February 11, 2000

OPINION NO. 2000-001

The Honorable William E. Peelle
Clinton County Prosecuting Attorney
69 North South Street, Suite 200
Wilmington, Ohio 45177

Dear Prosecutor Peelle:

You have requested an opinion concerning the duty of a county or a soil and water conservation district, in calculating its employees' vacation benefits, to grant its employees credit for prior service in the Ohio National Guard.[1] Your letter states that two employees, one hired in 1986 and one hired in 1992, recently requested credit for previous service with the Ohio National Guard. You ask whether these employees are entitled to receive prior service credit only for purposes of calculating vacation benefits earned after the employees gave notice of their prior service credit or whether such credit must be applied retroactively to an earlier date.

Vacation leave is provided for county employees by R.C. 325.19.[2] As explained in 1994 Op. Att'y Gen. No. 94-008 at 2-30:

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[1] Pursuant to R.C. 1515.11, the county prosecuting attorney is the legal adviser of a soil and water conservation district. Also, pursuant to R.C. 1515.09, employees of a soil and water conservation district are entitled to receive "the vacation leave benefits that are provided in [R.C. 325.19]." *See* 1979-1980 Ohio Laws, Part II, 3200 (Am. Sub. H.B. 655, eff. May 2, 1980) (amending R.C. 1515.09 and entitling soil and water conservation district employees to receive vacation benefits as provided in R.C. 325.19). Because both employees about whom you ask have been entitled at all relevant times to receive vacation leave in accordance with R.C. 325.19 and the corresponding prior service credit provision in R.C. 9.44, this opinion will discuss the scheme governing the calculation of vacation benefits generally for county employees. For ease of discussion, we will not separately refer to employees of a soil and water conservation district.

[2] R.C. 325.19, which establishes vacation benefits for county employees, states in part:

> Pursuant to R.C. 325.19(A)(1), the number of hours of annual vacation leave to which a full-time county employee is entitled depends upon the number of hours in that employee's standard workweek, as well as the employee's number of years of prior service; R.C. 325.19(A)(2) and (3) decrease the amount of vacation leave provided to a full-time county employee who works a standard workweek of less than forty hours or who is in active pay status in a biweekly period for less than eighty hours or the number of hours considered as full time by the appointing authority. (Footnote omitted.)

> (A)(1) The granting of vacation leave under division (A)(1) of this section is subject to divisions (A)(2) and (3) of this section. Each full-time employee in the several offices and departments of the county service, including full-time hourly rate employees, after service of one year with the county or any political subdivision of the state, shall have earned and will be due upon the attainment of the first year of employment, and annually thereafter, eighty hours of vacation leave with full pay. One year of service shall be computed on the basis of twenty-six biweekly pay periods. A full-time county employee with *eight or more years of service with the county or any political subdivision* of the state shall have earned and is entitled to one hundred twenty hours of vacation leave with full pay. A full-time county employee with *fifteen or more years of service with the county or any political subdivision* of the state shall have earned and is entitled to one hundred sixty hours of vacation leave with full pay. A full-time county employee with *twenty-five years of service with the county or any political subdivision* of the state shall have earned and is entitled to two hundred hours of vacation leave with full pay. Such vacation leave shall accrue to the employee at the rate of three and one-tenth hours each biweekly period for those entitled to eighty hours per year; four and six-tenths hours each biweekly period for those entitled to one hundred twenty hours per year; six and two-tenths hours each biweekly period for those entitled to one hundred sixty hours per year; and seven and seven-tenths hours each biweekly period for those entitled to two hundred hours per year. (Emphasis added.)

R.C. 325.19(A)(2) and (3) provide for the reduction of vacation benefits for persons employed for less than a standard forty-hour work week. R.C. 325.19(B) authorizes a board of county commissioners, by resolution, to grant certain vacation benefits to part-time county employees.

