

J. Y. Interpretation No.715 ( December 20, 2013 ) \*

【Case concerning inadmissibility of persons who have a record of conviction to examinations for reserve military or noncommissioned officers】

**ISSUE:** Is it unconstitutional to prohibit people with a record of conviction from registering for the reserve military or reserve noncommissioned officer examination as stipulated by the Ministry of National Defense in the recruitment and admission guidelines ?

**RELEVANT LAWS:**

Articles 18 and 23 of the Constitution ( 憲法第十八條、第二十三條條 ) ; Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Interpretation Procedure Act ( 司法院大法官審理案件法第五條第一項第二款 ) ; Point 1.2(2) of the 2010 Examination and Admission Guidelines for the Volunteer Reserve Military Officer and Reserve Noncommissioned Officer Examination ( 中華民國九十九年國軍志願役專業預備軍官預備士官班考選簡章壹、二、(二) ) ; Article 11, Paragraph 1 of the Act Of Military Service System」 ( 兵役法第十一條第一項(一〇五年五月十八日修正公布) ) ; Article 5, Paragraph 1, Subparagraph 4, and Paragraph 3 of the

\* Translated by Spenser Y. Hor, Esq. and Chien Yeh Law Offices.

\*\* Contents within frame, part of the original text, are added for reference purposes only.

Act of Military Education (軍事教育條例第5條第1項第4款、第3項(一〇五年十一月九日修正公布)) ; Article 3, Paragraph 1 of Article 5, and Paragraph 1 of Article 16 of the Enforcement Regulations regarding Selection and Training of Reserve Ranking Officers and Reserve Noncommissioned Officers for Military Services (as amended on April 27, 2009) (預備軍官預備士官選訓服役實施辦法第三條、第五條第一項、第十六條第一項(九十八年四月二十七日修正公布)) ; Article 8-3, Subparagraph 3 of the Military Academy Attendance Rules (軍事學校學員生修業規則第八條之三第三款).

**KEYWORDS:**

Right to hold public office (服公職權), principle of legal reservation (法律保留原則), principle of proportionality (比例原則), reserve military officers (預備軍官), reserve noncommissioned officers (預備士官), military (軍職), examination (考選), record of conviction (刑之宣告), negative qualifications (消極資格), military service (兵役), military education (軍事教育), discretion (裁量), public interest (公共利益), intention (故意), negligence (過失), minor offense (情節輕微).\*\*

**HOLDING:** Point 1.2(2) of the “2010 Examination and Admission Guidelines for the Volunteer Reserve Military Officer and Reserve Noncommissioned Officer Examination” regulating

**解釋文:** 中華民國九十九年國軍志願役專業預備軍官預備士官班考選簡章壹、二、(二)規定:「曾受刑之宣告……者,不得報考。……」與憲法第二十三條法律保留原則無違。惟其對

that “Those who have a record of conviction ... cannot register for the examination” complies with the principle of legal reservation provided by Article 23 of the Constitution. However, if restrictions on examination qualifications are applied beyond the extent necessary, it violates the principle of proportionality, as set out in Article 23 of the Constitution, and people’s right to hold public office under Article 18 of the Constitution. Recruitment and admission guidelines for similar examinations held by relevant government agencies in the future should thus follow the intent provided in this Interpretation.

**REASONING:** According to Article 5, Paragraph 1, Sub-paragraph 2 of the Constitutional Interpretation Procedure Act, if rights guaranteed to the people by the Constitution have been violated and legal proceedings initiated, and there are doubts whether the laws or ordinances applied in the final judgment conflict with the constitution, constitutional interpretation may be sought. National Planning Ordinance No. 098003746 of December 14, 2009 issued by the Department of

應考試資格所為之限制，逾越必要程度，抵觸憲法第二十三條比例原則，與憲法第十八條保障人民服公職之權利意旨不符。相關機關就嗣後同類考試應依本解釋意旨妥為訂定招生簡章。

**解釋理由書：**按人民於其憲法上所保障之權利，遭受不法侵害，經依法定程序提起訴訟，對於確定終局裁判所適用之法律或命令發生有牴觸憲法之疑義者，得聲請解釋憲法，司法院大法官審理案件法第五條第一項第二款定有明文。國防部九十八年十二月十四日國力規劃字第0九八00三七四六號令頒「九十九年國軍志願役專業預備軍官預備士官班考選簡章」（下稱系爭簡章）係就有關九十九年國軍志願役專業預備軍官預備士官班之招生考選（下稱系爭

