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RESERVE OFFICER, UNITED STATES — EMPLOYED BY BUREAU OF UNEMPLOYMENT COMPENSATION OR ANY DEPARTMENT, DIVISION OR OFFICE OF STATE OR POLITICAL SUBDIVISIONS — NOT ENTITLED TO LEAVE OF ABSENCE WITH PAY FOR PERIODS OF TIME AS PROVIDED IN SECTION 5273-2 G.C. — AMENDED SENATE BILL 247, 94 G.A. — ACTIVE DUTY, SELECTIVE TRAINING AND SERVICE ACT OF 1940, AMENDED BY SERVICE EXTENSION ACT 1941 — 50 U.S.C.A. APPENDIX 303, AMENDED, PUBLIC LAW 213-77 CONGRESS.

SYLLABUS:

A reserve officer of the United States, employed by the Bureau of Unemployment Compensation, or any other department, division or office of the state, or its political subdivisions, who was or is ordered to active duty under the Selective Training and Service Act of 1940 (50 *USCA Appendix* §303), *as amended by the Service Extension Act of* 1941 *(Public Law* 213 — 77th *Congress), is not entitled to leave of absence from his duties as a state employe without loss of pay for the periods of time provided in Section* 5273-2, *General Code, as it formerly existed, or as amended by the* 94*th General Assembly* (*Am. S.B. No.* 247; *Effective* 4-28-1941).

Columbus, Ohio, September 30, 1941.

Honorable H. C. Atkinson,
Administrator, Bureau of Unemployment Compensation,
Columbus, Ohio.

Dear Sir:

I have your recent communication with which you transmit a letter from Mr. Don C. Power, Secretary to the Governor, suggesting that you obtain my opinion upon a question presented in a letter from Major B., Q.M.C., now stationed in the office of the Quartermaster, at Hill Field, Ogden, Utah. Major B.'s letter reads in part as follows:

" * * * I was Senior Investigator in the Dayton offices of

> the Ohio State Employment Service until March 14, 1941, at which time I departed under War Department orders for military duty at this station. On March 3, 1941, I wrote the Columbus office requesting that I be paid for two weeks active duty pay each year, regardless of whether the two weeks' training period occurred in Spring or Summer. As a matter of simple fact, I was paid for two weeks' active duty while on such duty, from March 29, 1940, to April 13, 1940.
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> * * * I want two weeks with pay."

It appears from the copy of a letter from your Bureau that Major B.'s request has thus far been denied for the reason that, as stated in such letter, under the regulations of your Bureau the fifteen days "military leave," provided for in Section 5273-2, General Code, as it existed prior to its amendment by the 94th General Assembly (Am. S.B. No. 247; Effective May 9, 1941), was "only for summer training."

Former Section 5273-2, supra, as it read on the date Major B. was ordered to report for active duty, provides as follows:

> "All officers and employees of the state or the political subdivisions thereof, who are members of the Ohio national guard, the naval militia or the officers reserve corps shall be entitled to leave of absence from their respective duties without loss of pay for such time as they are in military service *on training duty* for periods not to exceed fifteen days in any one calendar year." (Emphasis mine.)

This section was first enacted in 1931 in "An Act relative to the absence of State employees in military service" (114 v. 144; effective 7-29-31). As thus passed, this act read:

> "All officers and employees of the state, the several counties, cities and city school districts thereof, who are members of the Ohio national guard, naval militia, or officers reserve corps, shall be entitled to leave of absence from their respective duties, without loss of pay or time, for such time as they are in the military service *on training duty* under the orders of the governor of the state of Ohio as the commander in chief, in case of the national guard and the naval militia, or competent authority in case of the officers' reserve corps, for periods not to exceed 15 days in any one calendar year." (Emphasis mine.)

The act was amended by the 92nd General Assemly in 1937 (117 v. 146; Effective 7-14-37), in "An Act — Providing for the conformation of the military laws of this state to the national defense act, and for said

purpose amending "various sections of the General Code and enacting certain supplemental sections." As amended in 1937, the statute read as above quoted.

The section was again amended by the 94th General Assembly so as to include within its provisions members of the Ohio State Guard and the Ohio State Naval Militia, and to change the period of training duty from fifteen to thirty-one days.

You also have transmitted to me a copy of the administrative order adopted by your Bureau in conformity with what is denominated "Draft Regulations" furnished by the Federal government, your order reading as follows:

"Administrative Order No. B-46.

Statement of Policy Regarding Leave.

This order is a statement of policy and will be modified or disregarded in special or peculiar cases in the sole discretion of the authority by which it is promulgated. * * *

Section 2. Military Leave.