The vacation leave provisions of R.C. 325.19 may, however, be superseded in certain instances by the terms of a collective bargaining agreement, *see generally* 1998 Op. Att'y Gen. No. 98-028 at 2-149 to 2-151, or by an alternative policy of vacation leave governed by R.C. 325.19(F), *see generally* 1999 Op. Att'y Gen. No. 99-039. We will assume for purposes of this opinion that the employees about whom you ask are not subject to a collective bargaining agreement or an alternative schedule of leave under R.C. 325.19(F), but are receiving their vacation benefits as full-time county employees in accordance with R.C. 325.19(A).

Thus, R.C. 325.19(A)(1) entitles an employee to receive credit for purposes of calculating the amount of his vacation leave for prior service "with the county or any political subdivision of the state."

In determining the amount of prior service credit to which a county employee is entitled for vacation leave purposes, we must also consider R.C. 9.44, which states in pertinent part:

> (A) Except as otherwise provided in this section, *a person employed*, other than as an elective officer, *by* the state or *any political subdivision* of the state, earning vacation credits currently, *is entitled to have his prior service with any of these employers counted as service with the state or any political subdivision of the state, for the purpose of computing the amount of his vacation leave.* The anniversary date of his employment for the purpose of computing the amount of his vacation leave, unless deferred pursuant to the appropriate law, ordinance, or regulation, is the anniversary date of such prior service. (Emphasis added.)

Thus, except as provided in R.C. 9.44(B) and (C),[3] R.C. 9.44 entitles, among others, an employee currently earning vacation leave under R.C. 325.19 to receive credit, for purposes of computing the employee's vacation benefits, for prior service not only with the county or another political subdivision but also with the state.[4]

The prior service for which the employees you describe are claiming credit under R.C. 9.44 is for time served in the Ohio National Guard prior to commencing their current employment. It is well settled that service with the Ohio National Guard constitutes service with the state for purposes of R.C. 9.44. *See State ex rel. North Olmsted Fire Fighters Ass'n v. City of North Olmsted*, 64 Ohio St. 3d 530, 532, 597 N.E.2d 136, 139 (1992) ("R.C. 124.11(A)(6) plainly provides that all officers and enlistees in the state military are unclassified Ohio civil servants. Therefore, we also hold that National Guard duty is prior state service for the purpose of R.C. 9.44"); 1981 Op. Att' y Gen. No. 81-066. Thus, R.C. 9.44 now entitles an employee who earns vacation benefits under R.C. 325.19(A) to receive vacation benefits based upon the

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[3] R.C. 9.44(B) and (C) prescribe exceptions to the prior service credit provisions of R.C. 9.44(A) applicable to certain municipal and township employees and to certain persons who again become public employees after having "retired in accordance with the provisions of any retirement plan offered by the state."

[4] As concluded in *State ex rel. Int'l Union of Operating Engineers v. Simmons*, 58 Ohio St. 3d 247, 569 N.E.2d 886 (1991), a collective bargaining agreement that specifically limits vacation accrual rights to that of continuous service with the employer supersedes the prior service credit provisions of R.C. 9.44. We will assume for purposes of discussion that the employees about whom you ask are not subject to a collective bargaining agreement containing such a limitation.

number of years of the employee's prior service with the state, including the Ohio National Guard, in addition to the employee's prior service with the county or any political subdivision.

Your specific concern is when the right to receive prior service credit granted by R.C. 9.44 accrues to an employee who receives vacation leave under R.C. 325.19(A). The right to receive prior service credit under R.C. 9.44(A) is granted to "a person employed, other than as an elective officer, by the state or any political subdivision of the state, *earning vacation credits currently*." (Emphasis added.) Thus, at any time an employee is earning vacation benefits under R.C. 325.19(A), he is entitled to receive prior service credit for that purpose as prescribed by R.C. 9.44(A).