National Defense authorizes the “2010 Examination and Admission Guidelines for the Volunteer Reserve Military Officer and Reserve Noncommissioned Officer Examination” (hereinafter referred to as the “Disputed Guidelines”), which set forth matters related to the 2010 class recruitment examination for volunteer reserve military officers and reserve non-commissioned officers (hereinafter referred to as the “Disputed Examination”). It is a general regulation announced to the public and thus shall be considered an ordinance as referred to above. Therefore the court may review these Disputed Guidelines to confirm its conformity with constitutional law.

Article 18 of the Constitution protects people’s right to hold public office and the right to engage in public service works. Volunteer reserve military officers and volunteer reserve noncommissioned officers are cadres at the basic level in the military and shall be considered public service officers under Article 18 of the Constitution, since they are selected and trained pursuant to statutory procedures

考選) 事項所訂定，並對外發布之一般性法規範，屬前開規定所稱之命令，得為本院違憲審查之客體，合先敘明。

憲法第十八條規定人民有服公職之權利，旨在保障人民有依法令從事於公務之權利。志願役預備軍官及預備士官為軍中基層幹部，係依法定程序選訓、任官，並依國防法等相關法令執行訓練、作戰、後勤、協助災害防救等勤務，自屬憲法第十八條所稱之公職。人民依法令所定方式及程序選擇擔任預備軍官或預備士官以服公職之權利，自應予以保障。九十八年四月二十七日修正

and perform duties such as training, military operations, logistical service, and disaster prevention assistance in accordance with the National Defense Act and other relevant regulations. Therefore, a person's right to choose to become either a reserve military officer or a reserve noncommissioned officer pursuant to the methods and procedures stipulated by law should be protected. Article 16, Paragraph 1 of the Enforcement Regulations regarding Selection and Training of Reserve Ranking Officers and Reserve Noncommissioned Officers for Military Services (hereinafter referred to as "Selection and Training Enforcement Regulations") as amended and announced on April 27, 2009 provides that reserve military officers or reserve noncommissioned officers who pass the basic education will, unless otherwise stipulated, be promoted to either Second Lieutenant or Corporal with their active duty commencing on the date of appointment. Any university or college graduate wishing to enter military service as reserve military or reserve noncommissioned officer shall be admitted by the Disputed Examination and be required

發布之預備軍官預備士官選訓服役實施辦法（下稱選訓服役辦法）第十六條第一項規定，受預備軍官或預備士官基礎教育期滿成績合格者，除該辦法另有規定外，分別以少尉或下士任官分發，並自任官之日起服現役。故大學或專科以上畢業者，如志願以預備軍官或預備士官官階服軍旅，須經系爭考選錄取及完成基礎教育。系爭簡章壹、二、（二）規定：「曾受刑之宣告……者，不得報考。……」（下稱系爭規定）雖非直接禁止受刑之宣告者擔任預備軍官或預備士官之公職，然參加國軍志願役專業預備軍官預備士官班之考選，為大學或專科畢業者擔任前述軍事公職之必要條件；且入學考選錄取者，於受基礎教育期滿成績合格時，即分別以少尉或下士任官分發，而無另外任官考試之程序。系爭規定所為消極資格之限制，使曾受刑之宣告者不得參加系爭考選，因而造成其無法選擇服志願役預備軍官預備士官之公職之結果，自屬對人民服公職權利之限制。

to complete the basic education. Point 1.2(2) of the Disputed Guidelines states: “Those who have a record of conviction ...cannot take the examination” (hereinafter referred to as “Disputed Provision”). Although the Disputed Provision does not directly prohibit those with a record of conviction from becoming a reserve military officer or reserve noncommissioned officer, participation in the Volunteer Reserve Military Officer and Reserve Noncommissioned Officer Examination is a necessary requirement for university or college graduates to serve in the aforementioned military rank. Furthermore, those admitted by said Examination and having passed the basic education are promoted to either Second Lieutenant or Corporal without any further examination procedures. Hence the Disputed Provision is a negative qualification that does not allow those with a record of conviction to take the Disputed Examination. As a result, those with a record of conviction do not have the choice to become either volunteer reserve military or reserve non-commissioned officers, thus restricting people’s right to serve in public office.

