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1. EMPLOYE, PUBLIC — CONSCRIPTED INTO MILITARY SERVICE OF UNITED STATES — NOT LEGAL, UNDER EXISTING LAW, FOR STATE OR SUBDIVISIONS TO CONTINUE PAY OR COMPENSATION DURING TIME EMPLOYE IS IN SERVICE.

2. PUBLIC EMPLOYES' RETIREMENT SYSTEM, LAW — IF PUBLIC EMPLOYE DRAFTED INTO MILITARY SERVICE OF UNITED STATES, IS NOT PAID IN WHOLE OR IN PART BY STATE OR SUBDIVISIONS, HE CEASES TO BE PUBLIC EMPLOYE — NOT LAWFUL FOR RETIREMENT BOARD TO ACCEPT CONTRIBUTIONS FROM SUCH EMPLOYE ON BASIS OF SALARY AT TIME OF ENTRANCE INTO MILITARY SERVICE.

SYLLABUS:

1. *It would not be legal under existing law for the State or its subdivisions to continue the pay or compensation of a public employe, conscripted into the military service of the United States, during such time as he is in the service.*

2. *If a public employe, as defined in the public employes' retirement law, be drafted into the military service of the United States, and is not being paid in whole or in part by the State or one of the subdivisions covered by such law, he ceases to be a public employe within the meaning of the law in question, and it would not be lawful for the retirement board to accept contributions from the employe on the basis of his salary at the time he entered the military service.*

Columbus, Ohio, November 16, 1940.

Mr. Wilson E. Hoge,
Secretary, Public Employes Retirement System,
Columbus, Ohio.

Dear Sir:

I have your recent request for my opinion reading as follows:

"The recent conscription laws to draft citizens into Federal

Military Service have raised questions in regard to the status of membership in the Retirement System for persons affected.

Numerous departments and municipalities throughout the state have raised the question as to whether it would be legally possible for the state or its subdivisions to continue the regular remuneration or part of it to employes who are conscripted. Naturally, if that were possible, the regular contributions to protect the employe for such service would continue to be made to the Retirement System. However, if it is not possible for the units to continue the remuneration to such employes or if at any rate it is not done, the question arises as to whether the Retirement Board would have the authority to permit such employes to continue to contribute on their own initiative to the Retirement System on the basis of their regular salaries at the time of their departure for the military service. We are very eager to protect the employes so far as their rights in the Retirement System are concerned and would prefer to do it without amendatory legislation if it is possible.

The questions are, therefore: First, would it be legal for the State of Ohio or its subdivisions to continue an employe's salary during the period that he was conscripted into military service; second, if an employe is drafted and is not being paid a salary by the state or the subdivision for whom he worked, would it be legal for the retirement board to accept contributions from him on the basis of his salary at the time the draft became effective?

If it is impossible to handle the proper protection of the employes under the present law, it will be necessary for us to prepare legislation for submission early to the next General Assembly. For that reason we shall appreciate your early consideration."

It is noted that your request is limited to state and public *employes* as distinguished from state and public *officers*. This fact is mentioned because of the "well established principle that a salary to an office is an incident of the office itself, and not to its occupation and exercise or to the individual discharging the duties of the office." See 22 R. C. L. 525. See also page 529 of the same authority, where it is said that the "right of an officer to his fees, emoluments, or salary is not impaired by his occasional or protracted absence from his post, or even by his neglect of duty, or failure to perform substantial services.

As stated in 46 C. J. 1014:

"The person rightfully holding an office is entitled to the compensation attached thereto; *this right does not rest upon contract, and the principles of law governing contractual relations and obligations in ordinary cases are not applicable.* * * * *The* right to the compensation attached to a public office is an incident to the

> title to the office and not to the exercise of the functions of the office; *hence, the fact that officers have not performed the duties of the office does not deprive them of the right to compensation, provided their conduct does not amount to an abandonment of the office.* * * * "

A public *employment* is a much different thing, however, from a public *office,* and the principles above set forth have no application to one serving as a public employe. In the second section of his work on Public Offices and Officers, Meechem says at page 3 that a "public office differs in material particulars from a public employment, for, as was said by Chief Justice Marshall, 'although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer' " (Citing, United States v. Maurice, 2 Brook (U. S. C. C.) 96, 103 (1823).

Except as it may serve to emphasize the fundamental differences between public office and public employment, a definition of public office is here unnecessary. In any event the citation of numerous authorities is not required. It is sufficient to say that a public office is an employment, in any station or public trust, not merely transient, occasional, or incidental. Generally speaking, it embraces the idea of tenure, duration, fees or emoluments, rights and powers, as well as that of duties. "In accordance therewith, it is said that a public office is the right, authority and duty created and conferred by law by which, for a given period—either fixed by law or enduring at the pleasure of the creating power—an individual is invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public. The individual so invested is a public officer." See 32 O. Jur. 855, and Ohio cases cited; 46 C. J. 922; and Words and Phrases, Perm. Ed., Vol. 14, p. 480, et seq.