The time and manner in which a county employee begins earning vacation benefits under R.C. 325.19 was explained in 1994 Op. Att'y Gen. No. 94-008 at 2-30 to 2-31, as follows:

> [I]n accordance with R.C. 325.19(A)(1), a full-time county employee who has completed one year of *service* with the county or any political subdivision, upon attainment of the first year of *employment*, and annually thereafter, "shall have earned and will be due . . . eighty hours of vacation leave with full pay." Thus, a full-time county employee does not have any vacation leave placed to his credit until he has completed one year of "service" and has "attain[ed] . . . the first year of employment." Upon completion of the first year of employment, the employee is credited with a lump sum of vacation leave, determined in accordance with R.C. 325.19(A)(1), (2), and (3); thereafter, the employee accrues vacation leave on a biweekly basis. (Footnote omitted; emphasis in original.)

Thus, in accordance with R.C. 325.19(A), at the time an employee begins earning vacation credits, *i.e.*, when the employee has completed the first year of full-time employment, he becomes entitled by R.C. 9.44(A) to receive credit for prior service with the Ohio National Guard for purposes of computing the amount of vacation leave to which he is entitled. *See* 1985 Op. Att'y Gen. No. 85-035 (syllabus, paragraph one) ("[p]ursuant to R.C. 325.19, a full-time county employee does not accrue vacation benefits during his first year of employment").

Your particular concern arises from various amendments to R.C. 9.44 since its enactment in 1970. As originally enacted in 1969-1970 Ohio Laws, Part II, 1917 (Sub. H.B. 202, eff. Aug. 27, 1970), R.C. 9.44 authorized employees of the state and its political subdivisions who were then earning vacation benefits to receive credit for prior service with the state or any political subdivision for purposes of calculating their vacation benefits.[5]

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[5] At the time R.C. 9.44 was enacted in 1969-1970 Ohio Laws, Part II, 1917 (Sub. H.B. 202, eff. Aug. 27, 1970), former R.C. 325.19, *see* 1969-1970 Ohio Laws, Part III, 2966 (Am. H.B. 1140, eff. May 26, 1970), based the amount of a county employee's vacation leave upon the employee's number of years of "county service."

The prior service credit authorized by R.C. 9.44 for county employees, among others, was changed in 1987-1988 Ohio Laws, Part II, 2564 (Am. Sub. H.B. 178, eff. June 24, 1987).[6] Am. Sub. H.B. 178 enacted R.C. 9.44(B)(2), pursuant to which a person initially employed by a county on or after July 5, 1987, was entitled to receive prior service credit for purposes of computing vacation leave only for prior service with a county. *See* 1989 Op. Att'y Gen. No. 89-096 (syllabus, paragraph three) ("[p]ursuant to R.C. 9.44(B)(1), a person whose first employment with a county occurs on or after July 5, 1987, shall have only his prior service with a county counted as service for the purpose of computing the amount of his vacation leave while he is employed, other than as an elective officer, by a county and is earning vacation credits"); 1988 Op. Att'y Gen. No. 88-089 (syllabus, paragraph three) (stating in part, "a person who is initially employed by a county on or after July 5, 1987, however, is limited by R.C. 9.44(B)(2) to receiving such service credit only for prior service with a county"). Thus, anyone who was initially employed by a county on or after July 5, 1987, was not entitled to receive credit for vacation purposes for prior service with the state, including service with the Ohio National Guard.[7]

R.C. 9.44 was again amended in 1995-1996 Ohio Laws, Part V, 8516 (Am. Sub. S.B. 99, eff. Oct. 25, 1995) to read in its current form.[8] Specifically deleted from R.C. 9.44 by Am. Sub. S.B. 99 was division (B)(2), concerning prior service credit for county employees. As of October 25, 1995, therefore, pursuant to R.C. 9.44(A), all county employees who were earning vacation credits, regardless of the date on which they were initially employed by the county,

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[6] Pursuant to R.C. 9.44(B), as amended by 1987-1988 Ohio Laws, Part II, 2564 (Am. Sub. H.B. 178, eff. June 24, 1987), "[t]o determine prior service for the purpose of computing the amount of vacation leave for a person initially employed on or after July 5, 1987, by … (2) A county, the person shall have only his prior service with a county counted…."

