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ADJUTANT GENERAL'S DEPARTMENT:

1. OFFICERS ON FULL PAY—STATUS, INCLUDING ADJUTANT GENERAL, ASSISTANT ADJUTANT GENERAL AND ASSISTANT QUARTERMASTER GENERAL—NOT ENTITLED TO “DRILL AND CAMP PAY” IN ADDITION TO STATUTORY SALARY.
2. EMPLOYES OF STATE, INCLUDING CIVILIAN EMPLOYES IN SAID DEPARTMENT, MEMBERS OF OHIO STATE GUARD OR OHIO NAVAL MILITIA ENTITLED TO COMPENSATION FOR DRILL IN ADDITION TO FIXED SALARIES—SECTION 5224 G.C.—AMENDED SENATE BILL 247, 94 GENERAL ASSEMBLY.
3. STATE EMPLOYES, EMPLOYES POLITICAL SUBDIVISION, INCLUDING CIVILIAN EMPLOYES, SAID DEPARTMENT, MEMBERS OHIO NATIONAL GUARD, OHIO STATE GUARD, NAVAL MILITIA OR OHIO STATE NAVAL MILITIA, ENTITLED TO LEAVE OF ABSENCE WITH PAY, WHILE ON TRAINING DUTY, NOT TO EXCEED THIRTY-ONE DAYS PER YEAR.

SYLLABUS:

(1) *Under the provisions of Section 2249-1 and cognate sections of the General Code, officers on a full pay status, as such, in the Adjutant General's Department of Ohio, including the Adjutant General, the Assistant Adjutant General and the Assistant Quartermaster General, are not entitled to “drill and camp pay,” whether on training duty or otherwise, in addition to their salary as such officers as fixed by statute.*

(2) *Employes of the State, including civilian employes in the Adjutant General's Department, who are members of the Ohio State Guard or Ohio Naval Militia, are entitled to receive the compensation for attending drill fixed by the Legislature in Section 5224, General Code, as amended (Am. S.B. 247; Effective April 28, 1941), in addition to their salaries or compensation earned in their regular employment.*

(3) *By the terms of Section 5273-2, General Code, as amended by the Ninety-Fourth General Assembly (Am. S.B. No. 247; Effective April 28, 1941), employes of the State or the political subdivisions thereof, including civilian employes in the Adjutant General's Department, who are members of the Ohio National Guard; the Ohio State Guard; the Naval Militia; or the Ohio State Naval Militia, are entitled to leave of absence from their respective duties without loss of pay for such time as they are in the military service on training duty for periods not to exceed thirty-one days in any one calendar year.*

Columbus, Ohio, August 2, 1941.

Brigadier General W. S. Bird, Adjutant General of Ohio,
Columbus, Ohio.

Dear General Bird:

I have your request for my opinion, your letter reading as follows:

"Your opinion is respectfully requested on the following matters:

1. Will officers on a full pay status, as such, in the Adjutant General's Department, be entitled to drill and camp pay without deduction from their salary, received as a result of such full time employment?
2. Will officers and enlisted men in the Ohio State Guard be entitled to drill and camp pay when such persons are employed in the Adjutant General's Department on a civilian basis?
3. Will officers and enlisted men be entitled to drill and camp pay without deduction from their salary if employed as civilians in other state departments?

This department will appreciate an early reply as we are now engaged in the process of formulating rules and regulations for the new Ohio State Guard."

In so far as civilian employes in the Adjutant General's office are concerned, Section 486-8, General Code, defining classified and unclassified civil service, provides in part as follows:

"The civil service of the state of Ohio and the several counties, cities and city school districts thereof shall be divided into the unclassified service and the classified service.

(a) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required in this act. * * *

All commissioned, non-commissioned officers and enlisted men in the military service of the state including military appointees in the offices of the adjutant general. * * * ”

By Section 1, Rule III, of the Rules and Regulations prescribed by the State Civil Service Commission, it is provided that:

“The term ‘military appointees’ appearing in paragraph 6 of Section 486-8 shall apply only to those persons who, after appointment, render service of a military character and are in the military service of the state, having some connection with, and some rank in, the National Guard.”

1. When you speak in your first question of “officers on a full pay status, as such, in the Adjutant General’s Department,” I assume that you refer to such officers as the Adjutant General, Assistant Adjutant General, and Assistant Quartermaster General.

