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ATTORNEY GENERAL

THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

August 2, 1951

Hon. C. H. Cavness
State Auditor
Austin, Texas

Opinion No. V 1228

Re: Proper portion of Armed
Forces compensation to
be considered in calcu-
lating the pay of State
employees while on mili-
tary leave.

Dear Sir:

You have asked that we define "pay and allowances when on active duty" as used in Senate Bill 180, Acts 51st Leg., R.S. 1949, ch. 523, p. 954 (Art. 5769b, V.C.S.) in order to determine what portion of his salary from the State, if any, should be paid to a State employee on military leave. You have also asked whether allowances include the value of food and quarters furnished as distinguished from those cases in which cash payments are received in lieu of food and quarters.

Section 3 of the Article in question states:

"All officers and employees of the State of Texas who shall be members of the National Guard or official militia of Texas, or members of any of the Reserve Components of the Armed Forces, shall be entitled to leave of absence from their respective duties without loss of time or efficiency rating on all days on which they shall be ordered by proper authority to duty with troops or field exercises, or for instruction for not to exceed fifteen (15) days in any one calendar year; provided, however, that the State Comptroller shall pay to the officer or employee the difference between his pay and allowances when on active duty, as certified by said officer or employee, and his salary from the State of Texas when the latter is the greater, and when authorized to do so by the head of the Department or the directing board of an institution or agency where such officer or employee is employed."
(Emphasis added.)

It is manifest that the purpose of this act was to encourage public employees who are "members of the National Guard or official militia of Texas, or members of any of the Reserve Components of the Armed Forces" to participate in the usual amount of authorized military training each year by providing that such employees shall not suffer loss of time, efficiency rating, or their normal pay. In the light of this purpose, it is our opinion that "pay and allowances" is used in this article in the same sense as the term "salary," with which that term is compared in determining the amount of the supplement authorized by the act, and includes all remuneration received by the employee in the nature of salary or compensation while on active military duty.

The term "pay" is defined in the Dictionary of United States Army Terms (SR 320-5-1, Dept. of Army, August, 1950), page 166, as

"... regular compensation for Army services including increases for length of service, but not including allowances, mileages, rations, or the like."

This is in accord with the meaning given that term by the courts. See Kogel v. McGoldrick, 289 N.Y. 318, 45 N.E.2d 817, 819 (1942); United States v. Miller, 197 U.S. 223, 227-228 (1905); Sherburne v. United States, 16 Ct. Cl. 491, 497 (1880); Irwin v. United States, 38 Ct. Cl. 87, 103 (1903). It includes "flight pay." United States v. Jones, 100 F.2d 65, 67 (C.C.A. 8th 1938).

Allowances, on the other hand, "are indirect or contingent remuneration, which may or may not be earned, and which is sometimes in the nature of compensation, and sometimes in the nature of reimbursement. . . ." Sherburne v. United States, 16 Ct. Cl. 491, 497 (1880). Those which are in the nature of compensation, such as monetary allowances for dependents, are to be included in computing the "pay and allowances" under Article 5769b. Those which are in the nature of reimbursement should not, in view of the purpose of Article 5769b, be included in such computation. Of this nature are travel allowances or mileage¹ and quarters or rental

^{1/} United States v. Smith, 158 U.S. 346 (1895).

allowances.² We think subsistence allowances are of the same nature as quarters allowances and should also be excluded. This is consistent with the rule that quarters and subsistence allowances "are not considered as income for the purposes of taxation." Bercaw v. Commissioner of Internal Revenue, 165 F. 2d 521, 524 (C.C.A. 4th 1948). Since quarters and subsistence allowances are not to be included in the computation, a fortiori the value of food and quarters furnished in kind should not be included.

SUMMARY

In computing "pay and allowances" of a State employee on active military duty under Article 5769b, V.C.S., the regular compensation for Army services, including increases for length of service and hazardous duty pay, should be included, as well as monetary allowances for dependents. Travel allowances or mileage, quarters allowances, subsistence allowances, and the value of food and quarters furnished in kind should not be included in such computation.

Yours very truly,

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