

rules in order to allow the use of certified mail or registered mail in certain cases where registered mail was heretofore required by the Supreme Court Rules, and in at least one case maintained the necessity of registered mail only. The Court has adopted amendments to the Supreme Court Rules, which will become effective Septemeber 7, 1955, allowing certified mail to be used in most cases in which registered mail has heretofore been required by the Rules. The Supreme Court also adopted an order on June 27, 1955, that "pending the effective date of the amendments to the Rules promulgated to be effective September 7, 1955, certified mail will be permitted wherever registered mail is prescribed by the Rules, except that certified mail shall not be permitted under Rule 4:96-4(c)." Rule 4:96-4(c) pertains to service of a copy of the complaint upon the defendant in an action for divorce or nullity when the defendant cannot be served personally within the state.

The legislature may, of course, in its discretion, enact general legislation providing that, with regard to any statute requiring the use of registered mail, certified mail may be used on or after a prescribed date. Until such time as such legislation is enacted, however, the use of certified mail cannot be regarded as compliance with a statute which provides for the use of registered mail.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.

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AUGUST 15, 1955.

MR. STEVEN E. SCHANES,
Bureau of Public Employees' Pensions,
State House Annex.
Trenton, New Jersey.

FORMAL OPINION—1955. No. 32.

DEAR MR. SCHANES:

On March 30, 1955, we rendered an opinion advising you that personnel of the State Militia or New Jersey National Guard, who serve in the Department of Defense in a permanent capacity, are not entitled to prior service credit in the Public Employees' Retirement System for time spent in the active military service of the United States in time of war, if such service in time of war was at a time prior to their becoming permanent personnel as above set forth.

You now ask if such personnel would be entitled to prior service credit for time spent in the active military service of the United States in time of war, subsequent to their becoming state employees as members of the State Militia or New Jersey National Guard who served in the Department of Defense in a permanent capacity.

R. S. 38:12-8 provides as follows:

"Officers and enlisted men serving the State in a permanent duty status shall be eligible for the disability and retirement privileges and benefits available to all other employees of the State . . ."

R. S. 38:1-8, which is part of Chapter 95 of the Public Laws of 1939 dealing with the organization of the New Jersey National Guard, constitutes officers and enlisted men who serve in a permanent duty status as state employees for retirement purposes. They should, therefore, be accorded the same rights to prior

service credit for time spent in the active military service of the United States as is granted to all other state employees for military service after becoming permanent employees. It should be pointed out, however, that R. S. 38:12-8 does not constitute as state employees for purposes of disability and retirement privileges and benefits those members of the New Jersey National Guard or State Militia who are not in a permanent duty status.

The rights of state employees generally to prior service credit for time spent in military service are based upon three statutes, N. J. S. A. 38:23-4, N. J. S. A. 38:23-5, and N. J. S. A. 43:15A-10. The most recent of these statutes, N. J. S. A. 43:15A-10, which was enacted in 1954 as part of the Public Employees' Retirement Act, provides as follows:

"Any state employee who had entered or shall hereafter enter into the active air, military, or naval service of the United States before making application for enrollment in the retirement system shall be accepted as a member upon his filing application, provided such application is made within three months after entry into such active air, military, or naval service, and his regular salary deductions as determined by the board of trustees shall be paid to the retirement system by the employing department as provided by chapter 252 of the laws of 1942 as amended by chapter 326 of the laws of 1942 . . ."

This section deals specifically with state employees who are not or were not members of the Public Employees' Retirement System at the time of their entry into armed service, and makes provision for such membership after entry into the armed forces. It refers to state employees who enter the active air, military, or naval service of the United States, making no requirement that such entry be during the time of war. It has effect only after the effective date of January 1, 1955.

Although the Public Employees' Retirement Act does not specifically provide for free credit in the Public Employees' Retirement System for state employees who are already members of that system, and who enter the armed service, such a grant of credit may be found in Chapter 252 of the Public Laws of 1942, as amended by Chapter 326 of the Public Laws of 1942 (N. J. S. A. 38:23-5), which is referred to in N. J. S. A. 43:15A-10, and which provides as follows:

"No person holding any office, position or employment under the government of the State of New Jersey, or of any county, municipality, school district, or other political subdivision of the State, or under any board, body, agency or commission of the State or of any county, municipality or school district who, heretofore and subsequent to July first, one thousand nine hundred and forty, entered or hereafter, in time of war, shall enter, or heretofore or hereafter in time of emergency entered or shall enter, the active military or naval service of the United States or the active service of the Women's Army Auxiliary Corps, the Women's Reserve of the Naval Reserve or any similar organization authorized by the United States to serve with the Army or Navy and who, at the time of such entry was or is a member in good standing of any pension, retirement, or annuity fund, shall suffer the loss or impairment of any of the rights, benefits or privileges accorded by the laws governing such pension, retirement or annuity funds; and the time spent in such service by any such person shall be considered as time spent in the office, position or employment held by him at the time of his entry into such service, in all calculations of the amount of pension to which he is entitled and of the years of service required to entitle him to retire. . . ."

