United States.

Thus it becomes necessary to examine what the regulations of the Navy Department are with respect to discharges, to determine whether or not a discharge reading "Discharged as undesirable, by reason of inaptitude", is an "honorable discharge."

At the outset, it may be stated that the courts of Ohio have not passed upon the question at issue herein; however, it has been stated by the courts that where an Ohio court has not decided a question, consideration must be given to decisions of supreme courts of sister states on same or similar questions. See *D. & H. Coal Co. vs. Ley*, 37 App., 433; 152 O. S. 468.

In the case of *In re Application of Frank I. Reidler for a Minnesota Soldiers Bonus, Frank I. Reidler vs. The Soldiers Bonus Board of Review and Another*, 152 Minn., 346, 188 N. W. 563, decided by the Supreme Court of Minnesota on June 9, 1922, the relator, Reidler, was a person who had been enlisted in the *marine corps* of the United States starting November 15, 1917, and who had been discharged therefrom on November 9, 1918, which discharge was given by reason of a report of medical survey for a physical disability, which disability was the result of claimant's own misconduct and not in the line of duty. Under the Minnesota bonus law, the claimant must have been given "an honorable or ordinary discharge or release" from the military or naval service to be entitled to a bonus. See Minnesota laws, extra session, 1919, Chapter 49, Section 1, and second paragraph of the court's opinion at page 347. The court stated at page 347:

"Whether the relator was given such a discharge is the only question presented. He was *in the marine corps and subject to the laws and regulations governing the navy.*" (Italics mine)

The court further stated at page 347:

"The naval regulations provide that an honorable discharge shall be given to two classes of persons: First, those who upon the expiration of their term of enlistment are recommended by their commanding officer for fidelity, obedience and ability during their term of service and who are desirable to retain and second, those 'discharged before the expiration of enlistment upon recommendation of a medical survey for injuries received or disabilities incurred in line of duty * * * provided their records warrant the same.'

Relator was not within either of these two classes and did not receive an honorable discharge. The regulations provide that a dishonorable or bad-conduct discharge can be given only pursuant to the sentence of a court martial. Relator was not court martialed and did not receive a dishonorable discharge. The regulations provide:

"The following persons are entitled to an ordinary discharge only:

'(A) All who are not recommended by the commanding officer for fidelity, obedience and ability during his term of service.

'(B) All who are discharged before the expiration of their term of enlistment at their own request or for their own convenience.'

Relator is not in class A because he was discharged before the expiration of his term of service: he was not in class B because he was not discharged at his own instance.

The naval regulations provide that with certain specified exceptions no enlisted person shall be discharged 'prior to three months before the expiration of his term of enlistment * * * except by special order of the Secretary of the Navy (or for one of the following causes: *Undesirability, inaptitude, physical or mental disability, unfitness, or by sentence of court martial.*' (Italics mine)

The finding of the court was that Reidler was not entitled to the bonus.

Under the analogy of the foregoing case, it is obvious that the ex-marine corps enlisted man involved in your communication did not receive an "honorable discharge" from the Marine Corps. Your communication shows he was discharged on the twenty-fifth day of September, 1918; thus he was discharged prior to the end of his term of enlistment, and without being recommended by his commanding officer for fidelity, obedience and ability during his term of service. Also the discharge indicated that such marine was not thought to be one whom it was "desirable" to retain in service. Therefore he was clearly not within the two classes of persons to whom an honorable discharge "shall" be given.

It was expressly held in the foregoing case that Reidler was not within either of the two classes to whom an honorable discharge might be given and "did not receive an honorable discharge." It is unnecessary to decide whether or not the ex-marine involved in your communication received an "ordinary discharge", as the Ohio law provides that the discharge must be an "honorable discharge", and does not go as far as the Minnesota law permitting "an honorable or ordinary discharge or release from the military or naval service."

The reasoning of the Minnesota case is strengthened by the case of *Seigle vs. Soldiers' Compensation Board*, 119 Kans., 253, 237 Pac., 657, decided by the Supreme Court of Kansas on July 11, 1925. The syllabus of such case reads as follows:

"Plaintiff, a citizen of Kansas, performed honorable active service as a fireman in the United States navy from the date of his enlistment, April 7, 1917, until the armistice, but was discharged from the naval service with an 'undesirable discharge' because of being jailed by the civil authorities while on shore leave for a breach of the peace and consequently absent without leave from his military duty for a time. Held, that the want of the statutory requisite of an honorable discharge or its equivalent is a bar to plaintiff's claim for compensation."

