

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

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."

Thus, this statute provides that an employee on active duty shall receive such portion of his salary *as will equal the loss he may suffer* while on such duty. The general problem is the method of computing the loss the employee may suffer. The precise question is whether to subtract his total military remuneration (basic military salary and allowances) from his salary prior to his entrance upon the military, or to subtract from such salary merely his basic military pay without including allowances.

It is clear that the rationale of the statute is to permit the employee entering active duty to maintain his status quo with respect to his finances. An employee who receives differential pay while on active duty based solely upon his basic military salary may receive a gross sum (consisting of basic military salary, military allowances and differential pay) in excess of that which he received before entering the military. Certainly, the intention of the Legislature in enacting R.S. 38:12-5 was not to provide a possible windfall to the employee entering active military service. On the contrary, the purpose of R.S. 38:12-5 is to protect the employee from any financial deficit he may suffer while serving on active military duty. Therefore, in order to equalize the loss an employee may suffer, differential pay should be based upon total military remuneration rather than solely upon basic military salary.

A definition of military pay is contained in National Guard Regulation 51, promulgated by the Federal National Guard Bureau, which establishes the Army National Guard Technician Program. Paragraph 14 of this regulation provides that differential pay may be given to technicians attending a military school. Differential pay is stated to be the difference between technician pay and military pay. Military pay is defined as *base pay plus allowances* which includes longevity, subsistence, quarters, special and hazardous duty pay.

In conclusion, it is our opinion that differential pay made pursuant to R.S. 38:12-5 must be based upon basic military salary plus all military allowances.

Very truly yours,

DAVID D. FURMAN  
*Attorney General*

By: STEVEN S. RADIN  
*Deputy Attorney General*

December 12, 1961.

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

FORMAL OPINION 1961—No. 34

DEAR MRS. WHITE:

In the general election held in November 1960 the people of the State of New Jersey voted to adopt a constitutional amendment, as proposed by Senate Concurrent Resolution No. 12, filed June 8, 1960. This constitutional amendment provides: