

The requestor, Major General John F. Nichols, has asked that the attached request for an opinion be placed on hold until the Texas Military Forces makes a decision about whether to withdraw or amend the request. Until that time, the Office of the Attorney General will refrain from responding to this request.



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OPINION COMMITTEE

REPLY TO ATTENTION OF

Office of the General Counsel

TEXAS MILITARY FORCES
Joint Force Headquarters
Adjutant General's Department
Post Office Box 5218
Austin, Texas 78763-5218
512-782-5057

September 4, 2013

FILE # ML-47385-13
I.D. # 47385

RQ-1150-GA

Office of the Attorney General of Texas
Attn: Opinion Committee
Post Office Box 12548
Austin, Texas 78711
Via Email: Opinion.Committee@texasattorneygeneral.gov

Dear Attorney General:

On June 26, 2013, the United States Supreme Court held Section 3 of the Defense of Marriage Act unconstitutional, which prevented federal recognition of same-sex marriages. Based on this decision, the Department of Defense (DoD) will extend partner/spouse and family benefits, such as identification cards, to same-sex spouses. Enrollment into the Defense Enrollment Eligibility Reporting System (DEERS) began on September 3, 2013.

Same-Sex Marriage at the Federal Level: Partial Repeal of Defense of Marriage Act (DOMA), Windsor vs. U.S. 570 U. S. ____ (2013). The U.S. Supreme Court, in *Windsor*, struck down a portion of DOMA because defining marriage has traditionally been an issue for state determination. For example, Section 2 of DOMA, permits states to elect whether or not to recognize same-sex marriage from other states. Accordingly, not all federal benefits will be given to same-sex couples residing in states where same-sex marriages are not recognized. Thus, in Texas and some 33 other states, same-sex marriages are still impacted. Some examples include:

a. Family and Medical Leave for Non-Federal Employees: Existing Family Medical Leave Act (FMLA) regulations look to an employee's state of primary residence to determine whether a person is considered a "spouse";

b. Federal Taxes: The Internal Revenue Service has historically used the "domicile" rule, like the FMLA, to assess marital status;

c. Medicaid: It is possible that some states will provide hardship protection for partners of a person in long-term care, but eligibility for other Medicaid protections are also dependent on state recognition of marital status;

d. Social Security: Family and spousal protections relating to Social Security use a wage earner's primary state of residence as guidance for marriage recognition; and

e. Veterans: Spousal benefits for veterans are more lenient, but there are still instances in which benefits are not granted. If a same-sex couple lives in a state that recognized their marriage when they married, but moved to a non-recognition state by the time benefits took effect, they would be considered married and given the respective benefits. But if a gay couple traveled to a recognition state to marry and continued to live in a non-recognition state after their wedding, benefits would not be given.

The Texas Military Forces (TXMF), which is also a state agency under the authority and direction of the Texas state government, recognizes that the Texas Constitution and Texas Family Code 6.204 conflict with the same-sex benefit DoD policy change.

In Texas, same-sex marriage is banned by constitutional amendment. Thirty- three other states also ban same-sex marriage by amendments to their state constitution or by state law. On November 8, 2005, Texas became the 19th state to adopt a constitutional amendment banning same-sex marriage.

Texas law specifically prohibits a state agency or political subdivision from recognizing or validating a same-sex marriage.¹ The TXMF is a state-based military organization under the operational, tactical and administrative control of the Adjutant General and Governor.² The National Guard retains the characteristic of a state organization while under Title 32 U.S.C. or State Active Duty until its members or units are formally called into active federal service (Title 10) by the President³. The law seems well settled that members of the National Guard of the various states are under the control of the state, except in times of war.⁴ Enclosed is a list of typical clerical and administrative type functions that Title 32 service members typically perform reflecting the change in marital status from single to married of a TXMF service member.

¹ TEX FAM CODE, Sec. 6.204. RECOGNITION OF SAME-SEX MARRIAGE OR CIVIL UNION. (a) In this section, "civil union" means any relationship status other than marriage that:

(1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and

(2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.

(b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.

(c) The state or an agency or political subdivision of the state may not give effect to a:

(1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or

(2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.

² TX GOVT CODE §§ 437.002, 437.053.

³ TEX. CONST. art IV Section 7.

⁴ Singleton v. Merits Sys. Protection Bd., 244 F. 3d 1331, 1333 (Fed.Cir.2001).

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What actions, if any, can the TXMF take in order to fulfill the DoD policy of extending spousal and dependant benefits to same-sex spouses without violating the Texas Constitution and Texas State Law?

Sincerely,

JOHN F. NICHOLS
Major General, TXANG
Adjutant General

Enclosure