The case of state employees who were not members of a retirement system prior to the adoption of the Public Employees' Retirement Act, and who entered into the armed services of the United States in time of war, is covered by N. J. S. A. 38:23-4, which provides as follows:

"Every person holding office, position or employment, other than for a fixed term or period, under the government of this State or of any county, municipality, school district or other political subdivision of this State, or of any board, body, agency or commission of this State or any county, municipality or school district thereof, who after July first, one thousand nine hundred and forty, has entered, or hereafter shall enter, the active military or naval service of the United States or of this State, in time of war or an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service, or who, after July first, one thousand nine hundred and forty, has entered or hereafter, in time of war, shall enter the active service of the United States Merchant Marine, or the active service of the Women's Army Auxiliary Corps, the Women's Reserve of the Naval Reserve or any similar organization authorized by the United States to serve with the Army or Navy, shall be granted leave of absence for the period of such service and for a further period of three months after receiving his discharge from such service . . . *During the period of such leave of absence such person shall be entitled to all the rights, privileges and benefits that he would have had or acquired if he had actually served in such office, position or employment during such period of leave of absence except, unless otherwise provided by law, the right to compensation. . .*" (Underscoring supplied).

In view of the foregoing, it is apparent that the service credits of state employees who have entered the military service of the United States in time of war have been protected, at least since the outbreak of World War II. Therefore, they are entitled to receive such prior service credit from the Public Employees' Retirement System if they are presently members of that system.

You have also asked whether, by reason of R. S. 38:14-9, a person who is presently an officer in the New Jersey National Guard, serving in a permanent duty status, but who was merely in active status in the New Jersey National Guard, and in permanent duty status, at the time he entered into the military service of the United States in time of war, is entitled to prior service credit in the Public Employees' Retirement System for such period of time in the United States military service. Investigation reveals that a member of the New Jersey National Guard who is in active status must present himself for a certain number of drills, and a required period of field training each year. He is to be distinguished, however, from a New Jersey National Guard member in permanent duty status, who is a full time state employee under the jurisdiction of the Department of Defense.

R. S. 38:14-9, which was originally enacted as Chapter 49, Article XVII, Section 9 of Public Laws of 1937, entitled "An Act concerning the militia of the State," provides as follows:

"For all purposes, officers and enlisted men who entered the active service of the United States in time of war by appointment or enlistment, or under call, order or draft by the president, or who shall hereafter enter such service under like conditions, shall be entitled to credit for the time served in the active service of the United States, as if such service had been rendered in the State."

The important feature of the above quoted section which must be noted for the purpose of your inquiry is that the service referred to therein by officers and enlisted men of the State Militia or National Guard who entered the active service of the United States in time of war is to be regarded as service rendered "in the state" for the period of such active service. The statute does not constitute such service as being service rendered "for the state," which would make such service properly creditable.

As a matter of fact, a reading of Chapter 49, Article XVII, of the Public Laws of 1937, of which R. S. 38:14-9 is a part, leads to the conclusion that the service therein referred to was designated as service rendered "in the state" so as to qualify the officers or enlisted men who rendered such service for eligibility to receive a faithful service medal provided by Chapter 49, Article XVII, Section 2 of the Public Laws of 1937, R. S. 38:26-1, which provides as follows:

"The governor may issue to officers and enlisted men who have served faithfully in the organized militia, after ten years of active service, an appropriate medal, and for each and every five years of subsequent faithful, active service, a suitable numeral therefor. Any person who shall consider that he is entitled to receive a faithful service medal or numeral, shall submit to the adjutant general an application therefor. If it shall appear to the adjutant general that the applicant is entitled to the medal or numeral, he shall direct the quartermaster general to issue such medal or numeral."

The conclusion that it was not the intention of Chapter 49, Article XVII, Section 9 of P. L. 1937 (R. S. 38:14-9) to constitute the service therein referred to as tantamount to state service is fortified by a consideration of Chapter 49, Article XVII, Section 7 (R. S. 38:14-7) which provides as follows:

"Any citizen of this state may accept and hold a commission in the militia of this state, the national guard of the United States or any reserve component of the United States army, navy or marine corps, without thereby vacating any civil office, position or commission held by him. The acceptance or holding of any such commission shall not constitute such holding of an office of trust and profit under the government of this state or of the United States as shall be incompatible with the holding of any civil office, position or commission under the government of this state."

In view of the foregoing, it is our opinion that a person who is presently a state employee by reason of his being an officer of the New Jersey National Guard in permanent duty status, but who was merely in active status of the New Jersey National Guard, not in permanent duty status, at the time he entered into the military service of the United States in time of war is not entitled to prior service credit in the Public Employees' Retirement System for such period of time in the United States military service.

Very truly yours,

GROVER C. RICHMAN, JR.,
Attorney General.

By: CHARLES S. JOELSON,
Deputy Attorney General.