The Dean Law Group
A Professional Law Corporation

Merrianne E. Dean
Bridget J. Wilson

Telephone (619) 232-8377
Facsimile (619) 238-8376

ATTORNEY GENERAL GREG ABBOTT
OFFICE OF THE ATTORNEY GENERAL OF TEXAS
Attention: OPINION COMMITTEE
P.O. Box 12548
Austin, TX 78711

OFFICE OF THE ADJUTANT GENERAL OF
THE TEXAS MILITARY FORCES,
JOHN F. NICHOLS, MAJOR GENERAL,
TXANG
Joint Forces Headquarters
Adjutant General's Department
P.O. Box 5218
Austin, TX 78763-5218

September 23, 2013

Dear Attorney General Abbott and Major General Nichols:

This communication is forwarded on behalf of the American Military Partner Association (AMPA). AMPA is the nation's premier resource and support network for LGBT military spouses and their families. As a non-partisan, non-profit 501(c)(3) organization, AMPA is committed to connecting, supporting, honoring and serving our modern military families. The Association has assisted numerous same-sex couples with the unique challenges that they still face in light of exclusion by state governments and numerous organizations around the country from the recognition that they deserve as members of our Armed Forces and as the families who serve with them. AMPA is dedicated to educating and advocating on behalf of these family members.

On September 4, 2013, the Texas Adjutant General's Office sent an opinion letter related to the Texas National Guard's current refusal to process federally mandated benefits and follow administrative procedures related to lawful same-sex spouses as determined by federal law to the Attorney General of the State of Texas. That letter contains some accurate information and some incorrect information, some of the misunderstandings understandable, given that clarification of these issues has only recently been forthcoming from federal agencies.

This letter will discuss and correct some of those errors. Also, it will describe how the Texas National Guard is breaching its responsibilities to the federal government, the troops they are mandated to support and the readiness of the force by its arbitrary, discriminatory, and

improper actions in refusing to properly process these service members for the benefits to which they are entitled and which are so essential to maintaining a ready force.

As accurately cited in the letter to the Attorney General, on 26 June, 2013, the Supreme Court of the United States overturned Section 3 of the so-called "Defense of Marriage Act" in an action brought by a widow from the State of New York, Edith Windsor in *Windsor v. U.S.*, 570 U.S. ___, 133 S. Ct. 2675. The Court struck down the portion of DOMA that prohibited the federal government from recognizing for any purpose the lawful marriages of persons of the same sex. In a lengthy decision, the U.S. Supreme Court determined that the federal government could not do this, and cannot treat lawfully married spouses differently under federal law.

Accordingly, on 13 August 2013, Secretary of Defense Chuck Hagel announced that the Department of Defense would treat lawful same-sex spouses in the military in the same manner as any other military spouse. They will provide the benefits to which they are entitled under federal law.

AMPA members are painfully aware that a number of states, Texas included, have adopted other statutes, or, in some cases, Constitutional amendments that purport to bar same-sex marriage or the recognition thereof. However, this dispute is not a matter of state law, but stems from Federal law to which the Guard is subject.

The requirements that the Department of Defense has placed upon the National Guard with regard to the prompt and efficient administration of these federal benefits does not intrude upon any decisions that may have been made by the State of Texas. Although we disagree with the State of Texas in not recognizing these marriages, and are confident that at some time in the future this form of discrimination will be rejected, at this time in history, we are aware of Texas' position and that *Texas Family Code* § 6.204 prohibits the recognition of same-sex marriages or civil unions in the State of Texas.

However, that does not relieve the State of Texas from its responsibility to carry out the requirements of federal law with regard to implementing measures designed to protect the force, including family benefits and other resources available to service members who are married and who are now recognized by the federal government for that purpose. The Texas National Guard, which includes the Army National Guard and the Air National Guard, receives the bulk of its funding from the federal government. The Texas National Guard, like other National Guards, carries out a number of federal functions that are not subject to Texas law, but subject solely to federal law. And, it carries out those mandates.

Given that numerous agencies in the federal government have only begun to clarify their own circumstances with regard to the recognition of marriage under federal law because of the patchwork quilt that is federal law, the letter of 4 September, 2013 contains some assertions that are no longer accurate. In the past, the Internal Revenue Service has used "domicile" to assess

marital status. However, the IRS has issued Revenue Ruling 2013-17 to the contrary. That Revenue Ruling holds that for Federal Tax Purposes the Internal Revenue Service ("Service") recognizes a marriage of same-sex individuals validly entered into in a state whose laws authorize the marriage of two individuals of the same sex, even if the state in which they are domiciled does not recognize the validity of same sex marriages. (Emphasis added.)

