



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GROVER SELLERS  
ATTORNEY GENERAL

Honorable Arthur B. Knickerbocker  
Adjutant General of Texas  
Austin, Texas

Opinion No. 0-7199

Re: Legal status of Texas State Guard  
Post Exchanges

Dear General:

You ask for an opinion from this Department upon the above subject matter, your request being as follows:

"1. Attached hereto is correspondence from the War Assets Corporation, Consumer Goods Division, Fort Worth, Texas, requesting a legal opinion on the status of Texas State Guard Post Exchanges.

"2. It is requested that you submit to this Headquarters an opinion in accordance with the attached communication regarding the legal status of said Texas State Guard Post Exchanges."

The attached correspondence referred to contains a letter from Frank C. Langford, Consumer Goods Division, addressed to Mr. W. D. Atwood, Texas State Guard Post Exchange, 701 Ruth Street, Goose Creek, Texas, in which Mr. Langford says:

"\* \* \* We have been advised by our General Counsel in Washington that the State Guard Post Exchanges are not eligible under the law to purchase surplus property under priority for resale unless it can be shown affirmatively by an opinion from the Attorney General, or other competent authority, that the State Guard Post Exchanges are instrumentalities of the State.

"It was our thought that inasmuch as the Army Post Exchanges and the Navy Ship Service Stores

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were eligible to make purchases of surplus property for subsequent resale, the same ruling would apply to the State Guard Post Exchanges.

"If you will submit this question to the State Adjutant, Brigadier General Arthur B. Knickerbocker, he can request a ruling from the Attorney General, and if favorable, we shall be glad to comply with your previous request for purchases of surplus property.

\* \* \*

In a subsequent letter you state that "this Department has issued no Rules, Regulations, or Orders governing Post Exchanges of the Texas State Guard."

The Texas State Guard, as the same is organized and functioning under our statutes, (Vernon's Ann. Civ. Stat., Art. 5891a, as amended by the 48th Legislature, (1943)) is an instrumentality of the State of Texas. Sec. 1(a) insofar as pertinent is as follows:

"Whenever any part of the National Guard of this State is in active Federal service, the Governor is hereby authorized to organize and maintain within this State during such period, under such regulations as the Secretary of War of the United States may prescribe for their organization, standards of training, instruction and discipline, such military forces as the Governor may deem necessary to defend this State. Such forces shall be composed of officers appointed and commissioned and assigned by the Governor or under his authority, to hold office and assignment during the pleasure of the Governor, and such able-bodied male citizens of the State and such able-bodied residents of the State who shall have declared their intention to become citizens of the United States, as shall volunteer for service therein, supplemented, if necessary, by men of the reserve militia enrolled by draft or otherwise as provided by law. \* \* \*

Sec. 2(a) declares:

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"The Governor is hereby authorized to prescribe rules and regulations not inconsistent with the provisions of this Act governing the enlistment, organization, administration, uniforms, equipment, maintenance, command, training and discipline of such forces; provided such rules and regulations, in so far as he deems practicable and desirable, shall conform to existing law governing and pertaining to the National Guard and the rules and regulations promulgated thereunder."

Sec. 4 prescribes:

"For the use of such forces, the Governor is hereby authorized to requisition from the Secretary of War such arms and equipment as may be in possession of, and can be spared by, the War Department; and to make available to such forces the facilities of State armories and their equipment and such other State premises and property as may be available. Authorization is hereby provided for school authorities to permit the use of school buildings by the Texas Defense Guard; provided further that County Commissioners Courts, city authorities, communities, and civic and patriotic organizations are empowered and authorized by this Act to provide funds, armories, equipment, material, transportation, or other appropriate services or facilities, to the Texas Defense Guard."

Sec. 5 contains the following:

"(a) Upon the request of the Governor of another State, the Governor of this State may, in his discretion, order any portion or all of such forces to assist the military or police forces of such other State, who are actually engaged in defending such other State. Such forces may be recalled by the Governor at his discretion."

These provisions of the statute make clear the legislative intention to create and constitute such body a governmental agency in the discharge of its authorized duties.