In the foregoing case, it appeared that Seigle had enlisted in the naval service of the United States on April 7, 1917, and had been discharged on June 28, 1919. His discharge was lost and the government gave him the following document in its place:

"N. Nav. 119.

N642-AB

17,143.

"BUREAU OF NAVIGATION, NAVY DEPARTMENT,
DEPARTMENT OF THE NAVY, BUREAU OF NAVIGATION.

Washington, 14 December 1923

"The chief of bureau directs me to state that the records of this bureau show that William Marshall Seigle, 191-49-31 enlisted April 7, 1917, and was discharged from the U. S. naval service June 28, 1919, from the receiving ship, Boston, Mass., as fireman 1c., with an undesirable discharge.

"This information is given upon the statement that the original discharge has been lost or destroyed, and upon the condition that it shall not be accepted as a voucher for the payment of any claim against the United States for pay, bounty, or other allowance.

(Signed) C. P. HATCH,

Lt. Commander, USNRF."

The government also gave the plaintiff a certificate as follows:

"No. 236258. 191-49-31.

"U. S. N.

"War Service Certificate, United States Navy.

"This certifies that William Marshall Seigle, Fireman 1c., U. S. N., performed honorable active service in the United States Navy from April 7, 1917 to November 11, 1918, on board the following ships and stations: Naval Training Station, Great Lakes, Ill.; U. S. S. Arizona; U. S. S. Alabama; Receiving Ship, Philadelphia; U. S. S. DeKalb; U. S. S. Wyoming; U. S. S. Missouri; U. S. S. Indiana; Receiving Ship New York, N. Y.; U. S. S. Westwood.

"(Signed)

RANDALL JACOBS,

For the Chief of the Bureau of Navigation."

The statute permitting the bonus in the state of Kansas, section 73-102 of the Kansas laws, reads:

"The state of Kansas acknowledges its indebtedness to, and promises to pay to each person, who was a resident of the state of Kansas at the time of entering the service, and who served in the world war in any branch of the army, navy or marine corps of the United States prior to November 11, 1918, and who was *honorably discharged* therefrom, the sum of one dollar per day for each day of his or her entire service during the emergency created by the world war, which for the purposes of this act shall be construed as commencing April 6, 1917; and ending June 30, 1919, which compensation shall be in addition to all pay and allowances made by the United States government." (Italics mine)

The court stated specifically at page 255 that the question before them was:

"* * * Whether any soldier or sailor who was discharged by the national government under other than honorable conditions is entitled to compensation under the Kansas statute (73-102)."

The court, in holding that the plaintiff did not receive an honorable discharge, stated at pages 255 and 256:

"In his brief the appellee supplies the court with certain information concerning discharges from the military services of the United States:

"The army had three kinds of discharges: "white," honorable; "yellow", dishonorable; and "blue", for discharge when the soldier was discharged other than honorable or dishonorable. Appellee contends that the navy had three kinds of discharges and that his discharge was not a dishonorable one and occupied the same position as the "blue" discharge of the army."

To show what he assumes to be the negligible character of plaintiff's delinquency, in his brief, appellee says:

"The only blemish that appears on this man's record during his entire military career . . . from his enlistment at the outbreak of the war until he was discharged, was that after the armistice had been signed and when the

morale of all of the military forces stationed in the United States was at a low ebb on account of not having seen overseas service, and while appellee was on leave from his ship he got into a petty quarrel with some one upon the streets of a city and was incarcerated in a city jail. It followed that appellee was "A. W. O. L." (absent without leave) from his military command during the time appellee was in jail, and because of this infraction of the military rule, and because it was at a time when the military forces were being disbanded, this appellee was discharged unceremoniously.'

The court had no reason to doubt that these were the circumstances which prevented the plaintiff from receiving an honorable discharge, but we cannot rewrite our compensation act. Two requisites are indispensable to compensation—government service in the world war prior to the armistice in the army, navy or marine corps, and an honorable discharge. Plaintiff lacks one of these requisites, and this court cannot give its sanction to a holding that the two documents furnished by the government, set out above, are the equivalent of an honorable discharge."

It will be noted that the discharge of Seigle was "undesirable" just as in the case with the discharge of the ex-marine corps enlisted man involved in your communication.