With regard to veterans' benefits, two cases have already determined that the provision in veteran's benefits law that requires that spouses be of the opposite sex is unconstitutional. See, 38 U.S.C. § 101 (31) and (3). In United States District Court of the Southern District of California, the Court determined that this provision was unconstitutional based upon the finding in *Windsor*. See, *Cooper-Harris v. U.S.*, cv 12-0887 CBM (AJWX). Similarly, a ruling by the United States District Court in the State of Massachusetts, *McLaughlin v. Hagel*, 1:11 cv 11905-RGS, determined that the statutory provision is unconstitutional based on the Supreme Court decision in *Windsor*.

Both the Secretary of the Department of Veterans Affairs, Secretary Shinseki and the Attorney General of the United States have issued opinion letters in which they confirm that they will not defend that provision of Title 38. The remaining case in the courts, *Cardona v. Shinseki*, No. 11-3083 (Vet. App.) is still awaiting resolution, having been stayed pending the decision in *Windsor*. It is anticipated the Court of Appeals for Veterans Claims will reach a decision in the near future, which is unlikely to differ from the finding of the Article III Courts.

Another section of the code that would appear to limit the receipt of V.A. benefits to couples living in "non-recognition" states has not yet been clarified by the Department, nor has the retroactivity of V.A. benefits been determined. For that reason, it is premature for Texas to issue an opinion with regard to how veterans' spousal benefits will be determined. Clearly, this law is in flux.

The letter from the Texas Adjutant General states that Social Security benefits are strictly a matter of the state of residence. Again, this is in a state of flux. The Social Security Administration has not, at this time, taken a formal position. They are aware of the ambiguity and are encouraging applicants to apply so as to preserve filing dates while awaiting clarification of this issue. Therefore, it is incorrect to state that Social Security benefits will not be granted to individuals who live in non-recognition states, such as Texas. This is an area of law that is changing daily. [1]

[1] On its webpage at http://www.ssa.gov/doma/Department of Justice, the SSA has published the following information: "On June 26, 2013, the Supreme Court ruled that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. Social Security is now processing some retirement spouse claims for same-sex couples and paying benefits where they are due. In the coming weeks and months, we will develop and implement additional policy and processing instructions. If you are in a same sex marriage or other legal same-sex relationship, even if you live in a state that prohibits same-sex marriage, we encourage you to apply right away." (Emphasis in SSA instruction).

In another example, the Department of Labor announced on 18 September 2013 that they would interpret the Supreme Court's decision in *Windsor* as recognizing lawful same-sex spouses for the purposes of determining whether a person is a "spouse" or determining whether who is in a "marriage" in Title I of ERISA and related department regulations. That includes same-sex couples legally married in any state or foreign jurisdiction that recognizes such marriages, regardless of where they currently live. As you can see, this entire process is not trending away from, but in favor of recognition of marriages, regardless of domicile. See, *http://www.dol.gov/opa/media/press/ebsa/EBSA20131720.htm*

Ultimately, however, that is of collateral significance to the issues raised by the Texas National Guard's refusal to process the paperwork for Guardsmen and their lawful spouses for the receipt of federal benefits to which they are entitled, the issuance of identification cards and participation in mission-essential events to assist in Family Readiness. Currently, only Texas, Mississippi, Louisiana and Oklahoma are failing in their responsibilities to process these administrative matters that involve same-sex couples whose marriages are recognized under federal law. This harms the readiness of the force.

Family Readiness is not an afterthought in the process of troop readiness. In fact, the services have long recognized how important Family Readiness is. For example, the National Guard has stated in its description of Family Readiness that:

> "Family Readiness is a critical issue for the Department of Defense. Quality of life and family matters are priority issues for the Secretary of the Services. The Department's ability to assist service members and their families to prepare for separations during short and long-term deployments is paramount to sustaining mission capabilities and mission readiness. The reserve components work closely with their parent services to develop seamless, integrated Family Readiness and support programs that provide information and services to all members, regardless of parent service or component of the member - Active Guard or Reserve". See, *https://www.jointservicessupport.org/fp/default/aspx*, describing the National Guard Family Program.

