

INCOME TAX:  
MISSOURI NATIONAL GUARD:  
FEDERAL RESERVES:  
ARMED FORCES:  
ACTIVE DUTY:

1. A Missouri National Guardsman is not a member of the Armed Forces of the United States on active duty within the meaning of Section 143.105, RSMo Cum. Supp. 1957, while attending summer camp or drill period pursuant to state order. 2. A ready reservist

who is ordered to active duty by the appropriate Federal secretary for annual training is on active duty with the Armed Forces of the United States within the meaning of Section 143.105, RSMo Cum. Supp. 1957.

3. The ready reservist attending drill period is not on active duty with the Armed Forces of the United States within the meaning of Section 143.105, RSMo Cum. Supp. 1957.

October 14, 1959



Honorable L. A. Haake, Supervisor  
Income Tax Department  
Department of Revenue  
Jefferson Building  
Jefferson City, Missouri

Dear Mr. Haake:

You recently asked us for an opinion as follows:

"It has always been the interpretation of this department that members of the military forces located on a military reservation and fully subject to military control are expressly exempt from reporting service pay up to \$3,000. The question, of course, now arises concerning the members of the national guard, who attend weekly meetings, called drill meetings, and who are required to attend summer camp for a period of two weeks. The Department's policy in the past has been to exempt the two weeks pay from taxation but to require them to report the amounts received as drill pay for the weekly meetings. I can find no legal reason on which to base this interpretation unless it would be in the definition of the term 'active duty' as used in its common form.

"Since it is now incumbent upon the Department to release regulations concerning pay of members of the armed forces, I believe that it would be in order to pose the following questions:

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"1. Are members of the national guard entitled to exempt the pay they receive for drill pay of weekly meetings for state income tax purposes?

"2. Are the same members mentioned in item 1 entitled to exempt the two weeks pay when they attend summer training?

"3. Are members of the Missouri National Guard considered members of the military forces of the United States in order to exempt their drill pay from taxation?

"4. Are members of the military reserve of the United States entitled to exempt amounts received for weekly meetings and are they, likewise, entitled to exempt their two weeks training period pay, the same as members of the national guard?"

Section 143.105, RSMo Cum. Supp. 1957, reads as follows:

"The amount of service pay up to but not exceeding three thousand dollars received by a member of the armed forces of the United States on active duty in any one calendar year shall not be taxable and need not be included in his state income tax return for the year 1950 and every year thereafter. No person receiving a dishonorable discharge shall receive this exemption. The administrator, executor or next of kin of any deceased member of the armed forces may claim such exemption for such person."

In order to answer your inquiry as it relates to the Missouri National Guard, we must first determine whether a guardsman is a member of the Armed Forces of the United States on active duty while he is on annual training duty and while he is on drill duty. If he is not a member of the Armed Forces of the United States, then the above section is not applicable to him.

The term armed forces has a particular meaning under Federal law. Title 10, §101 (4), defines armed forces as follows:

"(4) 'Armed forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard."

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National Guard is defined in the same title and section, paragraph 9, as follows:

"(9) 'National Guard' means the Army National Guard and the Air National Guard."

Army National Guard is defined in paragraph 10 as follows:

"(10) 'Army National Guard' means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that--

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized."

Air National Guard is defined in paragraph 12 as follows:

"(12) 'Air National Guard' means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive, that--

(A) is an air force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized."

Title 10, U.S.C.A., deals with general military law but these exact definitions are repeated in Title 32, Section 101, which deals specifically with the forming of the National Guard. The

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Missouri National Guard is an organized militia of the State of Missouri (See Section 41.050, RSMo Cum. Supp. 1957) and of the United States (See Title 10, Section 311, U.S.C.A.). It is subject to the call of the Governor of the State of Missouri (See Sections 41.100 and 41.110, RSMo Cum. Supp. 1957) or to call by the Federal government (See Title 10, Section 672, U.S.C.A.). The Governor of the State of Missouri is the commander in chief of the guard except when the guard is in the service of the United States. (See Section 41.080, RSMo Cum. Supp. 1957). The guard is equipped by the Federal government and is subject to Federal inspection, and its members must meet certain Federal standards as to physical and other qualifications. (See Title 32, Section 105, U.S.C.A.). Title 10, Section 672, paragraph (d) of the United States Code Annotated provides that a guardsman may be called to active duty by the Federal government with his consent and with the consent of the governor of the appropriate state at any time. The training of the guard generally is left up to the states. Title 32, Section 501 (b) reads as follows:

"(b) The training of the National Guard shall be conducted by the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia in conformity with this title."

We have checked with General A. D. Sheppard of the Missouri National Guard and we find that the Missouri guard in the past has been ordered by the Governor of the State of Missouri to their annual training period.