[7] The prior service credit for vacation purposes of those county employees who had been initially employed by the county prior to July 5, 1987, was not, however, affected by Am. Sub. H.B. 178. *See* 1988 Op. Att'y Gen. No. 88-089 (syllabus, paragraph three) (stating in part, "[e]xcept for a person initially employed by a county on or after July 5, 1987, a county employee is entitled to receive service credit pursuant to R.C. 325.19 for prior service with a county or any political subdivision of the state, and, pursuant to R.C. 9.44(A), for prior service with the state or any political subdivision, for purposes of calculating the amount of his vacation benefits under R.C. 325.19").

[8] Although the General Assembly also amended R.C. 9.44 in 1989-1990 Ohio Laws, Part IV, 5670 (Am. H.B. 552, eff. July 14, 1989), that amendment did not change the limitation contained in R.C. 9.44(B)(2) with respect to the calculation of prior service credit for county employees, and is not, therefore, relevant to this discussion.

were entitled to receive credit for vacation leave purposes for prior service with the state or any political subdivision.[9]

The various amendments to R.C. 9.44 since its enactment in 1970 have, therefore, resulted in county employees being entitled, on an inconsistent basis, to receive credit for prior service with the state for purposes of calculating their vacation leave benefits. From August 27, 1970, until July 5, 1987, county employees who were earning vacation benefits were entitled by former R.C. 9.44 to receive credit for vacation purposes for prior service with the state. Those persons initially employed by a county between July 5, 1987, and October 25, 1995, however, were entitled by former R.C. 9.44(B)(2) to receive credit for vacation purposes only for prior county service, while those persons employed by a county prior to July 5, 1987, remained entitled by then R.C. 9.44(A) to receive credit for vacation purposes for their prior state service. Finally, as of October 25, 1995, R.C. 9.44 was again amended and now entitles all county employees who are earning vacation benefits to receive credit for vacation purposes for prior service with the state.

In considering the effect of the amendments to R.C. 9.44, particularly Am. Sub. S.B. 99, we must bear in mind that, pursuant to R.C. 1.48, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." Thus, in applying the amendments to R.C. 9.44 by Am. Sub. S.B. 99 prospectively, a county employee who received vacation benefits under R.C. 325.19, but who was initially employed by a county between July 5, 1987, and October 25, 1995, became entitled, on or after October 25, 1995, to include credit for prior service with the state, including the Ohio National Guard, for purposes of calculating any vacation benefits earned. *See Ebert v. Stark County Board of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980) (an employer's authority to alter its sick leave policy could operate prospectively only, and could not operate to retroactively revoke previously accumulated benefits).

Let us now apply the foregoing to the particular employees about whom you ask. One such individual was initially employed by the county in 1992. Because his initial employment occurred after July 5, 1987, and prior to October 25, 1995, he was limited by former R.C. 9.44(B)(2), *see* Am. Sub. H.B. 178, to including only prior service with a county for purposes of calculating any vacation benefits earned until October 25, 1995. As of October 25, 1995, however, provided the employee was then earning vacation benefits, R.C. 9.44(A) entitled him to

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[9] Based upon the amendment of R.C. 9.44 in 1995-1996 Ohio Laws, Part V, 8516 (Am. Sub. S.B. 99, eff. Oct. 25, 1995), we must limit the conclusion set forth in 1989 Op. Att'y Gen. No. 89-096 (syllabus, paragraph three) to those individuals whose initial employment with a county occurred on or after July 5, 1987, but prior to October 25, 1995, the effective date of Am. Sub. S.B. 99. For the same reason, the exception noted in syllabus, paragraph three of 1988 Op. Att'y Gen. No. 88-089 for persons initially employed by a county on or after July 5, 1987, applies only to such persons hired prior to October 25, 1995. We, therefore, also limit 1988 Op. Att'y Gen. No. 88-089 (syllabus, paragraph three).

