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CIVIL SERVICE, CLASSIFIED—OFFICES AND POSITIONS OF EMPLOYES WHO ENTER ARMED SERVICES OF UNITED STATES—PROTECTED UNDER SECTION 486-16a G. C. UNTIL WAR AGAINST AXIS POWERS TERMINATED BY PRESIDENTIAL PROCLAMATION OR BY JOINT RESOLUTION OF CONGRESS.

SYLLABUS:

The offices and positions of employes in the classified civil service who enter the armed services of the United States are protected under Section 486-16a, General Code, until the war against the Axis Powers has been terminated by Presidential Proclamation or by joint resolution of Congress.

Columbus, Ohio, October 8, 1948

Hon. Carson Hoy, Prosecuting Attorney
Hamilton County, Cincinnati, Ohio

Dear Sir:

I am in receipt of your request for my opinion which contains the following inquiries:

> "1. Are the positions of employes in the classified civil service who are drafted pursuant to the Selective Service Act of 1948, still protected under Section 486-16a, General Code of Ohio?
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> "2. Are the positions of employes between the ages of 18 and 19 years, in the classified civil service, who voluntarily enlist for one year, pursuant to the Selective Service Act of 1948, still protected under Section 486-16a, General Code of Ohio?
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> "3. In cases not related to the Selective Service Act of 1948, are the positions of employes in the classified civil service, who voluntarily enlist in one of the various branches of the armed services for a regular enlisted period, still protected under Section 486-16a, General Code of Ohio?
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> "4. In cases where employes held positions in the classified civil service prior to entering upon active duty in World War II, who then served more than ninety days in the armed services, were honorably discharged or reverted to inactive status in a reserve component, were then reinstated to their positions in the classified civil service, pursuant to Section 486-16a, General Code of Ohio, and who now re-enlist or are recalled to active duty, are the positions of such employes still protected under Section 486-16a?"

Section 486-16a, General Code, originally became effective August 11, 1943, and read in part:

> "Any person who at the time he held or holds an office or position under the classified service and has held such office or position for a period of ninety days or more, enlisted or enlists in the armed services of the United States subsequent to December 8, 1941, was or is commissioned in said armed services or was or is called into said armed services in consequence of an act of Congress, the call of the president of the United States, or due to his status in the reserve forces, national guard, or other similar defense organization shall, within thirty days after making application therefor, be restored to the office or position held by

him immediately prior to his entering into the armed services of the United States, * * *"

"* * * The provisions of this act shall not apply to persons who enter the armed services after the termination of the present war with the Axis powers."

Thereafter, this act was amended on July 10, 1946. However, the last paragraph remained unchanged. The answer to all of your inquiries is dependent on the phrase "termination of the present war" contained in this last paragraph. If the General Assembly intended this phrase to mean "cessation of hostilities," then it is doubtful if Section 486-16a would apply to persons entering the armed services pursuant to the Selective Service Act of 1948. On the other hand, if it was thereby intended that this phrase in question should mean "termination by proclamation of the President of the United States" or "termination by joint resolution of Congress," then Section 486-16a would be applicable to any person now entering the armed service since neither of these official acts has taken place. In any event, indicative of the General Assembly's intent relative to this question is the date this section was last amended, plus the additional fact that the above quoted concluding paragraph was contained within this amendment. Actual fighting of World War II was suspended by the surrender of Japan on August 14, 1945, and formally suspended on September 2, 1945, designated as "V-J Day." Thereafter, the above amendment was enacted and it was stated therein that "this act shall not apply * * * after termination of the present war." It is therefore evident that the General Assembly did not consider the war to be terminated even though fighting had ceased.

The phrase "termination of the war" has caused considerable litigation. In United States v. Watkins, 67 F. Supp. 556 at 564, decided August 6, 1946, this problem was answered as follows:

"That the United States, despite cessation of hostilities, is still at war with Germany has been authoritatively settled. Citizens Protective League v. Clark, supra, 155 F. 2d at page 295; Kahn v. Anderson, 1921, 255 U. S. 1, 9, 41 S. Ct. 224, 65 L. Ed. 469; Matter of Yamashita, 1946 66 S. Ct. 340, 90 L. Ed. ——."

Probably the most conclusive decision on this matter is Samuels v. United Seaman's Service, Inc., 68 F. Supp. 461, decided October 12, 1946,

wherein it was held that there has been no formal proclamation of either the end of the war or the cessation of hostilities. It was further stated in this opinion:

> "On September 2, 1945, the President of the United States, as part of his official proclamation said: 'As President of the United States, I proclaim Sunday, September 2, 1945, to be V-J Day—the day of formal surrender by Japan. It is not yet the day for the formal proclamation of the end of the war or of the cessation of hostilities.'
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> "There has been no 'cessation of hostilities' or 'end' of the war or termination thereof, by proclamation of the President. Nor has there yet been a resolution of Congress.
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> "Under date of September 1, 1945, and before the Proclamation referred to, Hon. Tom Clark, Attorney General of the United States, rendered an opinion to the President concerning the then status of emergency legislation relating to the wartime powers of the Executive. The opinion is quoted in part:
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> "'First of all, it should be borne in mind that the war powers of the President and the Congress do not automatically cease upon the termination of actual fighting. As the Supreme Court said in Stewart v. Kahn, 11 Wall. 493, at p. 507, 20 L. Ed. 176: "(The war power) * * * is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." See also Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 40 S. Ct. 106, 64 L. Ed. 194.
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> "'The broad basis of governmental power on which the various emergency and wartime statutes rest cannot, therefore, be said to have been terminated by recent developments, including the unconditional surrender of our enemies. Questions do arise at the present stage, however, with regard to the time which the Congress has specified in individual statutes as being the termination date of the powers therein conferred. As will appear in the attached compilation, certain of the wartime statues are made effective only "in time of war," or "during the present war," or "for the duration of the war." Still other expressions may be found of similar character.
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> "'Speaking generally, I believe that statutes of the type just mentioned should be considered as effective until a formal state of peace has been restored, unless some earlier termination date is made effective by appropriate governmental action. In Hamilton v. Kentucky Distilleries Co., supra, Mr. Justice Brandeis, speaking for the Court, said: "In the absence of specific provisions to the contrary the period of war has been held to extend

to the ratification of the treaty of peace or the proclamation of peace." Again, in Commercial Cable Co. v. Burleson, 2 Cir., 255 F. 99, 104, Judge Learned Hand rejected the contention that certain wartime powers conferred on the President in the First World War had terminated with the Armistice of November 11, 1918, and added: "Even if I were to assume that the power were only coextensive with a state of war, a state of war still existed. It is the treaty which terminates the war." See also Kahn v. Anderson, 255 U. S. 1, 10, 41 S. Ct. 224, 65 L. Ed. 469; Ware v. Hylton, 3 Dall. 199, 236, 1 L. Ed. 568; 22 Op. A. G. 190 (1898). It is perhaps unnecessary to add that the Congress can at any time in response to changed conditions, repeal or amend any wartime statute or group of statutes.

"'I turn to another group of statutes: those which are to be terminated "upon the cessation of hostilities, as proclaimed by the President." Speaking once more in general terms, I believe that a provision of this type should be interpreted to refer to a formal proclamation, issued after you have determined that the facts warrant such action. Any less formal action on your part would not in my opinion be given by the courts the legal effect of terminating a wartime statute, in the absence of proof in the document itself that it was your intention so to do. See Hamilton v. Kentucky Distilleries Co., supra.'

"On September 6, 1945, the President of the United States, in his message to Congress reiterated — 'The time has not yet arrived, however, for the proclamation of the cessation of hostilities, much less the termination of the war. Needless to say, such proclamations will be made as soon as circumstances permit.'"

Dubisson v. Simmons, 26 S. 2d 438, 157 Fla. 493, concerned a statute of the state of Florida which declared in part that civil service employes who become sixty-five years of age shall be retired except retirement shall not be required "so long as the present state of war with the Axis owers or any of them, shall actively continue." In the interpretation of the above quoted portion of the civil service act, the court held that the President of the United States' Proclamation No. 2651, in which he stated that the allied armies have wrung from Germany a final and unconditional surrender and Proclamation No. 2660, in which he declared that Japan had unconditionally surrendered, were not declarations that a state of war no longer existed between the United States and the Axis governments. The court further stated:

"It is also a matter of common knowledge of which the courts may take judicial cognizance that there has been no

> Proclamation by the President and no Act of Congress of the United States by which it has been determined that such state of war has been discontinued. It is also a matter of common knowledge of which the courts may take judicial cognizance that the Armed Forces of the United States now occupy large parts of the territory formerly occupied by the Axis Powers and that such Armed Forces of the United States are in such areas actively prosecuting the purpose of war. * * *"

Other cases which substantiate this view are: Citizens Protective League v. Clark, 155 F. 2d, 290, 81 U. S. App. D. C. 116; Ribas j Hijo v. United States, 24 S. Ct. 727, 194 U. S. 315, 418 L. Ed. 994; Citizens Protective League v. Byrnes, 64 F. Supp. 233; Application of Yamashita, Phil. Islands, 66 S. Ct. 340, 327 U. S. 1.

In the above decisions it was held that a war could not be terminated except by Presidential Proclamation or Joint Resolution of Congress. Since neither such proclamation nor such resolution has to date been issued or adopted, it would follow that the war with the Axis Powers referred to in Section 486-16a is not terminated and consequently the provisions of said section are applicable to the persons in question.

In view of the foregoing and in specific answer to your questions, it is my opinion that the positions of employes in the classified civil service who are drafted or who enlist pursuant to the Selective Service Act of 1948 are protected under Section 486-16a, General Code. The remainder of your questions in like manner are answered in the affirmative.

Respectfully,

HUGH S. JENKINS,
Attorney General.