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ARMED FORCES OF UNITED STATES — STATE EMPLOYE LEFT STATE EMPLOYMENT TO ENTER SUCH SERVICES — UPON RETURN TO POSITION HELD IMMEDIATELY PRIOR TO ENTRY INTO ARMED SERVICES, SUCH EMPLOYE ENTITLED TO TEMPORARY SALARY INCREASE FOR YEARS 1943, 1944----HOUSE BILL 227, 95 GENERAL ASSEMBLY — INCREASE COMPUTED ON SALARY RECEIVED AT TIME EMPLOYE LEFT STATE EMPLOY TO ENTER ARMED SERVICES.

SYLLABUS:

A person who left the employment of the state to enter the armed services of the United States is, upon his return to the position held by him immediately prior to his entry into the armed services, entitled to the temporary increase for the years 1943 and 1944, provided for by House Bill No. 227 of the 95th General Assembly, which increase is to be computed on the salary which he was receiving when he left the state employ to enter the armed services.

Columbus, Ohio, July 18, 1944

Miss Gertrude Jones
Chairman, The State Civil Service Commission of Ohio
Columbus, Ohio

Dear Miss Jones:

This will acknowledge receipt of your recent communication, which reads as follows:

> "The Commission desires respectfully to request your advice upon the following question. Is a person honorably discharged from military service, entitled to the legislative increase as provided in the wage and salary adjustment provision of House Bill No. 227, when he returns to his position with the State of Ohio?"

The salary and wage adjustment provision of House Bill No. 227 of the 95th General Assembly, to which you refer in your letter, reads in part:

> "* * * Upon such distribution by order of the controlling board, the salaries and wages of all employees, within such offices, departments, boards and commissions, which are now less than $2,000.00 annually, shall be increased 10% unless such increase of 10% would result in a salary or wage in excess of $2,000.00 annually, in which event such salary or wage shall be increased only to the sum of $2,000.00 annually."

The above quoted language was under consideration by the Supreme Court of Ohio, in the case of State, ex rel. Mooney, v. Ferguson, 142 O. S. 279, decided December 1, 1943. In said case it was held that those employes of the state who entered their employment subsequent to the effective date of said House Bill No. 227 (June 24, 1943) were not entitled to the temporary increase in salary provided for in said act.

With respect thereto and in connection with the language above quoted, it was stated in the opinion of said case:

> "The use of the word 'now' in the part of House Bill No. 227 last quoted is significant and denotes an intention on the part of the General Assembly to increase the salaries or wages in effect on June 24, 1943."

Obviously, a former employe of the state who entered the armed forces prior to June 24, 1943 and who was not in the employ of the state on said date, had no salary or wage which was "in effect on June 24, 1943." From a superficial consideration of the above decision, it might therefore appear that a person who entered the armed services prior to said date and who then, subsequent to said date again entered said employment, would not be entitled to the temporary increase prescribed by the above act.

Such conclusion, however, overlooks the language contained in the third paragraph of such salary and wage adjustment provisions.

Said paragraph reads:

> "The temporary increases in compensation herein authorized shall not be paid to former employes who are not in the service of the state upon the date this act is filed in the office of the Secretary of State, except where those employes have left the employ of the state to serve in any branch of the armed forces of the United States."

The above language denotes a clear manifestation by the General Assembly to include within the benefits of the act the former employes of the state who left the employ of the state to serve in the armed forces of the United States. This provision must therefore be construed to operate as an exception to those general provisions of the act which were under consideration by the Supreme Court.

Inasmuch as the court held that the increase applied only to salaries and wages which were in effect on June 24, 1943, and since such persons were receiving no salaries or wages on said date, it might be argued that no base salary or wage exists upon which to compute the temporary increase, should such persons again enter state employment during the present biennium.

It seems to me, however, that such argument is completely overcome by section 486-16a of the General Code, which provides 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 * * *."

Under the express terms of the above provision, a person who after having been in the classified service of the state for a period of ninety days or more left such service to enter the armed forces is entitled to be restored to "the office or position held by him immediately prior to his entering the armed services".

From this it would appear that if effect is to be given to the intention of the General Assembly as expressed in the wage and salary adjustment provisions of House Bill No. 227, the salary which such person received immediately prior to his entering the armed services should be used as a basis for computation of the temporary salary increase prescribed in said provisions.

While it is true that section 486-16a has application only to persons in the classified civil service of the state, it seems to me that the rule laid down for such persons should likewise be applicable to employes who left the unclassified service of the state to enter the armed services of the United States. To hold otherwise would exclude from the benefits given to veterans by the salary and wage adjustment provisions of House Bill No. 227 such latter group of persons. Since the General Assembly made no such distinction, it seems to me every reasonable means should be employed to avoid it.

In view of the above, you are advised that in my opinion a person who left the employment of the state to enter the armed services of the United States is, upon his return to the position held by him immediately prior to his entry into the armed services, entitled to the temporary increase for the years 1943 and 1944, provided for by House Bill No. 227 of the 95th General Assembly, which increase is to be computed on the salary which he was receiving when he left the state employ to enter the armed service.

Respectfully,

THOMAS J. HERBERT
Attorney General