In the later Kansas Supreme Court case of *Jella vs. Soldiers' Compensation Board*, 121 Kans., 360; 246 Pac., 521, decided June 12, 1926, the relator filed an action in mandamus to compel the Kansas Soldiers' Compensation Board to pay his bonus. It appeared in such case that the evidence before the board showed he had received an "undesirable" discharge. The court denied the writ, stating in the syllabus:

"The writ of mandamus will not be granted to compel the compensation board to award compensation to a soldier of the World War who does not show that he received an honorable discharge."

In passing, I might say that the marine involved herein does not appear to have received a certificate from the Secretary of the Navy, under a section of the act passed by Congress on January 19, 1929, Chapter 80, 45 Statutes at Large, 1084, known as section 204 of Chapter 2 of Title 34, entitled "Navy" of the United States Code Annotated. The title of the act was "An act for the relief of certain members of the navy and marine corps who were discharged because of *misrepresentation of age*." Such section 204 reads:

"In the administration of any laws conferring rights, privileges, or benefits upon honorably discharged members of the military or naval forces of the United States, their widows and dependent children, *a member of the navy or marine corps* who was enlisted between April 6, 1917 and November 11, 1918, both dates inclusive, *and who was discharged for fraudulent enlistment on account of misrepresentation of his age*, shall hereafter be held and considered to have been honorably discharged from the navy or marine corps on the date of his actual separation therefrom *if his service otherwise was such as would have entitled him to a discharge under honorable conditions*. No back pay or allowances shall accrue by reason of the passage of this act. In any such case, the Secretary of the Navy shall, upon request, grant to such individual or his widow or next of kin a discharge certificate showing that such former member of the navy or marine corps is held and considered to have been honorably discharged under the provisions of this act. (this section)."

Such act obviously provides that marines who were discharged *for fraudulent enlistment on account of misrepresentation of their age* may obtain a certificate from the Secretary of the Navy showing such marines are held and considered to have been honorably discharged; however, this certificate may be obtained only if the marines' services otherwise were such as would have entitled them to a discharge *under honorable conditions*. In the facts as disclosed by your communication, it does not appear that the marine was discharged *for fraudulent enlistment on account of misrepresentation of his age*, although it does appear that he enlisted while under age. In other words, section 204 of Title 34 would not appear to have any application, as the ex-marine's services, being "undesirable, by reason of inaptitude", were not evidently "otherwise such as would have entitled him to a discharge under honorable conditions," within the provision of such section.

In this connection, it is to be noted that in the official roster of Ohio Soldiers and Marines, Vol. 22 "Marines", published pursuant to an act of the 83rd General Assembly, passed April 17, 1919 (108 O. L. Pt. 1, page 191), there are shown about fifteen discharges of marines which indicated through the service certificate from which the information was taken that the particular marine was discharged on grounds of "minority", "concealing minority," "fraudulent enlistment," and the like. However, from the portion of the discharge presented by the ex-marine which you refer to in your communication, no such grounds appear. It is a question of fact to be determined whether or not the service of the ex-marine in question was "undesirable by reason of inaptitude" for such cause of concealment of minority or fraudulent enlistment alone or for some further cause, and under the doctrine of the cases set out, *supra*, the burden of proof is upon the claimant to show that a discharge is an "honorable" one within the provisions of Section 204, Title 34, United States Code Annotated, *supra*.

I am therefore of the opinion, in specific answer to your question, that:

1. An ex-service man who was discharged from the United States Marine Corps or the United States Navy during the period between April 6, 1917 and November 11, 1918, solely on the ground of fraudulent enlistment on account of misrepresentation of his age, if his service was otherwise such as would have entitled him to discharge under honorable conditions, is by virtue of Section 204, Title 34, United States Code Annotated, "honorably discharged" within the meaning of section 486-10, General Code.

2. Such discharge reading "Discharged as undesirable, by reason of inaptitude," is not an "honorable discharge" within the meaning of section 486-10, General Code, where other elements caused such discharge in addition to such fraudulent enlistment.

Respectfully,

JOHN W. BRICKER,
Attorney General.

4262.

CONTRACT—HOUSE BILL #102 APPLIED TO CERTAIN CONTRACTS ENTERED INTO BY DIRECTOR OF HIGHWAYS.

SYLLABUS:

Applicability of House Bill No. 102 of the 90th General Assembly to certain contracts entered into by the Director of Highways discussed.

COLUMBUS, OHIO, May 14, 1935.

HON. JOHN JASTER, JR., *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is as follows: