

FEBRUARY 24, 1958

MAJOR GENERAL JAMES F. CANTWELL
Chief of Staff
Department of Defense
Trenton, New Jersey

HON. AARON K. NEED
State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-11

GENTLEMEN:

You have asked for the opinion of the Attorney General as to the right of State employees to State pay during periods of active duty for training as members of the National Guard, naval militia or New Jersey State Guard. A six months' active duty for training program, which with subsequent part-time training discharges the guardsmen's draft obligation, is now authorized in accordance with the Reserve Forces Act of 1955, Ch. 655, 84th Congress, First Session.

We advise you that State employees on active duty for training as members of the National Guard under the aforementioned six months training program are not entitled to any salary or compensation from the State. Neither R.S. 38:12-4 nor R.S. 38:12-5, making payment of State salary or compensation to National Guard members mandatory under certain circumstances, is applicable. The payment of salary or compensation by the State except for services rendered or in accordance with a specific statutory authorization is without sanction in law.

R.S. 38:12-4 provides:

"All officers and employees of this State or of any county or of any municipality in the State or of any board or commission of the State or of any county or municipality who are members of the National Guard, naval militia or New Jersey State Guard shall be entitled to leave of absence from their respective duties without loss of pay or time on all days during which they shall be engaged in field training or other duty ordered by the Governor."

The six months' active duty for training is not field training. You inform us as a fact that the active duty for training fails to meet the definition of "field training" set down by the Supreme Court in *Lynch v. Borough of Edgewater*, 8 N.J. 279, 285 (1951), viz.; participation in unit training in field operations, not including attendance at service schools. Nor is the active duty for training "other duty ordered by the Governor" within R.S. 38:12-4. The letter orders to enlisted personnel in the National Guard to report for active duty for training for a period of six months are by order of the Secretary of the Army of the United States.

R.S. 38:12-5 is a measure guaranteeing State employee members of the National Guard, naval militia or New Jersey State Guard against a reduction in pay because

of active service in time of war or national emergency with the Army or Navy of the United States. That act provides:

"During the absence of any such officer or other employee, mentioned in section 38:12-4 of this Title, on active service with the Army or Navy of the United States or any other organization affiliated therewith, such person shall receive such portion of his salary or compensation as will equal the loss he may suffer while on such active service.

"Any officer, warrant officer or enlisted man in the State Department of Defense, who is a member of the National Guard and who heretofore has been or who shall hereafter be transferred to Federal service, by order of the chief of staff of said State Department of Defense, shall during any period of such transferred service retain all rights and privileges as were accorded to officers, warrant officers and enlisted men in the State Department of Defense transferred to Federal service during World War II, including pay differential and any pension or retirement rights and privileges conferred by the laws of this State."

The limitation of the first paragraph of R.S. 38:12-5 to active service in time of war or national emergency is made plain by the second paragraph, enacted as Chapter 82 of the Laws of 1953, which guarantees the payment of the pay differential to Department of Defense employees during any period of transfer to active Federal status. The limitation is further exemplified by the discussion of R.S. 38:12-5 by the former Court of Errors and Appeals in *Adams v. Atlantic County*, 137 N.J.L. 648, 652 (E. & A. 1948):

"Generally, statutes of the character under consideration would be liberally construed in favor of the citizen who volunteers his services in time of war, but it is not the judicial function to add beneficiaries to those specified in the statutes."

We need not pass upon the technical legal question as to whether the Korean emergency is a continuing emergency because no termination or cut-off date has been proclaimed by the President of the United States or enacted by the Congress or State Legislature. The six months' active duty for training pursuant to the Reserve Forces Act of 1955 is not active service with the Army or Navy of the United States qualifying the trainee for benefits, as we previously advised State Treasurer Neeld in Formal Opinion 1958—No. 2 dated January 24, 1958.

Very truly yours,

HAROLD KOLOVSKY
Acting Attorney General

By: DAVID D. FURMAN
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