The sections of the General Code here pertinent are Sections 5276, as amended in House Bill No. 378, passed as an emergency act by the 94th General Assembly, effective on March 25, 1941; Section 5279, as amended in Senate Bill No. 247, also passed as an emergency act by the same General Assembly, effective April 28, 1941; Sections 5282 and 5283; and Section 2249-1.

Sections 5279, 5282 and 5283, General Code, respectively, prescribe the duties of the Adjutant General, the Assistant Adjutant General and the Assistant Quartermaster General. Their quotation in this opinion is deemed unnecessary.

Section 5276, General Code, as amended, reads in part as follows:

“The staff of the governor shall consist of an adjutant general of the grade of brigadier general, upon whom shall devolve the duties of quartermaster general; an assistant adjutant general of the grade of lieutenant colonel or commander; an assistant quartermaster general of the grade of lieutenant colonel or commander; all of whom shall be appointed by the governor and shall hold office during his pleasure or during the term for which he was elected. The governor’s staff shall also include four aides-de-camp, who shall be appointed by the governor and shall hold office during his pleasure or during the term for which he was elected.”

Section 2249-1, General Code, provides:

“The adjutant general, the assistant adjutant general, and the assistant quartermaster general shall receive the pay and allowance of their rank according to those at the time prescribed for the armies of the United States.”

From the provisions of the section last above quoted, which requires no interpretation or construction, it is clear that the Adjutant General, who is by law "of the grade of brigadier general" is entitled to receive the pay and perquisites of a brigadier general "according to those at the time prescribed for the armies of the United States," including base pay; longevity pay; rental allowance; and subsistence allowance; provided, of course, that all pay and allowances do not exceed the monthly maximum fixed in the proper War Department Pay Tables. Likewise, the Assistant Adjutant General and the Assistant Quartermaster General, each being of the grade of Lieutenant Colonel, is entitled to receive the pay and allowance fixed by the same pay tables for that grade, subject also to the maximum monthly pay and allowances for the grade of Lieutenant Colonel.

It is fundamental that a "public officer is entitled to receive only such compensation as is expressly provided by statute," and it is equally well established that "statutes relating to compensation are strictly construed, and the amount stipulated therein cannot be enlarged by implication beyond the terms of the statute." See 32 O.Jur. 1013, 1014, and the many Ohio cases cited.

And see page 1012 of the same work, where it is said:

"The fact that a duty is imposed upon a public officer will not be enough to charge the public with an obligation to pay for its performance, for the legislature may deem the duties imposed to be fully compensated by the privilege and other emoluments belonging to the office or by fees to be charged and collected for services connected with such duty or service and hence, provides no direct compensation therefore to be paid out of the public treasury."

See the text at page 1021, *Id.*, which reads:

"There is no doubt that an officer who receives a stated salary cannot recover further compensation for extra duties, germane to his office, imposed upon him by the legislature, or even for incidental or collateral services which properly belong to, or form a part of, his main office."

I am informed that the present Adjutant General is also the Commanding General of the Ohio State Guard. But even were this not the fact, any duties performed when attending drill or camp are duties of the office of Adjutant General. In Section 5279, *supra*, it is expressly pro-

vided that the Adjutant General "shall be chief of staff to the commander-in-chief and administrative head of the organized militia," the same section specifically detailing any number of duties requiring his presence at times either at drill or in camp. Moreover, as has been seen, Section 5276, supra, provides that upon the Adjutant General "shall devolve the duties of quartermaster general." Section 5219, General Code, provides that the Adjutant General "shall have general direction over the state arsenal, state camp grounds and other military property of the state," and Section 5220, General Code, makes this officer "the custodian of the state rifle range and military camp grounds." In view of the provisions thus briefly referred to and cognate sections of the General Code, it seems patent that not only is the duty of attending drill and attending camp, at such time as he deems proper or at such times as he may be directed so to do by the Governor, germane to the office of Adjutant General of Ohio, but are in fact duties of such office and of the officer hired by the State at the compensation fixed by Section 2249-1, supra, to do and perform them. And since the Assistant Adjutant General and Assistant Quartermaster General are assistants of the Adjutant General, the law inter alia directing that each shall perform such duties as are assigned to him by the Adjutant General and further providing that in the absence or disability of the Adjutant General the Assistant Adjutant General shall perform his duties, and that in the absence or disability of both, the Assistant Quartermaster General shall perform his duties, the pay status of these two subordinates would be the same as that of the Adjutant General in so far as question 1 is concerned, with the difference of course as to the amount thereof, in view of the differences in grade.

