



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 6, 1998

Brigadier General Daniel James, III
Adjutant General
Texas Air National Guard
P.O. Box 5218
Austin, Texas 78763-5218

Letter Opinion No. 98-038

Re: Whether the Texas National Guard is subject to the Hazard Communication Act, chapter 502 of the Health and Safety Code (RQ-951)

Dear Brigadier General James:

You ask whether the Texas National Guard is subject to the Hazard Communication Act, chapter 502 of the Health and Safety Code. Because the Texas National Guard is required by a federal regulation to comply with the federal Hazard Communication Standard, we conclude that it is not.

The Hazard Communication Act, chapter 502 of the Health and Safety Code (the "act"), requires employers subject to the act to furnish employees with education, training, and information concerning hazardous chemicals at their workplaces. Generally, the act requires the employer to maintain an updated chemical list of and material safety data sheet concerning hazardous chemicals present at the workplace that are to be available to employees.¹ It further requires that employers provide education and training programs for employees who use or handle hazardous chemicals.² Your question requires us to determine whether the Texas National Guard (the "TNG") is an "employer" subject to the act.

"Employer" for the purposes of the act means:

a person engaged in private business who is regulated by the federal Occupational Safety and Health Act of 1970 (Pub. L. No. 91-596), the Federal Coal Mine Health and Safety Act of 1969 (Pub. L. No. 91-173), or the Federal Mine Safety and Health Amendments Act of 1977 (Pub. L. No. 95-164) on the effective date of this Act, or the state or a political subdivision of the state, including a state, county, or municipal agency, a public school, a college or university, a river authority or publicly owned utility, a volunteer emergency service organization, and other similar employers. *The term does*

¹Health & Safety Code §§ 502.005, .006.

²*Id.* § 502.009.

not include any person to whom the federal Occupational Safety and Health Act of 1970 (Pub. L. No. 91-596), the Federal Coal Mine Health and Safety Act of 1969 (Pub. L. No. 91-173), or the Federal Mine Safety and Health Amendments Act of 1977 (Pub. L. No. 95-164) is applicable if that employer is covered by the OSHA standard or the other two federal laws.³

Section 502.004(a) of the act further provides:

Except as provided by Subsection (b),⁴ this chapter applies only to employers who are not required to comply with the OSHA standard, the Federal Coal Mine Health and Safety Act of 1969 (Pub. L. No. 91-173), or the Federal Mine Safety and Health Amendments Act of 1977 (Pub. L. No. 95-164).

(Footnotes in original text omitted) (footnote added). “OSHA standard” means “the Hazard Communication Standard issued by the Occupational Safety and Health Administration [(‘OSHA’)] and codified as 29 C.F.R. Section 1910.1200.”⁵

By its terms, the act does not apply to an employer who is covered by or required to comply with the OSHA standard, the Federal Coal Mine Health and Safety Act of 1969, or with the Federal Mine Safety and Health Amendments Act of 1977. You assert that the TNG is required to comply with the OSHA standard and is therefore not subject to the act. We concur, even though a review of the OSHA standard reveals that the TNG is not subject to the standard by its terms as an employer.

First we look at the scope of the Occupational Safety and Health Act⁶ (the “federal act”) under which the OSHA standard is promulgated.⁷ The federal act authorizes the Secretary of Labor to promulgate federal occupational safety and health standards and requires employers to comply with them.⁸ The federal act excludes from the definition of the term “employer,” and therefore from

³*Id.* § 502.003(11) (footnotes omitted) (emphasis added).

⁴Subsection (b) requires chemical manufacturers, importers, and distributors to provide material safety data sheets. *Id.* § 502.004(b). We assume for the purposes of this opinion that the Texas National Guard does not manufacture, import, or distribute chemicals.

⁵*Id.* § 502.003(19).

⁶*See* 29 U.S.C. §§ 651 - 678.

⁷*See infra* note 13.

⁸29 U.S.C. §§ 654(a), 655.

the coverage of the statute, “any State or political subdivision of a State.”⁹ Regulations promulgated under the federal act set out a two-part test for determining whether an entity is a state or political subdivision of a state within the meaning of the statute. Under this test any entity that

has been (1) created directly by the State, so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are controlled by public officials and responsible to such officials or to the general electorate, shall be deemed to be a ‘State or political subdivision thereof’ under section [652](5) of the Act and, therefore, not within the definition of employer, and, consequently, not subject to the Act as an employer.¹⁰

TNG is not subject to the federal act as an employer. The TNG satisfies both parts of the test for a “state or political subdivision thereof,” and is excluded from the statute’s definition of “employer.” First, it is a part of the state’s military forces established by Texas pursuant to state law.¹¹ Secondly, it is administered by the Texas Adjutant General, head of the state’s military forces including the TNG, who is appointed by the governor.¹²

Having determined that the TNG is not subject to the federal act as an employer, we turn now to the OSHA standard at issue here. The Hazard Communication Standard, section 1910.1200 of the Code of Federal Regulations, was promulgated under the federal act to protect workers from hazardous chemicals in the workplace.¹³ This standard requires chemical manufacturers or importers to assess the hazards of chemicals which they produce or import, and all employers to provide information to their employees about the hazardous chemicals to which they are exposed by means of a hazardous communications program, labels and other forms of warning, material safety data sheets, and information and training.¹⁴ “Employer” in the OSHA standard “means a person engaged in a *business* where chemicals are either used, distributed, or are produced for use or distribution,

⁹“Employer” means “a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.” *Id.* § 652(5).

¹⁰29 C.F.R. § 1975.5(b).

¹¹Gov’t Code §§ 431.001(3), (4), .041 - .045.

¹²*Id.* § 431.022; *see also* § 431.001(3), (4).