receive credit for prior service with the state, including the Ohio National Guard, for purposes of calculating any vacation leave earned thereafter in his county employment. *See generally, e.g.*, 1989 Op. Att'y Gen. No. 89-088 (syllabus, paragraph five) ("[i]f an employee of a board of elections who now serves on a full-time permanent basis was not properly granted service credit for work performed on an intermittent basis between 1964 and 1969, the board of elections may correct its records to grant such credit and may compute the employee's vacation leave benefits on the basis of the corrected records; if the employee has not been credited with all vacation leave to which she was entitled, the board of elections may modify its records to reflect the appropriate accrual of vacation leave"); 1987 Op. Att'y Gen. No. 87-067 (syllabus, paragraph two) ("[a] county appointing authority who has not credited his full-time employees … with the entire amount of vacation leave to which they became entitled upon the amendment of R.C. 325.19 in 1979-1980 Ohio Laws, Part I, 2542 (Am. H.B. 333, eff. May 13, 1980) has the implied authority to correct his payroll records to reflect the full amount of vacation benefits to which such employees have been entitled").

Let us now consider the individual whose initial employment occurred in 1986. At the time of this individual's initial employment, former R.C. 325.19 provided vacation leave to county employees in a manner similar to that currently in place, *i.e.*, vacation benefits were granted in amounts that increased in increments according to increases in the employee's years of service. *See* 1979-1980 Ohio Laws, Part I, 2542 (Am. H.B. 333, eff. May 13, 1980). Former R.C. 325.19 entitled full-time county employees, after service of one year, to receive eighty hours of vacation leave "upon the attainment of the first year of employment." *See* 1994 Op. Att'y Gen. No. 94-008. At the time of this individual's initial employment with the county in 1986, former R.C. 9.44, *see* Sub. H.B. 202, authorized county employees who were then earning vacation benefits, to receive credit for prior service with the state, including the Ohio National Guard, for purposes of calculating their vacation benefits. Because this employee was initially employed by the county after August 27, 1970, and prior to July 5, 1987, former R.C. 9.44, *see* Sub. H.B. 202, entitled the employee, upon completion of the first year of employment with the county, to receive credit for his prior service with the Ohio National Guard for purposes of calculating his vacation leave under R.C. 325.19. *See generally* note seven, *supra*.

Your request indicates that until recently, neither employee indicated to the county that he had previously served in the Ohio National Guard. Because these employees have been paid vacation leave by the county at a rate that does not include their prior service with the Ohio National Guard, you question whether the county now has an obligation to recalculate these employees' vacation benefits from the time they first became eligible for such prior service credit.

It is well settled that, "R.C. 9.44 imposes a mandatory duty on any political subdivision of the state of Ohio to credit employees with prior service vacation credit, absent a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 which specifically excludes rights accrued under R.C. 9.44." *State ex rel. Clark v. Greater Cleveland Regional Transit Authority*, 48 Ohio St. 3d 19, 548 N.E.2d 940 (1990) (syllabus); *see State ex rel. North Olmsted Fire Fighters Ass'n v. City of North Olmsted*, 64 Ohio St. 3d at 531-32, 597 N.E.2d at 138 ("R.C.

9.44 requires a current public employer to treat qualifying prior state service as if it were service with that employer, such that the value of the service, if any, is determined by the current employer's vacation leave policy"). In light of the length of time between the date on which the individuals you describe were initially employed by the county and the time they requested credit for their previous National Guard service, however, you question how far back the county must go in granting these employees credit for their prior state service for purposes of calculating their vacation leave.