On the basis of the above, we feel that the Army, Navy, Air Force, Marine Corps and Coast Guard comprise the Armed Forces of the United States. The National Guard is a militia force subject to Federal or State call. The usual training of the guard, including their drill periods and annual training, is performed in State, not Federal status. If this is true, then the guard is not "Armed Forces of the United States" at the time they are training and thus not eligible to claim the exemption set out in Section 143.105. We feel this conclusion is indicated also because of the treatment given guardsmen under the Federal Tort Claims Act. The Federal Tort Claims Act is found in Title 28, Sections 2671 and 2674, U.S.C.A., which read as follows:

§ 2671:

"As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term --

"'Federal Agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of

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the United States but does not include any contractor with the United States.

"'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty."

§ 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

It would seem that if National Guardsmen were, in fact, members of the Armed Forces of the United States, a successful action could be brought against the government for their torts committed in line of duty. This is not the case. The courts have uniformly held that a guardsman in training on state order was not covered by the Federal Torts Claims Act. This matter was taken up in *Satcher v. United States*, 101 F.Supp. 919, 920 [2], as follows:

"[2] National Guard Units of the various states are subject under the laws of the United States to be mustered into the Regular Army of the United States under directive

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of the President when Congress shall have declared a National Emergency, 32 U.S.C.A. §81, but until such assigning of a unit is ordered by the President into the regular armed forces of the United States, the National Guard Unit remains a component part of the State Militia and not of the Federal armed forces."

In *Storer Broadcasting Company v. United States*, 251 F.2d 268, 269, the court said as follows:

"\* \* \* all located decisions on the state and federal-militia relationship hold that National Guardsmen of the several states are employees of the state except when in the actual service of the United States.

"\* \* \* If a proposition so firmly established is to be changed, we think that should be done only by the Supreme Court, and that we should abide by our former decisions."

In *United States v. Frager*, 251 F.2d 266, 267 [1], the court said as follows:

"[1] The main claim, that the United States is responsible in damages under the provisions of the Federal Tort Claims Act for the negligent acts and omissions of members of the National Guard of a State not in the active service of the United States, has been answered in the negative in *Storer Broadcasting Company v. United States*, 5 Cir., 251 F.2d 268."

Certiorari was denied in the *Frager* case and in the *Storer* case. These were both 1958 Court of Appeals cases. The Missouri National Guard has a dual status. It is part of the Ready Reserve of the United States. See U.S.C.A., Title 10, Section 269 (b). It does not train in its Federal status and we, therefore, must conclude that the National Guardsman in training as a result of state order is not a member of the Armed Forces of the United States on active duty. It should be noted that although the guardsman is made a part of the ready reserves, the training performed by the guardsman in National Guard status is considered inactive-duty training insofar as the reserves are concerned. See Title 10, Section 101 (31), U.S.C.A. Therefore, the exemption granted in Section 143.105, supra, does not apply to the National Guardsman in the usual case.

The next question is as to the status of the military reserve

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of the United States. The laws of the United States set up what is called a ready reserve. Title 10, Section 269 (a) and (b), U.S.C.A., reads as follows:

"(a) Each person required under law to serve in a reserve component shall, upon becoming a member, be placed in the Ready Reserve of his armed force for his prescribed term of service, unless he is eligible to transfer to the Stand-by Reserve under subsection (e).

"(b) The units and members of the Army National Guard of the United States and of the Air National Guard of the United States are in the Ready Reserve of the Army and the Ready Reserve of the Air Force, respectively."

As before noted we see that all National Guard units are placed in the ready reserve. There are other members of the ready reserve, however, who are not National Guard members. The ready reserve is required to train. Title 10, Section 270, (a), reads as follows:

"(a) Except as specifically provided in regulations to be prescribed by the Secretary of Defense, or by the Secretary of the Treasury with respect to the Coast Guard when it is not operating as a service in the Navy, each person who is inducted, enlisted, or appointed in an armed force after August 9, 1955, and who becomes a member of the Ready Reserve under any provision of law except section 269(b) of this title, shall be required, while in the Ready Reserve, to--

(1) participate in at least 48 scheduled drills or training periods during each year and serve on active duty for training not more than 17 days during each year; or

(2) serve on active duty for training not more than 30 days during each year."

The National Guard is not required to train under this section even though the National Guard is part of the ready reserve. The ready reservist who is not in the National Guard is required to attend drills and/or to go on active duty. He is called to active duty with his consent by virtue of Title 10, Section 672 (d). He is called to duty by the "secretary". Secretary is defined in Title 10, Section 101 (8), as follows:

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"(8) 'Secretary concerned' means--

(A) the Secretary of the Army, with respect to matters concerning the Army;

(B) the Secretary of the Navy, with respect to matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a service in the Navy;

(C) the Secretary of the Air Force, with respect to matters concerning the Air Force; and

(D) the Secretary of the Treasury, with respect to matters concerning the Coast Guard when it is not operating as a service in the Navy."

