

of a person suffering from severe arthritis of the arms which may render that person disabled to a large extent from performing many physical functions but not in any way impairing that person's ability to walk. Such a person, though extremely disabled, would not be entitled to a special parking permit.

Thus, in our opinion it was not the intent of the Legislature to extend special parking privileges to persons suffering from minor disabilities. A minor disablement from walking is not sufficient to satisfy the statutory requirement that it be "difficult and burdensome" for the person to walk. In our opinion you should interpret this phrase in your administrative application of the Act so as to issue special vehicle identification cards to only those persons whose ability to walk is seriously impaired. Obviously, persons who are disabled from walking without suffering an amputation are entitled to a special parking permit, but only upon your finding that the disability from walking suffered by a person coming within the statutory definition of "amputee," such as paralysis or severe arthritis of a leg.

This opinion corresponds to the advice given you verbally in July of this year, following your request for an opinion.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: THEODORE I. BOTTER
Assistant Attorney General

December 7, 1961.

HONORABLE KATHARINE E. WHITE
Acting State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1961—No. 32

DEAR MRS. WHITE:

I. You have asked certain questions concerning the rights of members of the State retirement systems who receive differential pay when called into active military service with New Jersey National Guard units.

(1) If the pension deduction and the Social Security tax are to be taken on this differential pay it will sharply reduce the employee's Social Security benefit as well as the salary subject to retirement benefits. Can the Boards of Trustees permit the employee to contribute on the basis of his salary prior to entering the military for pensions and contributory insurance?

Our conclusion is that the Boards of Trustees should require the employee to contribute on the basis of his salary prior to entering the military for pension and contributory insurance.

N.J.S.A. 38:12-4 and N.J.S.A. 38:12-5 provide that when an employee of the State, county or municipality, who is also a member of the National Guard, is called into Federal service, he should be given leave without loss of pay or time. In order to

avoid loss of pay the individual is to receive such portion of his salary or compensation as will equal the loss he may suffer while in active military service.

N.J.S.A. 38:23-4 and N.J.S.A. 38:23-5 provide that such an individual shall retain all rights and privileges, including any pension or retirement rights conferred by the laws of the State.

N.J.S.A. 38:23-6 provides that during the period of active service:

"the State . . . shall contribute or cause to be contributed to such fund the amount required by the terms of the statute governing such fund based upon the amount of compensation received by such person prior to his entry into such service and during the period first mentioned in this section any such person receiving compensation from the State, county, municipality, school district, political subdivision, board, body, agency or commission, shall continue to contribute the amount required by statute to be paid by members of such fund . . ."

Under this section it is clear that the State must contribute its share to the pension or retirement funds based upon the compensation received by the employee prior to entering active duty. The problem is whether an employee who receives differential pay while serving on active military duty must contribute his statutory share to the pension fund. The precise statutory question is whether an employee receiving differential pay while on active duty is a person receiving "compensation" from the State within the meaning of N.J.S.A. 38:23-6. Differential pay is that portion of the salary paid by the State to an employee as will equal the loss of pay he may suffer while in active military service. This payment is made by the State in order to maintain the financial status quo of an employee while on active duty. Clearly, differential pay is to be considered "compensation" within the meaning of N.J.S.A. 38:23-6. Therefore, an employee who receives differential pay while serving on active military service is receiving "compensation" within the meaning of N.J.S.A. 38:23-6 and must contribute his statutory share to the pension fund.

In order to maintain the status quo of an employee with respect to his insurance and retirement benefits, the employee receiving differential pay shall continue to contribute his share for pension and contributory insurance on the basis of his salary prior to entering the military.

The next question to be considered is whether Social Security deductions are taken from differential pay and if so, how is this done.

The specific question is whether differential pay is "wages" within the meaning of 42 U.S.C.A. § 409. Under 20 C.F.R. § 404.1025, the term "wages" means all remuneration for employment unless specifically excepted under § 404.1027. Differential pay is not included within the exclusion section of the regulations.

In an Attorney General's Memorandum Opinion dated January 20, 1955, it was held that differential pay to public employees should be considered as wages subject to Social Security coverage.

The practice of the Social Security Division is to consider differential pay to public employees while on military service as "wages" for Social Security purposes. There are, however, two conditions that must be met. First, there must be no intention to terminate the employment relationship while the employee is on military duty. Second, the differential pay must be current compensation and not back pay. If either one of these conditions exists, the differential pay is not considered as wages and

Social Security payments are not deducted. In our situation there is no intention to end the employer-employee relationship and the differential pay is current compensation rather than back pay; therefore, differential pay is to be considered as wages within the Act and Social Security deductions must be made.