Article 11, Paragraph 1 of the Con-scription Act provides: “The Enforcement Regulations regarding Selection and Training of Reserve Ranking Officers and Reserve Noncommissioned Officers for Military Services stated in the above two articles are issued by the Ministry of National Defense together with the related agencies.” Article 5 of the Act of Military Education states: “The basic education has the objective to cultivate the military officers and noncommissioned officers and is being handled by the military academy, the classification and objectives of the basic education are as follows: ... 4. Military habitual education: targeting those with college degrees, vocational degrees or high school degrees, to pursue a military habitual education as its objective; can set up a Standing Ranking Officers class, Standing Junior Officers Class, Reserve Ranking Officers class, Reserve Junior Officers Class or its equivalent classes can be established (Paragraph 1) ... The regulations of ... enrollment qualification ... as stated in Paragraph 1, Subparagraph 4 are determined by the

兵役法第十一條第一項規定：「前二條預備軍官、預備士官選訓服役實施辦法，由國防部會同相關機關定之。」軍事教育條例第五條規定：「基礎教育以培養國軍軍官及士官為目的，由軍事學校辦理，其類別及宗旨如下：……四、軍事養成教育：以對具有大學、專科或中等教育學歷者，施予軍事養成教育為宗旨；得設常備軍官班、常備士官班、預備軍官班、預備士官班或同等班隊（第一項）。……第一項第四款……入學資格……等事項之規則，由國防部定之（第三項）。」而選訓服役辦法第三條規定：「預備軍官或預備士官年度考選之對象、方式、員額、專長職類、資格、報名方式及其他相關事宜，由國防部訂定考選計畫實施，或委任國防部陸軍司令部、國防部海軍司令部、國防部空軍司令部、國防部聯合後勤司令部、國防部後備司令部、國防部憲兵司令部……，擬訂考選計畫陳報國防部核定後實施。」同辦法第五條第一項規定：「預備軍官或預備士官之考選，由國防部、內政部、教育部等相關機關依考選計畫組成考選委員會，訂定考選簡章辦理。但志願役預備軍官、志願役預備士官或義務役預備士官之考選，得由

Ministry of National Defense (Paragraph 3).” Article 3 of the Selection and Training Enforcement stipulates: “The target applicants, methods, quota, subject matter, eligibility, method of registration and other related matters for the annual selection of reserve military officers or noncommissioned officers shall be implemented by the Selection Plan of the Ministry of National Defense, or the Land Command Headquarters of the Ministry of National Defense, Navy Command Headquarters of the Ministry of National Defense, Air Force Command Headquarters of the Ministry of National Defense, the Combined Logistics Command of the Ministry of National Defense, the Reserve Command of the Ministry of National Defense, or the Military Police Command of the Ministry of National Defense shall be appointed to devise the Selection Plan and report such Plan to the Ministry of National Defense and implemented upon approval.” Article 5, Paragraph 1 of the same Enforcement Regulations also mandates: “For the selection of reserve military officers or reserve noncommissioned officer, the Ministry of National Defense,

委任機關依國防部核定之考選計畫組成考選委員會，訂定考選簡章辦理。」故志願役預備軍官預備士官之選訓服役及入學資格等事項之規範，係由立法者基於國防事務之特殊性及專業性，授權國防部訂定；國防部復於依立法授權訂定之選訓服役辦法，明定志願役預備軍官預備士官之考選，得委任機關訂定計畫並經其核定後實施，再依該計畫實際組成考選委員會訂定考選簡章，據以辦理考選。是系爭考選之重要事項如考選對象、方式、員額、專長職類、資格、報名方式等，均係由國防部自行訂定或依其核定之考選計畫形成規範，以為實施之依據。系爭簡章形式上最終雖係由考選委員會依考選計畫所訂定，惟系爭考選之事項仍屬由國防部決定至明。參以軍事教育條例第五條第三項及該條例其他相關規定所訂定之軍事學校學員生修業規則第八條之三第三款亦規定：「學員生入學，應具備下列條件：……三、未曾受刑之宣告……者。但符合少年事件處理法第八十三條之一第一項規定者不在此限。」其雖非直接規定應考資格，然入學資格與考試資格，有直接密切關聯，其入學規定之限制與系爭規定類似。足見系爭規定並未逾越兵役法第十一條第一項及軍事教育條例第五條第