A permanent or probationary employee who is a member of the National Guard or of any of the Reserve Components of the United States Army or Navy shall be entitled to leave of absence from his duties without loss of pay or time, and without effect on his service rating, on days during which he shall be ordered to military duty or training, not to exceed in any one calendar year 15 calendar days in the case of members of the National Guard, or members of the Reserve Components of the Army and Navy, provided, however, that such military leave with pay shall not be granted to an employee for any period of active military service under the provisions of the Selective Training and Service Act of 1940 and the act authorizing the President to order into active duty the National Guard and the Reserve Components of the United States Army and Navy. An employee shall be required to submit an order or statement in writing from the appropriate military officer as evidence of such duty for which military leave with pay is granted."

While you do not so state, I shall assume that Major B. was ordered to "active military service under the provisions of the Selective Training and Service Act," pursuant to call and order of the President, as authorized in the Act of August 17, 1940, C. 689, 54 Stat. 858.

Section 1 of the above act reads:

"Sec. 1. During the period ending June 30, 1942, the President be, and is hereby, authorized from time to time to order into the active military service of the United States for a period of twelve consecutive months each, any or all members and units of any or all reserve components of the Army of the United States (except that any person in the National Guard of the United States under the age of 18 years so ordered into the active military service shall be immediately issued an honorable discharge from the National Guard of the United States), and retired personnel of the Regular Army, with or without their consent, to such extent and in such manner as he may deem necessary for the strengthening of the national defense: Provided, That the members and units of the reserve components of the Army of the United States ordered into active Federal Service under this authority shall not be employed beyond the limits of the Western Hemisphere except in the territories and possessions of the United States, including the Philippine Islands."

The words "existing general statutory authorizations" as used in Section 2 of the Act of August 27, 1940, supra, undoubtedly refer to the National Defense Act of 1916, as since amended.

In the National Defense Act, as codified in Title 10, Sections 361, 366, 367 and 369, Federal Code Annotated, the Congress has provided as follows:

Sec. 361:

"A reserve officer shall not be entitled to pay and allowances except when on active duty. When on active duty he shall receive pay and allowances as provided in section 366 of this title and section 7 of Title 37, and mileage from his home to his first station and from his last station to his home."

Sec. 366:

"Reserve officers and reserve warrant officers of the Army while on active duty, including duty for training purposes, shall receive the allowances prescribed for officers and warrant officers of the regular service under sections 9, 10 and 19 of Title 37."

Sec. 367:

"The mileage allowance to members of the Officers' Reserve Corps when called into active service *for training* for fifteen days or less shall not exceed 4 cents per mile." (Emphasis mine.)

Sec. 369:

"To the extent provided for from time to time by appropriations for this specific purpose, the President may order reserve officers to active duty at any time and for any period; but except in time of a national emergency expressly declared by Congress, no reserve officer shall be employed on active duty for more than fifteen days in any calendar year without his own consent."

In connection with the Act of August 27, 1940, your attention is further directed to the "Service Extension Act of 1941" (Public Law 213 — 77th Congress), approved August 18, 1941, and to Executive Order No. 8832 of the President, promulgated on August 21, 1941, carrying the provisions of the above law into effect. This act of the Congress reads in part:

"The Congress, acting in accordance with and solely for the purpose of carrying into effect the provisions of section 3(b) of the Selective Training and Service Act of 1940, *hereby declares that the national interest is imperiled.*

Sec. 2. The President is hereby authorized, subject, however, to the conditions hereinafter stated, to extend, for such periods of time as may be necessary in the interests of national defense, the periods of *service training and service, enlistment, appointment, or commission,* of any or all persons inducted for training and service under said Act, members and units of the *reserve components of* the Army of the United States (including the National Guard of the United States), retired personnel and enlisted men of the Regular Army, and any other members of the Army, who are now, or who may hereafter be, in or subject to active military service, or training and service. * * *

Sec. 3. Any person whose period of *active military service or training and service* is extended under section 2 and who was (a) ordered to active Federal service under Public Resolution Numbered 96, Seventy-sixth Congress, * * * (may) be granted insurance under such section without further medical examination if application therefor is filed within one hundred and twenty days after the date of enactment of this Act.

Sec. 4. The Secretary of War shall, when not in conflict with the interests of national defense, release from *active military service* those persons who apply therefor * * * . "

Sec. 8. * * *

(b) The provisions of this section shall be applicable only during the period of the unlimited emergency declared by the President on May 27, 1941.

> Sec. 9. During the existence of the authority conferred by section 2 of this joint resolution and for six months thereafter the limitation on the number of men who may be *in active training and service* at any one time under section 3 (b) of the Selective Training and Service Act of 1940 is hereby suspended: Provided, That the Secretary of War shall report to the Congress each month the number of men *in active training and service* in the land forces under section 3 (b) of said Act. * * * " (Emphasis mine.)