Social Security payments are deducted from differential pay based upon the amount of differential pay which the employee receives while on military service. In other words, Social Security payments based on differential pay are made by the State and the employee as if the employee were continuing in public service. Social Security payments are deducted from his military pay by the Federal Government based upon the amount of military pay which the employee is entitled to.

Social Security taxes, pension and insurance contributions are to be deducted from the differential pay. Where the differential pay minus the Social Security tax is not sufficient to cover the deductions for insurance and pension contributions, it shall be the responsibility of the employer to pay the additional pension contributions pursuant to N.J.S.A. 38:23-6, but payment of the contributory insurance presents a special problem and is discussed under the next question.

(2) While we assume that military leave is like any other leave so that the individuals would be covered for noncontributory insurance for the first 93 days of their leave, would they also be entitled to contribute for their additional insurance for the same period?

This question involves the applicability of N.J.S.A. 43:15A-108. This section provides that for purposes of both contributory and noncontributory insurance, an individual shall be considered in service for no more than 93 days while on leave of absence without pay. National Guard personnel who receive differential pay pursuant to N.J.S.A. 38:12-5 do not come within the purview of N.J.S.A. 43:15A-108, since they cannot be considered on leave of absence without pay.

Therefore, members on leave of absence with pay are covered with noncontributory insurance for the entire period they are in active service, and shall make contributory insurance payments during such period. This position is based upon the fact that there is no other statutory provision which denies the right to insurance coverage when an individual is on leave of absence with pay and consequently, we conclude that it is the intent of the statute to maintain such coverage. Furthermore, continuation of the insurance coverage is necessary in order to maintain the individual's status quo.

Where the differential pay has been exhausted by Social Security and pension deductions and is not sufficient to cover the contributory insurance payments, the employee is still deemed to be on leave of absence with pay and may continue his contributory insurance payments during the entire period he is serving on military duty. Under the present insurance contract, an individual who dies while on military duty is entitled to full death benefits.

(3) If they are indeed permitted to contribute for the first 93 days of their leave for the additional insurance that they have, would they also have the right to convert all of their insurance at the end of that period?

N.J.S.A. 43:15A-93 provides that the conversion privilege must be available whenever there is a termination of service for reasons other than death or retirement. A similar provision is contained in the insurance policies as required by law. Since it has been concluded that the employee going on active duty with the National Guard

is deemed to be on a leave of absence with pay, the 93-day limitation provided by N.J.S.A. 43:15A-108 does not apply. Therefore, an employee deemed on leave with pay is to be continued in the plan during his entire period of active service and the problem of conversion after 93 days does not arise.

II. You have asked certain questions concerning the rights of employees of the State Defense Department, who are also members of the National Guard, who request leave in order to attend a military service school.

In general, National Guard members attending a military service school are in no different status than other individuals in situations discussed under the preceding question. A person attending a military service school is entitled to all the rights and privileges pertaining to pension and retirement funds as if he had stayed in civilian service. N.J.S.A. 38:23-4 provides that any public employee is to be granted a leave of absence on entering active military service "*for or during any period of training,*" without any loss of rights, privileges and benefits except, unless otherwise provided by law, the right to compensation. It is clear that a person entering on active duty while attending a military service school comes within the purview of this section and should be granted full pension benefits. Of course, the right to recover loss of pay while on military service is provided in N.J.S.A. 38:12-4 and 38:12-5. Employees of the State Defense Department, who are also members of the National Guard who request leave in order to attend military service schools, are ordered to such duty by the Governor. Therefore, such employees come within the purview of N.J.S.A. 38:12-4.

The discussion of insurance coverage under question one is equally applicable to the instant situation. Since the individual is considered on leave of absence with pay, contributory insurance premiums and pension contributions should be deducted from the differential pay and the insurance would continue without interruption.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: STEVEN S. RADIN
Deputy Attorney General

December 7, 1961.

HONORABLE KATHARINE E. WHITE
Acting State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION 1961—No. 33

DEAR MRS. WHITE:

You have asked whether military pay used as a basis for determining differential pay within the meaning of R.S. 38:12-5 should include military allowances. Our conclusion is that military pay used as a basis for determining differential pay within the meaning of R.S. 38:12-5 should include military allowances.

R.S. 38:12-5 reads as follows:

"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