642 J. Y. Interpretation No.715

the Ministry of Interior, the Ministry of Education and other relevant agencies shall set up a selection committee pursuant to the Selection Plan to formulate and administer the general guidelines governing the examination. However, for volunteer reserve military officers, volunteer reserve noncommissioned officers or mandatory reserve noncommissioned officers, the appointed agency may form a selection committee to issue the examination guidelines in accordance with the Selection Plan approved by the Ministry of National Defense.” Hence, due to the special and professional nature of defense affairs, the legislators have authorized the Ministry of National Defense to prescribe regulations regarding matters such as the selection and training for military services and admission qualifications. The Selection and Training Enforcement Regulations prescribed by the Ministry of National Defense in accordance with legal authorization expressly stipulates that for the selection of volunteer reserve military officers and reserve noncommissioned officers, an agency may be appointed to formulate the plan and implement such

三項規定之直接或間接授權範圍，與憲法第二十三條法律保留原則無違。

plan upon approval, pursuant to which a selection committee will be formed to formulate the guidelines for the selection and administration of examinations. As such, important matters related to the selection such as target applicants, methods, quota, subject matter, eligibility, and method of registration are prescribed unilaterally by the Ministry of National Defense or formulated in accordance with the approved Selection Plan to serve as basis for implementation. Although the Disputed Guidelines are formally issued by the Selection Committee pursuant to the Selection Plan, the Ministry of National Defense still has the authority to decide the content of the Disputed Examination. With reference to Article 8-3, Subparagraph 3 of the Military Academy Attendance Rules prescribed in accordance with Article 5, Paragraph 3 of the Act of Military Education and other relevant provisions, which states: "Student enrollment should meet the following qualifications ... 3. Applicants should not have a record of conviction, but those falling under Article 83-1, Paragraph 1 of the Juvenile Proceeding Act are not restricted." Although this

644 J. Y. Interpretation No.715

does not directly concern eligibility to participate in examinations, admission eligibility and examination eligibility are very closely related and restrictions of class enrollment rules are similar to the Disputed Provision. This is sufficient to show that the Disputed Regulation does not go beyond the direct or indirect scope of authorization granted under Article 11, Paragraph 1 of the Conscription Act, and Article 5, Paragraph 3 of the Act of Military Education and is consistent with the principle of legal reservation provided by Article 23 of the Constitution.

When state organizations hold examinations to select public employees, in order to differentiate and select the appropriate persons, restrictions on applicant qualifications are not prohibited. This is within the competent authority's discretion and should be respected. Nevertheless, such restrictions should still comply with the principle of proportionality provided by Article 23 of the Constitution.

Volunteer reserve military officers and reserve noncommissioned officers

國家機關因選用公職人員而舉辦考選，為達鑑別並選取適當人才之目的，固非不得針對其需要而限制應考資格，此係主管機關裁量範圍，本應予尊重，然其限制仍應符合憲法第二十三條比例原則。

國軍志願役預備軍官預備士官可合法持有國防武器、裝備，必要時並能

can legally possess arms, equipment, and use military force when necessary. Military students are the future national army members or cadres, their personal integrity and ability will have significant impact on the strength of the military. To ensure the quality of military students and cadres as well as the supervision of the military command, the Disputed Provision stipulates that a record of conviction restricts an applicant's qualification to take an exam, so as to prevent lack of integrity or ability among the candidates that may endanger national or military security. This constitutes an important public interest, a legitimate aim, and the method will help achieve the stated purpose.

If a record of conviction arises from intentional criminal offense, it shows a clear lack of integrity. If the criminal offense is committed due to negligence, it means that there is lack of attentiveness. Permitting these people to become cadres at the basic level in the military may be detrimental to the standard of the troop's quality as a whole and the improvement of the overall capability of the troops and

用武力執行軍事任務；而軍校學生日後均為國軍成員或幹部，其個人品德、能力之優劣與國軍戰力之良窳關係至鉅。為確保軍事學校學生及國軍幹部之素質，維持軍隊指揮監督，系爭規定乃以是否曾受刑之宣告，作為有無應考資格之限制，以預防報考之考生品德、能力不足等情事，肇生危害國家或軍事安全之虞，所欲維護者，確屬重要之公共利益，其目的洵屬正當，且所採手段亦有助於前揭目的之達成。

