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Maintaining Domicile and Avoiding State Income Tax while on National Guard AGR tour

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Q: I am a warrant officer in the New Mexico Army National Guard and a frequent reader of your “Law Review” articles. I recently joined the Reserve Officers Association (ROA) when I learned that National Guard officers and NCOs are eligible.

I live in El Paso, Texas and have lived there most of my life. On drill weekends, I drive a short distance across the state line to a National Guard armory in New Mexico. I applied for and was accepted for an Active Guard & Reserve (AGR) tour at the Adjutant General’s headquarters in Santa Fe, New Mexico. I have the orders, and they cite 32 U.S.C. 502(f). What does that mean?

My AGR orders start on October 1. My wife and I are moving out of our El Paso apartment and will be renting an apartment in Santa Fe. Texas has no state income tax, but New Mexico does. I have read with great interest your Law Review 13120 (September 2013), about the Air Force Reserve Captain going from Texas to Maryland for an AGR tour at Andrews AFB. You said that he could maintain his domicile in Texas and avoid paying Maryland state income tax during his three-year AGR tour at Andrews AFB.

What works for that Air Force Reserve Captain will work for me also, right?

A: Unfortunately, no.

To have rights under the Servicemembers Civil Relief Act (SCRA), you must be performing “military service” as defined by the SCRA. I invite your attention to section 511(2)(A) of the SCRA, which provides as follows:

“(2) Military service. The term “military service” means—

(A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard—

(i) active duty, as defined in section 101(d)(1) of title 10, *United States Code*, and

(ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under [section 502\(f\) of title 32, United States Code](#), for purposes of responding to a national emergency declared by the President and supported by Federal funds..."

50 U.S.C. App. 511(2)(A) (emphasis supplied).

Section 511(2)(A)(i) refers to section 101(d)(1) of title 10, which provides as follows:

"The term "active duty" means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. *Such term does not include full-time National Guard duty.*"

10 U.S.C. 101(d)(1) (emphasis supplied).

The term "full-time National Guard duty" is defined in section 101(d)(5), as follows:

"The term 'full-time National Guard duty' means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States."

10 U.S.C. 101(d)(5) (emphasis supplied).

Your Army National Guard AGR orders cite 32 U.S.C. 502(f). Section 502 is one of the title 32 sections specifically enumerated in section 101(d)(5), the definition of "full-time National Guard duty." Thus, it is clear that your duty under these orders qualifies as "full-time National Guard duty."

Section 101(d)(1) clearly provides that *full-time National Guard duty is not active duty*. Section 511(2)(A)(i) clearly incorporates section 101(d)(1) of title 10. Your Army National Guard AGR duty *does not qualify as "military service" for purposes of the SCRA*.

The other way that you could qualify for SCRA protections would be under section 511(2)(A)(ii), which provides that a member of the Army National Guard or Air National Guard is covered when he or she is on duty for more than 30 consecutive days under 32 U.S.C. 502(f), but only when he or she is serving "under a call to active service authorized by the President or the Secretary of Defense ... for purposes of responding to a national emergency declared by the President and supported by Federal funds." 50 U.S.C. App. 511(2)(A)(ii) (emphasis supplied).

A standard National Guard AGR tour at the headquarters of the state Adjutant General does not meet this “for purposes of” requirement. *You are not protected by the SCRA during this upcoming AGR tour.*

That means that you do not have the right to get out of your lease on the El Paso apartment—you are not leaving El Paso in order to perform “military service” *as defined by the SCRA*. If someone sues you while you are on this AGR tour, you do not have the right (under the SCRA) to a continuance and to default judgment protection.

In this article, I am telling you what the law *is*, *not what I think that it should be*. We will bring this statutory glitch to the attention of the other associations in The Military Coalition, especially the National Guard Association of the United States (NGAUS) and the Enlisted Association of the National Guard of the United States (EANGUS). We will draft a corrective amendment, and we will push to get it enacted.