

unwarranted conclusion. We are of the opinion that nonproducing breakers are industrial establishments within the meaning of the act.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,

Attorney General.

WILLIAM M. RUTTER,

Deputy Attorney General,

OPINION No. 494

Legislature—House of Representatives—Members—Salary approval of member who is in active service in armed forces as a commissioned officer—Salary approval of member not a commissioned officer—See Official Opinions of the Attorney General, 1941-1942 at pages 180 and 224.

The Speaker of the House of Representatives may not legally approve payment of the salary of a member of the House of Representatives who is in active service of the armed forces of the United States as a commissioned officer, but may legally approve payment of the salary of a member who is in active service provided he is not a commissioned officer.

Harrisburg, Pa., March 16, 1944.

Honorable Ira T. Fiss, Speaker of House of Representatives, Harrisburg, Pennsylvania.

Sir: You have requested us to advise you whether a member of the House of Representatives of the General Assembly of the Commonwealth of Pennsylvania who is in active service as a commissioned officer in the armed forces of the United States is entitled to receive his salary as a member of the General Assembly, and also whether a member of the House of Representatives who is in active service of the armed forces of the Nation, but is not a commissioned officer, is entitled to receive his salary as a member of the General Assembly. You inform us that the cases you inquire about do not involve members of the General Assembly who entered the armed forces of the United States as the result of being members of the Pennsylvania National Guard when that unit became part of the Army of the United States.

In *Commonwealth ex rel. Crow v. Smith*, 343 Pa. 446 (1942), the Supreme Court held that a commissioned officer in the Officers Reserve Corps of the United States, called into active service as a Major in

the United States Army, could not continue to hold office as mayor of a city. The Constitution of the Commonwealth of Pennsylvania in Article XII, Section 2, provides that:

No * * * person holding or exercising any office or appointment of trust or profit under the United States, shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached. * * *

and acceptance of a commission as an officer in the Army was held to amount to an automatic vacation of the State office. Following the decision in *Commonwealth ex rel. Crow v. Smith*, supra, we advised the Auditor General in Formal Opinion No. 424, dated May 29, 1942, 1941-1942 Op. Atty. Gen. 180, that he could not legally approve a requisition for salary claimed to be due an additional law judge who had been ordered into active service of the United States Army as a Lieutenant Colonel.

The questions presented by your request are governed by Article II, Section 6 of the Constitution of the Commonwealth of Pennsylvania which provides that:

* * * no member of Congress or other person holding any office (except of attorney-at-law or in the militia) under the United States or this Commonwealth shall be a member of either House during his continuance in office.

The phrase "any office" contained in the foregoing provision being, if anything, of broader significance than the phrase, "any office or appointment of trust or profit" contained in article XII, section 2, it follows that if the holding of a commission in the Army of the United States is within the prohibition contained in that section of the Constitution, a fortiori, it is within the general prohibition of article II, section 6. Therefore, if article II, section 6, contained no exceptions, we would without hesitation say that the first question you present to us is ruled by *Commonwealth ex rel. Crow v. Smith*, supra, and would conclude that it would be unlawful for you to approve payment of salary to one elected to the House of Representatives who is now a commissioned officer in the Army.

There remains for consideration the question of whether the exception of an *office in the militia* changes this conclusion. This, in turn, depends on whether the word "militia" as used in article II, section 6 has a meaning broad enough to include service in the Army of the United States. Undoubtedly, this word is used in the foregoing section of our Constitution in the same sense as in that section on the Constitution entitled "Militia," namely, article XI, section 1, which reads as follows:

The freemen of this Commonwealth shall be armed, organized and disciplined for its defense when and in such manner as may be directed by law. The General Assembly shall provide for maintaining the militia by appropriations from the Treasury of the Commonwealth, and may exempt from military service persons having conscientious scruples against bearing arms.

It is apparent in this section that the word "militia" refers to *State* military forces.

Furthermore, at the time of the adoption of the Constitution of 1874 "militia" was very generally used with this meaning. In *Kneedler et al. v. Lane et al.*, 45 Pa. 238, 244 (1863), Chief Justice Lowrie said:

Now, the militia was a state institution before the adoption of the federal constitution, and it must continue so, except so far as that constitution changes it, that is, by subjecting it, under state officers, to organization and training according to one uniform federal law, and to be called forth to suppress insurrection and repel invasion, when the aid of the federal government is needed, and it needs this force. For this purpose it is a federal force; for all others it is a state force, and it is called in the constitution "the militia of the several states:" Art. 2, 2, 1. * * * *Neither the states nor the Union have any other militia than this.* (Italics ours.)

While the opinion of the Chief Justice here quoted, on rehearing became a minority opinion, it is clear from the opinions of all the judges in the foregoing case that "militia" was understood to mean the State armed forces as opposed to the word "army" of the United States.

Likewise, the Federal statutes in effect at the time of the adoption of the Pennsylvania Constitution of 1874 also recognized the militia as a purely State organization. For example, Rev. Stat., Section 1625 (1878) reads:

Every able-bodied male citizen of the *respective States*, resident therein, who is of the age of eighteen years, and under the age of forty-five years, shall be enrolled in the militia. (Italics ours.)

Rev. Stat., Section 1630 (1878) states that:

The militia of *each State* shall be arranged into divisions, * * * (Italics ours.)

Throughout the Federal statutes in effect in 1874, the militia is recognized as meaning the State armed forces.

It is our conclusion, therefore, that the word "militia" as used in article II, section 6 of the Constitution of Pennsylvania refers to the State militia, and that the exception contained in that article of any office in the militia does not apply to exempt a member of the General Assembly who is serving in the army of the United States as a commissioned officer, from the principles set forth in Commonwealth ex rel. Crow v. Smith, supra.

You may not, therefore, in our opinion, legally approve payment of salary to a member of the House of Representatives who is on active duty as a commissioned officer in the armed forces of the United States.

On the other hand, we know of no reason why a member of the General Assembly may not remain such and at the same time be in active service in the armed forces of the nation so long as he is not a commissioned officer. This question was fully discussed by us in an opinion rendered August 25, 1942, to Governor James. 1941-1942 Op. Atty. Gen. 224.

It is our opinion, therefore, that you may not legally approve payment of the salary of a member of the House of Representatives who is in active service of the armed forces of the United States as a commissioned officer, but that you may legally approve payment of the salary of a member of the House who is in active service of the armed forces of the nation provided he is not a commissioned officer therein.

Very truly yours,

DEPARTMENT OF JUSTICE,

JAMES H. DUFF,
Attorney General.

ROSS S. CAREY,
Deputy Attorney General.

WILLIAM M. RUTTER,
Deputy Attorney General.

OPINION No. 495

School districts—Teachers of vocational education—Salaries—Reimbursement to school districts—Acts of May 1, 1913, P. L. 138; May 18, 1911, P. L. 309; May 28, 1943, P. L. 786; June 4, 1943, P. L. 59.

Reimbursement to school districts for moneys expended for salaries to teachers of vocational education is to be made by the Commonwealth by using the same