On the other hand, not only does public employment lack practically all the characteristics above enumerated, but it differs basically in the roots from which it springs. The position of a public employe—with its relative right and duties—is brought into being by a contract of employment, and not by election, or by appointment in the true sense of that word, as in the case of a public officer. As pointed out by the Supreme Court of Massachusetts in the case of Attorney General v. Tillinghast, 203 Mass. 539, 83 N. E. 1058, 1060 (1909), one of the important tests among others to be applied in determining whether a public position be a public office or a public employment is:

> " * * * whether it (the position) is created by an appointment or election, or merely by a *contract of employment,* by which the rights of the parties are regulated; * * * " (Emphasis mine.)

This distinction was recognized by the Supreme Court of Louisiana in the case of Moll v. Sbisa, 51 La. Annual Reports 290, 25 So. 141 (1890), in which it was held:

> " 'Employees,' as used with respect to classes of public servants, refers to those whose employment is merely contracted for, and differs from officers, whose functions appertain to the administration of government."

Your attention is also invited to the case of State, ex rel Key v. Bond, Auditor, 94 W. Va. 255, 260, 118 S. E. 276, (1823), in which it was held by the Supreme Court of Appeals of West Virginia, as stated at page 260 of the opinion:

> "As a general rule it may be stated that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which are continuing in their nature and not occasional or intermittent. But one who merely performs the duties required of him by persons employing him *under an express or implied contract,* though such persons themselves be public officers, and though the employment be in or about public work or business, is a mere employee. * * * " (Emphasis mine.)

As a corrollary to the principle that the correlative rights and duties of a public employe are contractual in their nature, it follows *ex necessitate,* that the public employe may only be paid for services actually rendered or work actually done. Were the rule otherwise, payment to a public employe, or one who had been a public employe, who for a prolonged period had utterly ceased to perform the duties which he had agreed and had been hired to do and perform, would be tantamount to giving away the taxpayers' money. And this may not be done. As said by Judge Spear, in the case of Jones, Auditor, v. Commissioners of Lucas County, 57 O. S. 189, 216 (1897):

> " * * * But it (the board of county commissioners) is wholly without authority to sanctify a demand illegal because of being upon a subject which can admit of no claim, and thus give way the people's money. It can no more do so than can any other agent bind his principal by acts unauthorized because without the scope of his authority."

See also Peters, Dir. of Finance, v. State, ex rel., 42 O. A. 307, 12 Abs.

290, 182 N. E. 139 (C. of A. Lucas Co., 1932), in which Judge Lloyd said at page 308:

> " * * * Public officials, it would seem, should consider themselves rather as trustees than philanthropists, in the appropriation and disbursement of public funds."

In the case of People, ex rel. v. Jackson, Auditor, etc., et al., 85 N. Y. 541 (1881), the court of last resort in New York held the trustees of the College of the City of New York had "no authority to allow to the widow or representatives of a deceased teacher his salary for a period subsequent to his death." And see in this connection Board of Education, et al. v. Talbott, Auditor, 261 Ky. 66, 72, 86 S. W. (2nd) 1059 (1935), in which it was held that all "teachers of the common schools of the commonwealth are state *employees,*" that is to say, *public employees.*

The case of White v. City of Alameda, 124 Cal. 95, 56 Pac. 795 (1899) is here apposite. The headnote of this case reads:

> "The hiring of a driver of a street wagon belonging to a city, at a monthly salary, for no specified period, by virtue of a resolution passed by the city trustees, does not create an office which continues, without regard to service, until the resolution is rescinded or changed, but creates only the relation of master and servant, under a salary to be paid monthly when the service is performed, *and not unless it is performed.*" (Emphasis mine.)

In the opinion at page 97 it was said as follows:

> "The resolution under which defendant entered service is not pleaded, nor is its substance given, otherwise than it is alleged that defendant adopted a resolution appointing and employing one M. M. White 'driver of the street wagon and to take care of the horses of the defendant." This did not constitute White an officer, such, for example, as the state librarian mentioned in People v. Stratton, supra, who, it was held, continued in office after the expiration of his term, and until his successor was duly selected, and had qualified, although the law creating the office did not authorize him to do so. The law there laid down was based upon the reason that civil functionaries, like the state librarian, are charged with the duty of the safekeeping and current management of public property committed to their custody, and are by law made responsible as such custodians, and that the public business requires that these duties shall be discharged without interruption. The case in 66 California, supra, was that of police commissioners, whose appointment was under an act which did not fix the term. But we cannot regard the driver of a street wagon as any such officer, or as coming within the reason of the rule stated in People vs. Stratton, supra. Nor can we regard the resolution, so far as we can judge

> from what is said of it in the complaint, as amounting to anything more than a minute entry by defendant in its proceedings that it had hired plaintiff to do the work at the monthly compensation of sixty dollars. *No inference can be drawn from anything in the pleadings or the resolution that defendant was to receive pay when he did no work.* * * * "

From the above it seems clear, both upon principle and authority, that a public employe is entitled to compensation only when he performs the services or does the work he is employed to do.