In short, members of the Ready reserve who are not guardsmen are required to train. They are not state militia. They are ordered to active duty with their consent by the proper Federal secretary. Title 10, Section 678, U.S.C.A., allows the reserve to be detailed to duty with any armed force or otherwise as the secretary sees fit. We feel, therefore, that the ready reservist who is ordered to active duty by the Federal government becomes a member of the Armed Forces of the United States. We must next determine his status as to active or inactive duty. Title 10, Section 101 (22), U.S.C.A., defines active duty as follows:

"(22) 'Active duty' means full-time duty in the active military service of the United States. It includes duty on the active list, full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned."

Title 10, Section 101 (31), U.S.C.A., defines inactive duty as follows:

"(31) 'Inactive-duty training' means--

(A) duty prescribed for Reserves by the Secretary concerned under section 301 of title 37 or any other provision of law; and

(B) special additional duties authorized

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for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned.

"It includes those duties when performed by Reserves in their status as members of the National Guard."

Title 37, Section 301 (a), U.S.C.A., reads as follows:

"(a) Under such regulations as the Secretary concerned may prescribe, and to the extent provided for by law and by appropriations, members of the National Guard, Air National Guard, National Guard of the United States, the Air National Guard of the United States, Army Reserve, Naval Reserve, Marine Corps Reserve, Coast Guard Reserve, and the Reserve Corps of the Public Health Service, shall be entitled to receive compensation at the rate of one-thirtieth of the basic pay authorized for such members of the uniformed services when entitled to receive basic pay, for each regular period of instruction, or period of appropriate duty, at which they shall have been engaged for not less than two hours, including those performed on Sundays and holidays, or for the performance of such other equivalent training, instruction, or duty or appropriate duties as may be prescribed by the Secretary concerned, and additionally, in the discretion of the Secretary concerned, enlisted members of the above services shall be entitled to rations in kind, or a portion thereof, when the instruction or duty period or periods concerned total eight or more hours in any one calendar day: Provided, That for each of the several classes of organizations prescribed for the National Guard, Air National Guard, National Guard of the United States, the Air National Guard of the United States, the Army Reserve, Naval Reserve, Marine Corps Reserve, Coast Guard Reserve, and the Reserve Corps of the Public Health Service, the rules applicable to each of which services and classes within service may differ, the Secretary concerned--

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(1) shall prescribe minimum standards which must be met before an assembly for drill or other equivalent period of training, instruction, or duty or appropriate duties may be credited for pay purposes, which minimum standards may require the presence for duty of officers and enlisted personnel equal to or in excess of a minimum number or percentage of unit strength for a specified period of time with participation in a prescribed character of training;

(2) shall prescribe the maximum number of assemblies, or periods of other equivalent training, instruction, or duty or appropriate duties, which may be counted for pay purposes in each fiscal year;

(3) shall prescribe the maximum number of assemblies, or periods of other equivalent training, instruction, or duty or appropriate duties which can be counted for pay purposes in lesser periods of time; and

(4) shall prescribe the minimum number of assemblies or periods of other equivalent training, instruction, or duty or appropriate duties, which must be completed in stated periods of time before the personnel of organizations or units can qualify for pay."

We feel that the ready reservist called to active duty for annual training by the secretary of the appropriate Federal service is a member of the Armed Forces of the United States on active duty and that pay received would qualify for the income exemption provisions of Section 143.105. The reservist attending drill period is on inactive duty and moneys paid him for such attendance do not qualify for exemption under Section 143.105. It should be noted that the National Guard could be called to active duty by the Federal government for training with their consent and with the consent of the governor, and if they were so called their status would be the same as the ready reservist.

There may be some question as to the wisdom of legislation which allows an exemption from income tax for moneys paid a reservist on annual training duty and denies that exemption for guardsmen. Under the existing law we feel that our conclusion that such a distinction does exist is inescapable. The remedy, if one be called for, lies with the legislature.

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CONCLUSION

It is the opinion of this office that:

1. A Missouri National Guardsman is not a member of the Armed Forces of the United States on active duty within the meaning of Section 143.105, RSMo Cum. Supp. 1957, while attending summer camp or drill period pursuant to state order.

2. A ready reservist who is ordered to active duty by the appropriate Federal secretary for annual training is on active duty with the Armed Forces of the United States within the meaning of Section 143.105, RSMo Cum. Supp. 1957.

3. The ready reservist attending drill period is not on active duty with the Armed Forces of the United States within the meaning of Section 143.105, RSMo Cum. Supp. 1957.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James E. Conway.

Yours very truly,

JOHN M. DALTON  
Attorney General

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