For the above reasons, your first question must be answered in the negative.

2 and 3. Your second and third questions may be considered together.

It seems to me obvious that both officers and enlisted men in the Ohio State Guard, who are employed by the state, including those employed in the Adjutant General's Department, on a civilian basis, are entitled to drill pay without deduction from their salaries or compensation as state employes. In the first place, provision is made in Section 1, Article IX, of the Constitution of Ohio, for the enrollment in the militia, of the citizen residents of Ohio, with no distinction as to whether they are publicly or privately employed. Section 5176, as amended (Am.

S.B. No. 217,) provides among other things that the militia of the state of Ohio shall be divided into five classes, the National Guard, the Naval Militia, the Ohio State Guard, the Ohio State Naval Militia (the organized militia) and the unorganized militia. Section 5178, as amended in the same Senate Bill, reads in part that "the Ohio state guard and Ohio state naval militia shall consist of the militia between the ages of eighteen and sixty-four years regularly enlisted therein, and of officers between the ages of twenty-one and sixty-four years regularly commissioned therein or assigned thereto."

Section 5224, as also amended in Amended Senate Bill 247, supra, reads as follows:

"Each regularly enlisted man of the Ohio state guard or of the Ohio state naval militia shall be paid one dollar (\$1.00) for each regular weekly drill attended, not to exceed forty-eight in one year, and each commissioned officer of the Ohio state guard and the Ohio state naval militia shall receive compensation at the rate of one-thirtieth of the monthly base pay of his grade, as is provided or may hereafter be provided for commissioned officers of the armies or navies of the United States, for each authorized drill actually attended, provided that no officer shall receive more than five hundred (\$500.00) dollars per annum for such drill pay, to be paid quarterly upon the presentation of the proper certified muster and payroll to the adjutant general. Upon his approval, the state auditor shall issue his warrant upon the treasurer for the amount certified to as above provided in favor of the officer making the certificate as herein provided."

That employment by the state and service in the Ohio State Guard and Ohio State Naval Militia are not incompatible is obvious from the provisions of Section 1, Art. IX, Constitution of Ohio, supra, and from the provisions of Section 5273-2, hereinafter quoted. This latter section contains a clear legislative declaration that officers and employes of the state or the political subdivisions thereof may also be members of the organized militia, and by the provisions of Section 5224, supra, the legislature has also clearly indicated that such officers and enlisted men shall receive additional compensation in the amounts fixed in such section for their added services in the Ohio State Guard or Ohio State Militia.

In so far as "camp pay" is concerned, your attention is directed to Sections 5227 and 5273-2, General Code, as amended (Am. S.B. No. 247, supra).

Section 5227, General Code, provides in part that for "service in encampments and maneuvers, commissioned officers and enlisted men of the Ohio state guard and Ohio state naval militia shall receive the same pay and allowances per day as is provided or may hereafter be provided" for officers and men of like grade in the regular army or navy of the United States.

Section 5273-2 reads:

"All officers and employes of the state or the political subdivisions thereof, who are members of the Ohio national guard, *the Ohio state guard*, the naval militia, *the Ohio state 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 the military service on training duty for periods not to exceed * * * *thirty-one* days in any one calendar year."

The amendments in the above section are indicated by the words emphasized and the asterisks, the old section not including the Ohio State Guard or the Ohio State Naval Militia, and the extent of the leave of absence with pay being limited to periods of "not to exceed fifteen days in any one calendar year."

The question here involved was answered by one of my predecessors in office in Opinion No. 4553, Opinions, Attorney General, 1932, Vol. II, p. 950, in which former Section 5273-2, General Code, was construed. In that opinion it was held as stated in the syllabus:

"Where a state employe regularly employed by the state is a member of the National Guard, he is entitled to leave of absence from his duties during the time he is in attendance at the field training for a period not to exceed fifteen days and he is entitled to his regular salary or compensation without deduction for such absence."

In the body of the opinion it was said as follows at page 951:

"It is a general rule of construction that where a statute is borrowed from another state and enacted into law by the legislature the courts will presume that the legislative intent was to copy the statute with the interpretation which had been placed thereon by the courts of the state from which such statute was borrowed. See *Casualty Company vs. Nadler*, 115 O.S. 472. The federal government in construing the section above quoted holds that all employes of the federal government who are employed by the month or year are entitled to leave of absence with pay

while called out on military duty. See 2 Comptroller-Gen. Dec., page 54; 2 Comptroller-Gen. Dec., page 30; Dig.Op. — Judge Adv. Gen. (1922), page 6. The federal officials have also ruled that where the employe is employed for a period at a per diem compensattion merely as a measure of pay he is entitled to the benefits of such act. See 2 Comptroller-Gen. Dec. page 247. However, in such decision it is held that where one is employed merely from day to day by the federal government he is not entitled to the benefits of such act.

