

I am, therefore, returning herewith copy of said agreement, together with this, my formal approval as to form thereof.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

2710.

BURIAL OF A SOLDIER OR HIS MOTHER, WIFE OR WIDOW—SECTION 2950, GENERAL CODE, NOT APPLICABLE TO OHIO NATIONAL GUARD—UNLESS MEMBER IN SERVICE OF UNITED STATES IN EXERCISE OF FEDERAL AUTHORITY—ARTICLE I, SECTION 8, CLAUSE 15, FEDERAL CONSTITUTION.

SYLLABUS:

The provisions of Section 2950, General Code, relating to the burial of a soldier or his mother, wife or widow, are not applicable in the case of a member of the Ohio National Guard unless such member has served in the National Guard while it was in the service of the United States, pursuant to the exercise of federal authority contained in Article I, Section 8, Clause 15 of the Federal Constitution.

COLUMBUS, OHIO, July 15, 1938.

HONORABLE GEORGE E. GERHARDT, *Prosecuting Attorney, Pickaway County, Circleville, Ohio.*

DEAR SIR: You recently requested my opinion on the following question: Is the Board of County Commissioners authorized under the provisions of Section 2950, General Code, to defray the burial expenses of the mother, wife or widow of a resident of Ohio, who has served as a member of the Ohio National Guard, as this organization is now related to the federal government under the provisions of the National Defense Act?

Section 2950 of the General Code provides:

“The county commissioners of each county shall appoint two suitable persons in each township and ward in the county, other than those prescribed by law for the care of paupers and the custody of criminals, who shall, with the approval of the family or friends of the deceased, contract at

a fair and reasonable price, with the undertaker selected by said family or friends, and cause to be interred in a decent and respectable manner, the body of any honorably discharged soldier, sailor or marine having at any time served in the army or navy of the United States, or the mother, wife or widow of any such soldier, sailor or marine, or any army nurse who did service at any time in the army of the United States, who dies, not having the means to defray the necessary funeral expenses. Such burial may be made in any cemetery or burial ground within the state, other than those used exclusively for the burial of paupers and criminals.”

With regard to only those provisions which are relevant to the determination of the question presented, it is apparent that the benefits provided by this section are restricted to those soldiers, or the mothers, wives or widows of those soldiers who have served at any time “in the Army of the United States.”

Your question, accordingly, resolves itself into a determination of whether the Ohio National Guard, as it is now organized, is to be considered as a constituent part of the Army of the United States.

The National Defense Act describes the composition of the Army of the United States. According to Section I, Chapter 87 of this Act, as it was amended on June 15, 1933, 48 Statutes, 13, the composition of the Army of the United States is described in the following terms:

“The army of the United States shall consist of the regular army, *the national guard of the United States, the national guard while in the service of the United States*, the officers reserve corps, the organized reserves, and the enlisted reserve corps.”
(Italics, the writer’s.)

This definition obviously contemplates two types of national guard organizations. The first type referred to, namely, the National Guard of the United States, is defined by an amendment of June 19, 1935, Chapter 277, Section 2, 49 Statutes, 391, as follows:

“The National Guard of the United States is hereby established. It shall be a reserve component of the Army of the United States and shall consist of those federally recognized National Guard units, and organizations, and of the officers, warrant officers, and enlisted members of the National Guard of the several States, Territories, and the District of Columbia, who shall have been appointed, enlisted

and appointed, or enlisted, as the case may be, in the National Guard of the United States, as hereinafter provided, and of such other officers and warrant officers as may be appointed therein as provided in Section 81 of this title: *Provided, That the members of the National Guard of the United States shall not be in active service of the United States except when ordered thereto in accordance with law, and, in time of peace, they shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States, Territories, and the District of Columbia, as provided in this title: * * ** (Italics the writer's.)

At the outset this definition establishes the National Guard of the United States as a reserve component of the Army of the United States. This designation is later qualified by the provision which has been underscored, which refers to the status of such organizations "in time of peace." According to this qualification, Congress expressed its intention that the status of members of the National Guard of the United States is, in time of peace, similar to that of members of the National Guards of the several States. It, accordingly, becomes necessary to determine the status of the National Guard of Ohio as an organization within the category of the National Guard of one of the several States.

These latter organizations are defined in Section 5, Chapter 87 of the amended enactment of June 5, 1933, which is cited in 32 United States Code Annotated, 4b(a), as follows:

" 'National Guard' or 'National Guard of the several States, Territories, and the District of Columbia' means that portion of the Organized Militia of the several States, Territories, and the District of Columbia, active and inactive, federally recognized as provided in this Act and organized, armed, and equipped in whole or in part at Federal expense and officered and trained under paragraph 16, Section 8, Article I of the Constitution."

This definition recognizes members of the Ohio National Guard as serving under the same oath of allegiance as that taken by members of the regular army, and furthermore, that such members are paid for their services by funds received from the Federal Government. At first glance, these two factors appear to form a very close relationship between the federal government and those members of the Ohio National Guard who serve under an oath of allegiance to the United States, and are paid for their services by the federal govern-

ment. However, a closer scrutiny of this relationship reveals that despite the form of oath taken and the source of payment for services rendered, the Ohio National Guard is during peace time under the control of the Governor of Ohio. On the other hand, the President of the United States has no control over the Ohio National Guard unless and until Congress declares an emergency pursuant to the provisions of the Federal Constitution. By the same token, officers and members of the Ohio National Guard are not subject to discharge by Federal authority. Thus it becomes evident as one proceeds in the examination of this relationship, that the control of the Ohio National Guard remains during peace time in the hands of the officers of the State of Ohio.