Similarly, the Family Readiness program is described as a force-essential asset. Family Readiness is a force multiplier for deployments. Service Member / Family Readiness is a key factor for unit morale. In addition, the National Guard has determined that Family Readiness helps to increase the retention of service members and encourages family participation, ultimately contributing to the success and achievement of the mission. Family Readiness is a command responsibility.

Most importantly, the National Guard Bureau makes it clear that Family Readiness cannot be achieved through "catch up" activities conducted just before or during training or on a unit deployment. Instead, Family Readiness must be continually promoted through a well-

planned, and thoughtfully carried out program.

The Texas National Guard is being asked to carry out a task that is federally funded. Enrollment in DEERS, which is a federal mechanism, not a state activity, and funds for the personnel who support those operations are federal funds. It defeats the purpose of Family Readiness, in all of its elements; to pull otherwise fully qualified troops from that process and mandate that at their own expense, on their own time, they travel to a distant federal installation, separated from their colleagues, to fulfill the requirements of their service in the National Guard.

For these Guard members, registering and signing up family members in DEERS and setting out all of that information for the federal government, both for benefits and notification purposes, is not an optional activity, but mandated by regulation. See, for example, *AFI 36-3026_IP, Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel.* To interfere with those requirements harms the well-being and the efficiency of the force. It also damages the morale and well-being of not only these service members, but those around them. The Texas National Guard is not being asked to change state law. It is being asked to implement federal law that it is bound to observe.

Equally bad for force readiness, if not more damaging ,is the assertion that the lawful spouses of Guard members be barred from Family Readiness activities. This is undoubtedly damaging to morale, good order and discipline. Those events may include family social events with the Guard members and their families. It may include events that are designed to strengthen relationships strained by repeated deployments and the difficulties service members experience when they return. It is not substitute to shuffle these service members and spouses off to Federal installations, where they will not experience the bonding with their Guard colleagues that is so essential to unit cohesion. This would abandon the very goals of Family Support and gut its effectiveness to the detriment of the force. This Texas cannot do.

The unique relationship of the National Guard with states is well acknowledged. It is also well acknowledged that the Federal government retains Constitutional supremacy in militia matters under Article I of the U.S. Constitution. In practice, even though the states retain the right to appoint officers, all officers serving in the Army and National Guard must obtain federal

recognition or they will not be members of the Army or Air National Guard. They will not be paid through federal funds under Article 32, nor may they be called to duty under Title 10 without federal recognition. It is a joint process, but one over which the state does not make ultimate determinations, or, for that matter, have veto power. The federal government retains the authority to grant or deny federal recognition to officers. As you are also likely aware, enlisted members are always dual members and are federal soldiers and airmen, as with federally recognized officers. The training and discipline of the force is mandated by federal law. *32 U.S.C. Chapter 5.*

With regard to discipline, these states are left to create systems of discipline not inconsistent with the instructions of the federal government. See, *32 U.S.C. § 501*. This reflects the control that the federal government has been granted by the United States Constitution and the statutory authority that governs the National Guard. The state may not simply decide that it will abandon its responsibilities under federal law.

The existence of a federal v. state separation is well demonstrated by the existence of the Texas State Guard and similar state defense forces permitted under federal law at 32 U.S.C. § 109. The State Guard is a state defense force permitted under federal law which the state may retain for the command of the governor. State defense forces receive no federal funding, its officers are not federally recognized, nor are these troops eligible for call up in the same manner as Guardsmen. They function under state-only orders and are paid for with state funds. That contrasts with the Army and Air National Guard, which are over 90% funded by federal funds and equipment.

The Texas National Guard is in breach of its duties in this mistreatment of Guard members whose spouses, lawful under federal law, are being treated differently and it is apparent from the current position being taken by the Texas National Guard command will be excluded from National Guard programs that are necessary and required to be provided to these troops and their families. AMPA is most interested in the welfare of its members, those service members and the military families it serves. Each and every one of us is also well aware of the importance of family support services and the efficient implementation of the mission-essential tasks of maintaining the readiness of the force. It is our sincere hope that you will put the welfare of these troops, but also the readiness of the force, ahead of any political considerations that could motivate this unfortunate decision and comply with processing the federal benefits which the Texas National Guard has a duty to implement.

Very truly yours,

Bridget J. Wilson,
Attorney at Law for
American Military Partner Association