Like reasoning applied to the Ohio act would lead to the conclusion that any person who is in the regular employ of the state of Ohio, whether his compensation is by the year, month or day, is entitled to the leave of absence provided for in Section 5273-2, General Code, without deduction from his regular salary or compensation by reason of such leave of absence. But when a person is not in the regular employ of the state of Ohio but is a mere incidental or occasional employe, he is not entitled to the benefits of such section."

The same conclusion was reached in my Opinion No. 2614, Opinions, Attorney General, 1940, Vol. 1, p. 727, which also construed Section 5273-2, supra, as it formerly existed, the syllabus of this opinion reading:

"All officers and employees of the state who are members of the Ohio National Guard, the naval militia or the officers reserve corps, shall be entitled to leaves of absence from their respective duties for such time as they are in the military service on training duty, without loss of pay, for periods not to exceed fifteen days in any one calendar year, including Sundays; and in addition thereto state examiners and assistant state examiners are entitled to leaves of absence with compensation for a period not exceeding twelve days, excluding Sundays, in each year."

In Opinion No. 2614 the case of *Otten vs. Cincinnati*, 10 O.O. 276 (Hamilton Co. Common Pleas, 1937), was cited, in which it was held that the section under consideration was constitutional. It was also held in the *Otten* case as stated in the first headnote that:

"1. A municipality cannot refuse an employee compensation for a leave of absence with pay for vacation purposes, in addition to a leave of absence granted with pay for attendance at the encampment of the Ohio National Guard."

The mere fact that the Legislature has enlarged the scope of Section 5273-2, supra, so as to include members of the Ohio State Guard and the Ohio State Naval Militia and to extend the period of the leave of absence with pay, in nowise affects the reasoning or the conclusions of the above

opinions construing this section as it formerly read. Nor do I see any difference in the status of state employes in the Adjutant General's Department as distinguished from other offices, departments or divisions of the state government. The test whether or not the person claiming to be entitled to leave with pay under the section in question is: Is such person an employe of the State, or one of the political subdivisions thereof? And it would work an absurdity to hold that State employes in the Adjutant General's Department are not entitled to the benefits of Section 5273-2, supra, simply because their work is for the most part, if not entirely, of a military character and their daily duties correlated to and intimately connected with the training received and services rendered when on training duty. As observed by Judge Morrow at pages 278 and 279 in the Otten case cited above:

“Counsel for the city hinted in argument that military training at Fort Knox comes under the heading of ‘vacations.’ Again we disagree, — this avocation is emphatically not a vacation, although it means absence from civil employment and change of occupation.

The state by this legislation intends to encourage military and naval preparedness. If the city's contention is correct, young men in employ of the city of Cincinnati tempted to undergo military training, will be deprived of vacations with pay.”

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

(1) Under the provisions of Section 2249-1 and cognate sections of the General Code, officers on a full pay status, as such, in the Adjutant General's Department of Ohio, including the Adjutant General, the Assistant Adjutant General and the Assistant Quartermaster General, are not entitled to “drill and camp pay,” whether on training duty or otherwise, in addition to their salary as such officers as fixed by statute.

2. Employes of the State, including civilian employes in the Adjutant General's Department, who are members of the Ohio State Guard or Ohio Naval Militia, are entitled to receive the compensation for attending drill fixed by the Legislature in Section 5224, General Code, as amended (Am. S.B. 247; Effective April 28, 1941,) in addition to their salaries or compensation earned in their regular employment.

3. By the terms of Section 5273-2, General Code, as amended by

the Ninety-Fourth General Assembly (Am. S.B. No. 247; Effective April 28, 1941,) employes of the state or the political subdivisions thereof, including civilian employes in the Adjutant General's Department, who are members of the Ohio National Guard; the Ohio State Guard, the Naval Militia; or the Ohio State Naval Militia, are entitled to leave of absence from their respective duties without loss of pay for such time as they are in the military service on training duty for periods not to exceed thirty-one days in any one calendar year.

Respectfully,

THOMAS J. HERBERT,

Attorney General.