A review of the Opinions of the Attorney General relating to this subject, discloses that the nearest approach to a discussion of the question before us is found in those opinions which deal with the classification of the persons who are entitled to benefits under those enactments which provide for soldiers' relief.

In the Opinions of the Attorney General for 1931, Volume 1, page 278, it was decided that soldiers were eligible for benefits under Section 2930 of the General Code, even though they had not served in the army upon active duty during a legal state of war. In arriving at this conclusion, it was assumed that the soldiers referred to in Section 2930, General Code, were those only who had served as members of the regular Army of the United States.

In Opinions of the Attorney General for 1932, Volume 2, Page 810, the theory which had been impliedly adopted in the preceding opinion was expressly accepted. In this opinion it was decided that members and former members of the Ohio National Guard who were not mustered into Federal service were not entitled to the benefits of relief to be allowed by a soldiers' relief commission under the provisions of Sections 2930 to 2941, General Code. The conclusion of this opinion was based upon a construction of Section 2949, General Code, which provides in part as follows:

"The word 'soldiers' shall mean an honorably discharged soldier, sailor or marine who served in the Army or Navy of the United States of America. * *"

The definition of the term "soldier" as it appears in Section 2949, General Code, is substantially the same as the definition of those who are eligible for benefits under the provisions of Section 2950, General Code. Therefore, the conclusion with regard to the status of the member of the Ohio National Guard which was reached in the 1932 Opinion stands as a precedent in determining the status of

a member of the Ohio National Guard for the purpose of indicating eligibility for benefits under the provisions of Section 2950, General Code.

As far as I am aware the Courts of Ohio have not had occasion to decide a question similar to the one which you present. However, there are available several decisions of the courts of other states relating to the status of the members of their respective National Guard organizations, all of which are similarly related to the federal government by the terms of the National Defense Act. In the case of *Bianco vs. Austin*, 197 New York Supplement, 328, the New York Supreme Court had before it the question of whether a proceeding relating to the procurement of a discharge by a member of the New York National Guard in time of peace, was subject to the jurisdiction of the state courts. It was held that such a proceeding was a matter to be governed solely by state law, and arriving at its decision the Court stated:

“* * * The National Guard is only a potential part of the United States Army and does not in fact become a part thereof until Congress has made the requisite declaration of the existence of an emergency.”

In the case of *Spence vs. State*, 288 New York Supplement, 1007, the New York Court maintained a consistent viewpoint. In this case a claim against the state was filed by a member of the National Guard for injury sustained during maneuvers. The defense interposed that the guardsmen were training pursuant to the National Defense Act, that they were recognized by the federal government as members of the National Guard, and that the expense of their training was borne by the federal government, therefore the guardsmen were employes of the federal government, rather than of the state. The court held that a defense based upon these factors was not available.

In the case of *State vs. Johnson*, 202 N. W., 191, the Supreme Court of Wisconsin held that a member of the State National Guard in peace time was entitled to benefits under the Wisconsin Workmen's Compensation Law, relating to state employes. In reaching this conclusion it was necessary for the court to decide that a member of the National Guard was an employe of the state rather than of the federal government. In discussing this aspect of the case, the court stated:

“It must be conceded that the national defense act wrought a material change with respect to the National Guard. This

change, however, while it effected a greater unification of the National Guard with the Federal Army, and created conditions which to a very large extent, strengthened the guards from the standpoint of efficiency when they might be called on by the Federal Government, did not in any respect weaken the guard as a State organization, nor did it wipe out or eliminate its character as a distinctive State organization. While it is known under the name of the National Guard, it still retains its essential features as a part of the militia. Nowhere in this act (referring to the National Defense Act) can be found a provision which, in times of peace, alters the control which the state has over the Guard." (Parenthesis the writer's.)

The Wisconsin case was followed by the Supreme Court of North Carolina in the case of *Baker vs. State*, 156 S. E., 917. Here also the court reached the conclusion that a member of the National Guard was covered by the State Workmen's Compensation Law, with respect to state employes, and that the National Guard does not become a part of the United States Army unless Congress declares an emergency.

Therefore, in accordance with the authority cited herein it is my opinion that in time of peace the Ohio National Guard is an organization of the State Militia, and its members are not, as such, a constituent part of the Army of the United States. The Ohio National Guard does not become a part of the Army of the United States until Congress declares an emergency, calling it into the service of the United States.

Consequently, the provisions of Section 2950, General Code, relating to the burial of a soldier or his mother, wife or widow, are not applicable in the case of a member of the Ohio National Guard unless such member has served in the National Guard while it was in the service of the United States, pursuant to the exercise of federal authority contained in Article I, Section 8, Clause 15 of the Federal Constitution.

Respectfully,

HERBERT S. DUFFY,
Attorney General.