

OPTOMETRIST: Members in armed forces of the United States
FEES: government are not required to pay renewal fees.

October 16, 1942

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Dr. N. R. Hatfield
Secretary,
State Board of Optometry
Edina, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of October 8, 1942, which reads:

"At the meeting of the Missouri State Board of Optometry it was voted that the yearly renewal fees of our Registered Optometrists in the Armed Forces be waived for the duration. This vote was taken subject to your decision and if it does not conflict with the law and other States are doing this, may we have your opinion at an early date? I would like to get this word soon that I may answer the numerous inquiries that come to this office."

Section 10120, R. S. Missouri 1939, provides when optometrists in this State must renew their certificate of registration and reads:

"Every registered optometrist and every registered apprentice who continues in active practice or service, shall, annually, on or before the first day of April, renew his certificate of registration and pay the required renewal fee. Every certificate of registration

which has not been renewed during the month of April in any year shall expire on the first day of May in that year. A registered optometrist or a registered apprentice whose certificate of registration has expired may have his certificate of registration restored only upon payment of the required restoration fee. Any registered optometrist who retires from the practice of optometry for not more than five (5) years may renew his certificate of registration upon payment of all lapsed renewal fees."

The above provision requires a renewal fee annually of every registered optometrist and apprentice who continues in active practice or service. "Active" has been defined by Webster's New International Dictionary, Second Edition as follows:

"3. In action; actually proceeding; working; in force; - opposed to quiescent, dormant, or extinct; as, active laws, assets, or hostilities; an active volcano.

"5. Requiring or implying action or exertion; - opposed to sedentary or tranquil; as, active employment or service."

In *United States vs. Woodworth*, 36 Federal Supplement 645, l.c. 646, Woodworth was discharged from the army. He reenlisted in the Medical Enlisted Reserve Corps, returned to college where he completed his dental education and subsequently reentered active service of the army. The court held that he was not in "active service" between the dates of such discharge and reentry and in so holding the court said:

"The main question is then whether or not between November 1, 1917 and October 11, 1918, Woodworth was in the active service of the United States Army.

"During that period this man was separated from his former outfit, was not identified with any other unit of the army, was not under the immediate direction of any superior officer, was paying his own expenses for his dental education, and was merely a member of the army reserves. Active service does not necessarily mean actual service, but does mean service performed at the direction of a superior officer or officers while receiving the emoluments to which a soldier is entitled. It does not include one who has separated himself from the army to follow his own pursuits, even though he may be subject to call to active service. The distinction between a reservist and one on active service has been recognized in opinion of the Attorney General when in listing the various types of active service he particularly excepted the reservist from such classification. See 7 Op. Atty. Gen. 149; 32 Op. Atty. Gen. 12; and 32 Op. Atty. Gen. 193. See also, State v. Peake, 22 N.D. 457, 135 N. W. 197, 40 L.R.A., N.S., 354; State v. Josephson, 120 La. 433, 45 So. 381; Redd v. American Cent. Life Ins. Co., 200 Mo. App. 383, 207 S. W. 74; Betty v. State, 188 Ala. 211, 66 So. 457."

Also, in Caswell et al. vs. Somerville Retirement System, 28 N. E. (2) 231, 1. c. 232; 306 Mass. 373; the court held that individuals who were appointed and confirmed as police officers prior to December 27, 1930, but whose daily routine service and pay did not actually begin until January 11, 1931, were not in active service on January 1, 1931, when the Retirement System took effect and were not covered by statute in effect and force on January 1, 1931, and prior thereto, providing for pensioning of police officers when retired from active service, so that deductions were properly made from their salaries under the Somerville Retirement System. In so holding the court said:

"Even though the plaintiffs were police officers on January 1, 1931, that was

not enough to place them within the pensionable class under G.L. (1921) c. 32, Sec. 83. That statute provides for the pensioning of a police officer only when he is retired 'from active service'. To be retired from active service, one must already have been in active service. Until a police officer is in active service he is not within the class which upon disability may be pensioned under that statute. See *Dunn v. Commissioner of Public Service*, 281 Mass. 376, 183 N.E. 889, 87 A.L.R. 998. When the Somerville Retirement System took effect on January 1, 1931, these plaintiffs were not yet in active service, and consequently were not 'covered' by G.L. (1921) c. 32, Sec. 83. They therefore fell within the Somerville Retirement System."

In *State vs. Josephson*, -45 So. 381, l. c. 381-382; 120 La. 433; the court in holding that a member of the militia was not in active service of the State and was still subject to the jurisdiction of civil courts when not ordered into active service by the Governor said:

"At the time of the alleged offense defendant's company had not been 'ordered into active service' by the Governor.

"But the learned counsel for defendant contends that the state National Guard is in 'active service' all the time, and in support of this contention refers to section 99 of the act by which members of the guard, after four years of 'active service', are exempt from jury duty. But, manifestly, the statute contemplates two kinds of 'active service'-- the 'active service' which follows upon call of the Governor, and the 'active service' which consists in merely being a member of the organization in good standing. The former

withdraws the militiamen from the jurisdiction of the civil courts; the latter does not. In fact, the contention that a member of the militia is all the time not amenable to the powers of the courts can hardly be serious."

If this Department should hold that a member of the armed forces should be required to pay this renewal fee while in the active service of the armed forces, and while it is physically impossible for him to actively practice optometry in this State even if he so desired, it would be in effect declaring the words, "who continues in active practice or service" (Section 10120, supra.) superfluous and meaningless.

One of the cardinal rules of statutory construction is that effect should be given to all the provisions of a statute so that no part or section will be inoperative, superfluous, contradictory or conflicting. The court in *Graves vs. Little Tarkio Drainage District No. 1*, 134 S. W. (2) 70, 1. c. 78, 345 Missouri 557; announced this rule and said:

"* * * * * 'It is an elementary and cardinal rule of construction that effect must be given, if possible, to every word, clause, sentence, paragraph, and section of a statute, and a statute should be so construed that effect may be given to all of its provisions, so that no part, or section, will be inoperative, superfluous, contradictory, or conflicting, and so that one section, or part, will not destroy another. Sutherland on Statutory Construction (2d.Ed.) 731, 732, Section 380. Moreover, it is presumed that the Legislature intended every part and section of such a statute, or law, to have effect and to be operative, and did not intend any part or section of such statute to be without meaning or effect.' State ex rel. Dean v. Daues, 321 Mo. 1126, 1151, 14 S. W. 2d. 990, 1002.* * * * *"

Apparently it was the intention of the General Assembly in enacting Section 10120, supra, that no registered optometrist or

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registered apprentice shall be required to pay renewal fees who does not continue to be actively engaged in the practice of optometry, with this exception, when a registered optometrist retires from practice. Such a construction gives meaning to all provisions of Section 10120, supra, and is reasonable. Certainly, it will be conceded that such optometrists cannot be actually practicing their profession while enlisted in the armed forces of this country for the duration of this war and since the renewal fee applies only to such optometrists who continue the active practice or service as optometrists, it is the opinion of this Department that the Missouri State Board of Optometry is not required under the law to collect renewal fees from such persons in the armed forces.

Respectfully submitted

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Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General of Missouri

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