

OCTOBER 23, 1958

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Commissioner, N. J. State Highway Department
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 Trenton, New Jersey

HONORABLE RAYMOND F. MALE
President, Civil Service Commission
 State House
 Trenton, New Jersey

FORMAL OPINION 1958—No. 15

GENTLEMEN:

We have been asked to review the status of certain State Highway Department employees who are on so-called "extended military leave of absence." The inquiry is directed towards the status of employees who entered the active military service of the United States during World War II and who have either not returned to State service, or who having once returned to State service upon being separated from active military duty, thereafter re-entered the armed services on such active duty.

The controlling statute in this matter is N.J.S.A. 38:23-4 which provides:

"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. If any such person shall be incapacitated by wound or sickness at the time of his discharge from such service, his leave of absence shall be extended until three months after his recovery from such wound or sickness, or until the expiration of two years from the date of his discharge from such service, whichever shall first occur.

"In no case shall such person be discharged or separated from his office, position or employment during such period of leave of absence because of his entry into 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. Such leave of absence may be granted

he would thereby be entitled to a State pension in addition to any federal pension for the rest of his life.

In *Salz v. State House Commission*, 18 N.J. 106 (1955) holding that a State employee who was still in the armed services was not entitled to receive a pension, the Supreme Court stated at p. 114 that:

“* * * We are in accord with the reasoning and result of the opinion delivered . . . for the Appellate Division [32 N.J. Super. 230 (App. Div. 1954)], and the direction that the judgment be without prejudice to a reconsideration of the applicant's rights 'either in the event an application is made upon his separation from active service in the Army or in the event of his disability or death. The issue of abandonment and forfeiture of office by continued absence from the State service may then be litigated and determined.'”

In our opinion, public employees entering active military service must be deemed to have lost the protection of the statute at such time as they have abandoned State service in favor of a military career. Abandonment is a question of fact to be determined by the agency concerned after an examination of the particular circumstances presented in each case. Generally, abandonment may be inferred from voluntary continuance or resumption of a military career beyond the termination date of any initial period of service, whether or not that original service was incurred voluntarily or by obligation.

See also consistent opinions addressed to Mr. John A. Wood, Secretary, State Employees' Retirement System, dated March 24, 1944; to Dr. William S. Carpenter, President, Civil Service Commission, dated December 17, 1948; Formal Opinion #26 of 1950 addressed to Dr. Charles R. Erdman, Jr., Commissioner, Department of Conservation & Economic Development, dated April 17, 1950; and Formal Opinion #24 of 1952 addressed to Dr. Lester H. Clee, President, Civil Service Commission, dated August 27, 1952. To the extent that Memorandum Opinion of May 25, 1955 addressed to George M. Borden, Secretary, Public Employees' Retirement System is inconsistent with the opinion herein, the former opinion is expressly overruled.

Very truly yours,

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