In the acts of the Congress above quoted, these terms and phrases are used: "duty for training purposes"; "active service for *training* for fifteen days or less"; "national emergency expressly declared by Congress"; "active duty for more than fifteen days in any calendar year without his own consent" (Sections 366, 367 and 369; Title 10, Federal Code Annotated): "periods of service"; "active military service"; "training and service"; "enlistment"; "appointment"; and "commission" (Public Law 213, supra). Clearly the Congress had in mind certain differences among these various words and phrases and used them advisedly. And this view is supported by paragraphs 53 and 54 of Army Regulation 140-5, which provide in part:

> "53. ACTIVE DUTY IN AN EMERGENCY. — a. *Active duty.* — In time of a national emergency expressly declared by Congress the Preident may order Reserve officers to active duty for indefinite periods without their consent. * * *
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> 54. ACTIVE DUTY IN TIME OF PEACE. — a. Reserve officers will be ordered to active duty for 14 days' *training* in each fiscal year in the numbers permitted by appropriations and at such places as training facilities are available. In order that undue hardship may not be worked on individual officers on account of conflict with business or personal affairs, corps area commanders and chiefs of arms and services will excuse officers from such active duty upon their written request." (Emphasis mine.)

That is to say, it seems patent that the legislative body that created the Officers Reserve Corps intended that there should be a clear distinction between "training duty" in time of peace and "active duty" in "time of a national emergency expressly declared by Congress."

Two other reasons more than indicate the correctness of the conclusions herein reached. First, both the National Defense Act and the other acts of Congress above quoted, as well as Section 5273-2, supra, from the

time it was originally passed, manifestly make provisions for active duty in the military service, for a limited period, for the purpose of receiving *military training,* that is, "practical education in some art, profession, or the like; instruction coupled with practice in the use of one's own power; *military drill;* the developing of physical strength and endurance," (New Century Dictionary), in time of peace, as distinguished from active military duty in times of national emergency or at a time when "the national interest is imperiled." This must be true, because the Federal acts above set forth provide for active duty in ordinary times for not more than fifteen days without a reserve officers consent, and at the same time authorize the President to order such officers to active duty at any time and for any period "in time of a national emergency expressly declared by Congress," excepting, of course, as Congress may see fit to enact limitations in this regard as it has done in the instant case. Manifestly, there is a decided difference between a reserve officer, who is an employe of the state or one of its political subdivisions, being absent from his public employment for a period of fifteen or thirty-one days in each calendar year in order to prepare himself to defend his country, with the expectation of resuming his civil duties at the end of his military training period, and such an officer who leaves his state employment for an indefinite period and may never return to the state service. And, second, as above pointed out, Section 5273-2, supra, was amended by the 94th General Assembly so as to include officers and men of the Ohio State Guard and Ohio State Naval Militia, who are strictly state troops and not subject to call by the Federal government, except as such members may be individually inducted into the Federal Service, under the Selective Training and Service Act of 1940, as it has been and may from time to time be amended by the Congress. Just as a reserve officer of the Army of the United States may not be ordered to duty by the Governor of Ohio, officers and men of the Ohio State Guard and Ohio State Naval Militia may not be ordered to duty by the President or any other Federal authority, except as above noted. In other words, state employees in the Ohio State Guard or Ohio State Militia may be on "training duty" for only such periods of time as the proper officers of the state of Ohio may prescribe.

I am informed that since the original passage of Section 7273-2, supra, only reserve officers ordered to active duty "for *training purposes,*" and members of National Guard of Ohio, ordered to "military service on *training duty,*" have been granted leaves of absence without loss of pay

for the period of time prescribed by the then existing statute. And I am constrained to reach the determination that (1) from the context of the statutes quoted and more especially the words and phrases employed therein; (2) from the history of Section 5273-2, supra, as above summarized; and (3) from the administrative practice with regard to such section, the officer about whom you inquire is not entitled to any pay from the state of Ohio from and after the date he left its employment to serve in the Army of the United States pursuant to the acts of the Congress above set forth.

Before concluding, I desire to point out that the officer concerned must have himself noticed the distinctions herein pointed out, because in his letter, above quoted in part, he states that he "departed under War Department orders for *military duty*" (not training duty) at the station to which he is now assigned. And I desire to add that I have not done other than to quote the Draft Regulations, supra, and the Administrative Order adopted by your Bureau for the obvious reason that I find nothing therein inconsistent with the law of the land as exemplified in the several acts of the Congress and the enactments of the Legislature of Ohio.

In view of the foregoing, and for the reasons given, it is my opinion that:

A reserve officer of the United States, employed by the Bureau of Unemployment Compensation, or any other department, division or office of the state, or its political subdivisions, who was or is ordered to active duty under the Selective Training and Service Act of 1940 (50 USCA Appendix §303), as amended by the Service Extension Act of 1941 (Public Law 213 — 77th Congress), is not entitled to leave of absence from his duties as a state employe without loss of pay for the periods of time provided in Section 5273-2, General Code, as it formerly existed, or as amended by the 94th General Assembly (Am. S.B. No. 247; Effective 4-28-1941).

Respectfully,

THOMAS J. HERBERT,

Attorney General.