In *State ex rel. North Olmsted Fire Fighters Ass'n v. City of North Olmsted*, the court considered a similar question, and held, in pertinent part, "R.C. 2305.07 limits the actionability of R.C. 9.44 claims." 64 Ohio St. 3d at 532, 597 N.E.2d at 138. The *North Olmsted* court thus acknowledged that, although R.C. 9.44 imposes a duty upon public employers to treat prior state service as if it were prior service with that employer for purposes of calculating employee vacation benefits, the six-year statute of limitations established by R.C. 2305.07 applies to claims for prior service credit under R.C. 9.44. Accordingly, the employee in that case recovered uncredited vacation benefits to which he had been entitled, but only for the six years prior to the filing of a complaint for recovery.

The *North Olmsted* court also addressed the employer city's claim that laches prevented the employee's recovery of vacation benefits that he had not received due to the city's failure to give him credit for his prior service with the Ohio National Guard, and stated:

> The elements of a laches defense are "(1) [unreasonable] delay or lapse of time in asserting a right, (2) absence of an excuse for such delay, (3) knowledge, actual or constructive, of the injury or wrong, and (4) prejudice to the other party." *Kennedy v. Cleveland* (1984), 16 Ohio App.3d 399, 403, 16 OBR 469, 472, 476 N.E.2d 683, 688. The court of appeals held that the city had not proved the last of these elements because no evidence in the record supported the allegation of "budgetary prejudice." Where no evidence of material prejudice is presented, we have said that a court of appeals properly rejects laches as a defense. *Madden, supra*, 42 Ohio St.3d at 90, 537 N.E.2d at 649-650.
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> Courts have discretion to find laches in mandamus actions irrespective of whether the writ is barred by the statute of limitations. *State ex rel. Moore v. Sanders* (1981), 65 Ohio St.2d 72, 74-75, 19 O.O.3d 264, 265-266, 418 N.E.2d 1339, 1340-1341. Here, however, we agree that North Olmsted has not satisfied its burden of proof. We, therefore, also affirm the court of appeals' rejection of the city's laches defense.

64 Ohio St. 3d at 536-37, 597 N.E.2d at 142. The *North Olmsted* court thus left open the possibility that an employer may, in a particular case, employ the defense of laches as a basis for not allowing an employee to recover uncredited vacation benefits to which the employee had

been entitled.[10] *See also State ex rel. Caspar v. City of Dayton*, 53 Ohio St. 3d 16, 558 N.E.2d 49 (1990).

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. An individual who was initially employed by a county in 1992 became entitled to receive credit for vacation purposes for prior service with the state, including the Ohio National Guard, either on October 25, 1995, or the date on which he began earning vacation benefits, whichever is later. (1989 Op. Att'y Gen. No. 89-096 (syllabus, paragraph three) and 1988 Op. Att'y Gen. No. 88-089 (syllabus, paragraph three), limited.)

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[10] It is our understanding that neither employee has filed an action to recover the uncredited vacation benefits to which he is entitled under R.C. 9.44. While it appears that the six-year statute of limitations established by R.C. 2305.07 would apply to any such action, the question of whether laches would prevent either employee from recovering any uncredited vacation benefits in a judicial proceeding, however, involves questions of fact that cannot be determined in an opinion of the Attorney General.

2. An individual who was initially employed by a county in 1986 became entitled to receive credit for vacation purposes for prior service with the state, including the Ohio National Guard, at the time he began earning vacation credits under R.C. 325.19.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

February 11, 2000

The Honorable William E. Peelle
Clinton County Prosecuting Attorney
69 North South Street, Suite 200
Wilmington, Ohio 45177

SYLLABUS: 2000-001

1. An individual who was initially employed by a county in 1992 became entitled to receive credit for vacation purposes for prior service with the state, including the Ohio National Guard, either on October 25, 1995, or the date on which he began earning vacation benefits, whichever is later. (1989 Op. Att'y Gen. No. 89-096 (syllabus, paragraph three) and 1988 Op. Att'y Gen. No. 88-089 (syllabus, paragraph three), limited.)

2. An individual who was initially employed by a county in 1986 became entitled to receive credit for vacation purposes for prior service with the state, including the Ohio National Guard, at the time he began earning vacation credits under R.C. 325.19.