¹³29 U.S.C. § 655; *Moore v. Ashland Chemicals*, 126 F.3d 679, 697 (5th Cir. 1997); *Industrial Truck Association, Inc. v. Henry*, 125 F.3d 1305, 1306 (9th Cir. 1997).

¹⁴29 C.F.R. § 1910.1200 (b), (d) - (h). Employers who simply use chemicals, rather than produce or import them, are not required to evaluate the hazards of chemicals. *Id.* § 1910.1200(b). These employers need only establish a workplace program and transmit information to their employees about hazardous chemicals in the workplace. *Id.*

including a contractor or subcontractor.”¹⁵ More importantly, since the OSHA standard is promulgated pursuant to the federal act,¹⁶ this definition must necessarily exclude a state or a political subdivision thereof such as the TNG excluded from the definition of “employer” in the federal act. Accordingly, the TNG is not subject to the OSHA standard as an employer.

While we do not believe that the TNG is subject to the OSHA standard by its terms, it is our opinion that the TNG is nevertheless required to comply with the standard as a unit of the National Guard. The National Guard has a unique position in the federal structure.¹⁷ It is “an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war,” and “also may be federalized in addition to its role under state government, to assist in controlling civil disorders.”¹⁸ It is the successor to the state militias recognized in article I, section 8 of the United States Constitution, and all the states and Puerto Rico have their own National Guard.¹⁹ Within each state, the National Guard is a state agency, under the state’s authority and control.²⁰ At the same time, the activity, makeup, and function of the National Guard is provided for largely by federal law.²¹ The federal government provides state National Guard units with funds, subject to federal rules and regulations.²² Through this funding and regulation process, the federal government maintains considerable control over the standards, organization, activities, and functions of the various state National Guard units.²³

The National Guard is subject to regulations promulgated by the National Guard Bureau, a federal agency within the Departments of the Army and Air Force.²⁴ The Bureau is responsible for maintaining communications on all National Guard matters between the Departments of the

¹⁵*Id.* § 1910.1200(c) (emphasis added).

¹⁶*See supra* note 13.

¹⁷*New Jersey Air Nat’l Guard v. Fed. Labor Rel. Auth.*, 677 F.2d 276, 278 (3d Cir. 1982).

¹⁸*Gilligan v. Morgan*, 413 U.S. 1, 7 (1973).

¹⁹*Jorden v. National Guard Bureau*, 799 F.2d 99, 101 (3d Cir. 1986).

²⁰*New Jersey Air Nat’l Guard*, 677 F.2d at 278.

²¹*Id.*; *see generally* 32 U.S.C. §§ 101 - 713.

²²*See id.* §§ 107, 108.

²³*See id.* § 108 (federal funds and other benefits are subject to forfeiture if state does not comply with federal requirements or regulations); Attorney General Opinion DM-148 (1992).

²⁴10 U.S.C. § 10501. The National Guard comprises the Army National Guard and the Air National Guard. 32 U.S.C. § 101(3).

Army and Air Force and the several states.²⁵ The Bureau is generally charged with implementing and administering approved National Guard policies and programs, granting and withdrawing federal recognition of officers in each state, and publishing National Guard directives and regulations.²⁶ The federal act requires the Bureau to establish and maintain an effective and comprehensive occupational safety and health program consistent with its standards, including the OSHA standard.²⁷ Accordingly, chapter 6 of National Guard Regulation 385-10 promulgated by the Bureau “provides requirements needed to meet the standards established by 29 CFR 1910.1200 [OSHA standard], 29 CFR 1960.59, DODI 6055.1, AR 700-141, OSHA, and most State regulations. . . .”²⁸

The TNG is a unit of the National Guard established by Texas pursuant to state law.²⁹ As a National Guard unit, the TNG must comply with the requirements established by chapter 6 of the National Guard Regulation 385-10 to meet the OSHA standard.³⁰ Compliance with chapter 6 in this instance requires compliance with the OSHA standard. Thus, the TNG is required to comply with the OSHA standard even though it is not subject to the OSHA standard by its terms. Accordingly, we conclude that the Texas National Guard is not an employer subject to the Hazard Communication Act, chapter 502 of the Health and Safety Code.

²⁵*Id.* §§ 10501, 10503.

²⁶*Id.* § 10503.

²⁷*See* 29 U.S.C. § 668.

²⁸NGR 385-10, [§] 6-1 (effective October 21, 1988) (emphasis added). This regulation applies to the Army National Guard. *Id.* 385-10, [§] 6-2 (Applicability). Chapter 6 of the regulation “applies to all military, State and Federal personnel working in or for the ARNG [Army National Guard]. . . .” *Id.* 385-10, [§] 6-2. The Army National Guard includes that part of the organized militia of the several states that is (A) a land force, (B) is trained and has officers appointed under article I, section 8 of the United States Constitution, (C) organized, armed, and equipped wholly or partially at federal expense and (D) is federally recognized. 32 U.S.C. §101(4). *See also supra* note 24 & *infra* note 30.

²⁹Gov’t Code §§ 431.041 - .045; Attorney General Opinion DM-148 (1992) at 2.

³⁰Gov’t Code §§ 431.001(3), (4), .041 - .045; Attorney General Opinion DM-148 (1992). The Texas National Guard, comprising the Texas Army National Guard and the Texas Air National Guard, is also a reserve component of the United States Departments of the Army and the Air Force. 32 U.S.C. § 102; Gov’t Code § 431.001(4); Letter Opinion No. 89-66 (1989); *see also supra* notes 24 & 28.

S U M M A R Y

The Texas National Guard is not subject to the Hazard Communication Act, chapter 502 of the Health and Safety Code.

Yours very truly,

A handwritten signature in cursive script that reads "Sheela Rai".

Sheela Rai
Assistant Attorney General
Opinion Committee