行為人觸犯刑事法律而受刑之宣告，如係出於故意犯罪，顯示其欠缺恪遵法紀之品德；如屬過失犯，則係欠缺相當之注意能力，倘許其擔任國軍基層幹部，或將不利於部隊整體素質及整體職能之提升，或有危害國防安全之虞。系爭規定限制其報考，固屬必要。然過失犯因疏忽而觸法，本無如同故意犯罪之惡性可言，苟係偶然一次，且其過失情節輕微者，難認其必然欠缺應具備之

hence might jeopardize national security. Therefore, the restrictions placed by the Disputed Provision are necessary. However, if an offender committed the crime due to negligence with no malignance of an intentional offense and such act is only an occasional occurrence with slight consequences of minor offense, then it is difficult to say that the offender necessarily lacks integrity and capability and has an impact on military strength. The Disputed Provision deprives such persons the opportunity to hold military posts via the Disputed Examination and does not constitute the mildest way to achieve the stated purpose. It exceeds the necessary extent in contravention of the principle of proportionality under Article 23 of the Constitution and violates people's right to hold public office granted by Article 18 of the Constitution. Relevant agencies should subsequently formulate their recruitment and admission guidelines in accordance with this Interpretation.

Justice Shin-Min Chen filed concurring opinion.

Justice Chang-Fa Lo filed concur-

服役品德、能力而影響國軍戰力。系爭規定剝奪其透過系爭考選以擔任軍職之機會，非屬達成目的之最小侵害手段，逾越必要程度，牴觸憲法第二十三條比例原則，與憲法第十八條保障人民服公職之權利意旨不符。相關機關就嗣後同類考試應依本解釋意旨妥為訂定招生簡章。

本號解釋陳大法官新民提出協同意見書；羅大法官昌發提出協同意見書；蘇大法官永欽提出一部協同一部不同意

ring opinion.

Justice Yeong-Chin Su filed concurring opinion in part and dissenting opinion in part.

Justice Dennis Te-Chung Tang filed concurring opinion in part and dissenting opinion in part.

Justice Chen-Shan Li filed dissenting opinion in part.

Justice Mao-Zong Huang filed dissenting opinion in part.

Justice Pai-Hsiu Yeh filed dissenting opinion in part .

#### **EDITOR'S NOTE:**

Summary of facts: As stipulated in Point 1.2(2) of the "2010 Examination and Admission Guidelines for the Volunteer Reserve Military Officer and Reserve Noncommissioned Officer Examination" based on National Planning Ordinance No. 098003746 of December 14, 2009 issued by the Ministry of National Defense, persons with a record of conviction cannot register for the examination.

The petitioner, A, registered for the second session of the "2010 Volunteer

見書；湯大法官德宗提出部分協同暨部分不同意見書；李大法官震山提出部分不同意見書；黃大法官茂榮提出部分不同意見書；葉大法官百修提出部分不同意見書。

#### **編者註：**

事實摘要：國防部中華民國 98 年 12 月 14 日國力規劃字第 098003746 號令頒「99 年國軍志願役專業預備軍官預備士官班考選簡章」壹、二、(二)規定，曾受刑之宣告者，不得報考。

聲請人 A 報名參加 99 年國軍志願役專業預備軍官預備士官第二梯次考

648 J. Y. Interpretation No.715

Reserve Military Officer and Reserve Noncommissioned Officer Examination”, but did not pass the qualification review conducted by the Selection Committee of the Ministry of National Defense. Since the petitioner committed a crime of negligently causing injury in 2005, the Taiwan Taoyuan District Court sentenced him to 50 days of Detention. In accordance with above provision, the Selection Committee decided that he was not admitted to the exam due to disqualifying safety inquiries. The applicant was formally before the examination. The petitioner appealed the decision, but in the course of administrative litigation the case was finally dismissed. Claiming that the decision was based on the above provision, petitioner applied for constitutional interpretation.

選，其報名資格經國防部所屬志願役專業預備軍官預備士官考選委員會審查。因聲請人曾於94年犯過失傷害罪，經臺灣桃園地方法院刑事判決判處拘役50日定讞，考選委員會乃依上開規定，以其安全調查不合格為由，作成報名不合格之審查結果，於考試期日前發函通知聲請人。聲請人不服審查結果，主張該處分違法，提起行政爭訟迭遭駁回而確定，爰認確定終局判決所適用之前揭規定有違憲疑義，聲請解釋。