This does not mean that a public employe is not entitled to a reasonable period of absence from his employment for vacation purposes, or to what is commonly called "sick leave." Unless expressly forbidden by law, it is almost universally held that the head of a department or other chief officers has authority to grant reasonable leaves of absence to employes under him to enjoy a vacation, or in the interest of the health of the employe, or for other good reason. The theory underlying such a leave of absence is that it tends to promote the efficiency of the employe and generally to sustain the morale of all those in public employment. See McQuillin on Municipal Corporations, Second Edition, Revised, Vol. II, pp. 271 and 358, and authorities cited.

As held in O'Leary v. Board of Education of the City of New York, 93 N. Y. 1, 6 (1883):

> " * * * A discretionary power must exist in a board of public officers to determine when and to what extent persons in their employment should be excused by reason of sickness or temporary disability, and unless it is clear that such discretion has been abused it should not be overruled and disregarded. * * * "

The distinction between officers and their perquisites and public employees and their rights and duties, however, is recognized in Field's Civil Service Law, at page 193, where in discussing leaves of absence on account of sickness, it is said:

> "A distinction must be drawn between an office and an employment in connection with illness as a reason for absence. The theory of compensation is that an employe is entitled to it either through contract or through work done while the officer is entitled to it as a perquisite of office. * * * "

Indeed, provisions for time off for vacation or for sick leaves are commonly made by statute or by ordinance.

For example, Section 154-20, General Code, provides in part as follows:

> "All employes in the several departments except the state highway department shall render not less than eight hours of labor each day, Saturday afternoons, Sundays and days declared by law to be holidays excluded, except in cases in which, in the judgment of the director, the public service will thereby be impaired. Each employe in the several departments shall be entitled during each calendar year to fourteen days leave of absence with full pay. In special and meritorious cases where to limit the annual leave to fourteen days in any one calendar year would work peculiar hardship, it may, in the discretion of the director of the department, be extended. * * * "

In Section 276, General Code, it is provided that state examiners and assistant state examiners shall receive compensation "for each day absent on leave, not exceeding twelve days in each year." In the civil service law of Ohio it is provided in Section 486-16 of the General Code in part that:

> " * * *
> Any person holding an office or position under the classified service who has been separated from the service without delinquency or misconduct on his part may, with the consent of the commission, be reinstated within one year from the date of such separation to a vacancy in the same or similar office or position in the same department; * * * "

Sections 9 and 10 of the rules of the Civil Service Commission pertain to leaves of absence under this section, such being leaves without pay. It is of course obvious that these several provisions are limitations upon the power to grant leaves of absence, as well as authorizations therefor.

Many if not most municipalities provide by ordinance for leaves of absence.

In Opinions No. 3006, Opinions Attorney General, 1928, Vol. II, p. 2820, and No. 728, 1939, Vol. I, p. 917, it was held:

> "County employes on a monthly basis are entitled to a reasonable leave of absence for vacation or a sick leave if the contract of hire so provides either expressly or by necessary reasonable implication."

It will be observed that all the leaves of absence above discussed, with the exception of those granted under the provisions of Section 486-16, General Code, are mere temporary leaves, with pay or compensation continuing. And it is my opinion that a leave with pay continuing for the time necessi-

tated by the circumstances stated in your letter would be unlawful, and I accordingly answer your first question in the negative.

Touching your second question, in Opinion No. 848, Opinions of the Attorney General for 1939, Vol. II, p. 1119, in construing Section 486-33c, General Code, which defines municipal and certain other public employes, I reached the conclusion "that to be a municipal employee within the meaning of the retirement act, a person must be holding a municipal office, not elective, and paid in full or in part by such municipality." That is, to be such an employee, two conditions must exist; first, the person must be in the employe of the municipality, and, second, he must be paid in whole or in part thereby. The reasoning and conclusion of that opinion apply with equal force to the definition of state employes and other public employes as respectively defined in Sections 486-32 and 486-33c, General Code. It follows that since under the law neither state no other public employes may legally be paid under the circumstances set forth in your communication, they cease to be public employes within the meaning of the public employes retirement law, and your second question, therefore, must also be negatively answered.

In view of the foregoing, and in specific answer to your questions, it is my opinion that:

1. It would not be legal under existing law for the State or its subdivisions to continue the pay or compensation of a public employe, conscripted into the military service of the United States, during such time as he is in the service.

2. If a public employe, as defined in the public employes' retirement law be drafted into the military service of the United States, and is not being paid in whole or in part by the State or one of the subdivisions covered by such law, he ceases to be a public employe within the meaning of the law in question, and it would not be lawful for the retirement board to accept contributions from the employe on the basis of his salary at the time he entered the military service.

Respectfully,

THOMAS J. HERBERT,
Attorney General.