However, the status of Post Exchanges is quite a different question. Some courts have held that an Army Post

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Exchange is not an instrumentality or department of the federal government. People v. Standard Oil Co., 22 P. (2d) 2 (Calif. Sup. Ct., 1933), reversed on other grounds, 291 U. S. 242; Keane v. United States, 272 Fed. 577 (Circ. Ct. App., 1921); and cases cited. However, in Standard Oil Co. v. Johnson, 316 U. S. 481 (1942), the Supreme Court of the United States held that an Army Post Exchange is an arm of the Government, an integral part of the War Department, and, as such, partakes of whatever immunities the War Department may have under the Constitution and federal statutes. As shown by the following language quoted from its opinion in that case, the Supreme Court based its decision upon the federal statutes and Army Regulations authorizing such post exchanges:

"Since § 10 of the California Act made the tax inapplicable 'to any motor vehicle fuel sold to the government of the United States or any department thereof,' it was necessary for the Supreme Court of California to determine whether the language of this exemption included sales to post exchanges. If the court's construction of § 10 of the Act had been based purely on local law, this construction would have been conclusive, and we should have to determine whether the statute so construed and applied is repugnant to the Federal Constitution. But in deciding that post exchanges were not 'the government of the United States or any department thereof,' the court did not rely upon the law of California. On the contrary, it relied upon its determination concerning the relationship between post exchanges and the Government of the United States, a relationship which is controlled by federal law. For post exchanges operate under regulations of the Secretary of War pursuant to federal authority. These regulations and the practices under them establish the relationship between the post exchange and the United States Government, and together with the relevant statutory and constitutional provisions from which they derive, afford the data upon which the legal status of the post exchange may be determined. It was upon a determination of a federal question, therefore, that the Supreme Court of California rested its conclusion that, by § 10, sales to post exchanges were not exempted from the tax. Since this determination of a federal question was by a state court, we are not bound by it. We proceed to consider whether it is correct.

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"On July 25, 1895, the Secretary of War, under authority of Congressional enactments promulgated regulations providing for the establishment of post exchanges. These regulations have since been amended from time to time and the exchange has become a regular feature of Army posts. That the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law.

"Congressional recognition that the activities of post exchanges are governmental has been frequent. Since 1903, Congress has repeatedly made substantial appropriations to be expended under the direction of the Secretary of War for construction, equipment, and maintenance of suitable buildings for post exchanges. In 1933 and 1934, Congress ordered certain moneys derived from disbanded exchanges to be handed over to the Federal Treasury. And in 1936, Congress gave consent to state taxation of gasoline sold by or through post exchanges, when the gasoline was not for the exclusive use of the United States.

"The commanding officer of an Army Post, subject to the regulations and the commands of his own superior officers, has complete authority to establish and maintain an exchange. He details a post exchange officer to manage its affairs. This officer and the commanding officers of the various company units make up a council which supervises exchange activities. None of these officers receives any compensation other than his regular salary. The object of the exchanges is to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices. Soldiers, their families, and civilians employed on military posts here and abroad can buy at exchanges. The Government assumes none of the financial obligations of the exchange. But government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing

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its membership. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops.

"From all of this, we conclude that post exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes. \* \* \*"

Your supplemental letter states that you have issued no rules, regulations, or orders governing Post Exchanges. We have found no Texas statutes on the subject. Therefore, we must assume that any enterprises operating under that name are doing so without the sanction or authority of the State of Texas. Even assuming that the general statutes setting up the Texas State Guard impliedly authorize the Governor, through the Adjutant General of Texas, to establish post exchanges as instrumentalities of the State (which question we do not here decide), we understand that no such action has been taken, that no regulations have been issued by the Governor or the Adjutant General pertaining to post exchanges, that the Legislature has not recognized post exchanges as State activities, and that whatever action has been taken towards their establishment has been purely voluntary action on the part of individual officers and members of local units of the Texas State Guard. Therefore, having neither statutes nor regulations affording data upon which the legal status of such post exchanges may be determined, we must conclude that they are not instrumentalities or agencies of the State of Texas.

Very truly yours

APPROVED MAY 23, 1946

ATTORNEY GENERAL OF TEXAS

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ATTORNEY GENERAL OF TEXAS

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