

OPINION NO. 84-043**Syllabus:**

Pursuant to R.C. 5919.02, an individual who holds a commission as a general officer in the national guard of another state may not be appointed to the position of general officer of the Ohio National Guard.

To: Raymond Galloway, Adjutant General, Worthington, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 31, 1984

I have before me your request for my opinion on whether the Governor of Ohio may appoint an individual who holds a commission as a general officer of the national guard of a state other than Ohio to the position of general officer of the Ohio National Guard.

The Ohio National Guard is a part of the state militia, which is a standby reserve of citizens upon which the government ultimately relies to enforce its laws. See U.S. Const. art. I, §8, cl. 15 and cl. 16; R.C. Chapter 5923. Pursuant to R.C. 5923.01:

The militia of the state shall consist of all able-bodied citizens of the state, who are more than seventeen years of age, and not more than sixty-seven years of age except as provided in section 5923.03 of the Revised Code. The militia shall be divided into four classes:

- (A) The Ohio national guard;
- (B) The Ohio naval militia;
- (C) The Ohio defense corps;
- (D) The unorganized militia.

In particular, the Ohio National Guard consists of "such organizations and units as are, under the laws of the United States and the regulations promulgated in pursuance thereof, prescribed as the portion of the national guard of the United States apportioned and assigned to this state in accordance with troop basis approved by the governor of Ohio." R.C. 5919.01. See R.C. 5923.03.

Supplementary telephone conversations with your office have revealed that general officers are commissioned officers who command combat-type units. R.C.

5919.06 sets forth the classes of persons from which commissioned officers must be chosen by providing:

Persons commissioned as officers of the Ohio national guard shall be selected only from the following classes: officers or enlisted men of the national guard; officers, active or retired, reserve officers, and former officers of the armed forces of the United States; persons who hold certificates of eligibility for commission; enlisted men and former enlisted men of the armed forces of the United State who have received an honorable discharge; graduates of the United States military, naval, and air force academies; graduates of the reserve officer training corps; and for the technical branches and services, such other civilians as may be specifically qualified for duty therein.

R.C. 5919.02 further provides for the appointment of commissioned officers as follows:

All commissioned officers of the Ohio national guard shall be appointed by the governor as commander in chief, upon the recommendation of the commanding officers of the organizations to which such officers are to be assigned for duty, and be commissioned according to grade in the department, corps, arm, or service in which they are appointed. No officer shall be commissioned until he has successfully passed tests as to his physical, moral, and professional fitness as prescribed by federal law for federal recognition as an officer. (Emphasis added.)

See R.C. 5919.05 (requiring commissioned officers to take and subscribe to the oath set forth in that section. See also U.S. Const. art. I, §8, cl. 16 (reserving to the states the power to appoint officers of the national guard); 1917 Op. Att'y Gen. No. 618, vol. II, p. 1714 (summarizing the steps which must be followed in appointing commissioned officers).

R.C. 5919.071 provides: "Any person, commissioned. . .as an officer in the Ohio national guard, shall hold his commission. . .during the period of his federal recognition. The termination or withdrawal by the department of defense of the federal recognition of any commissioned. . .officer shall terminate his commission in the Ohio national guard." Federal recognition of commissioned officers is provided for in 32 U.S.C. §§305-310. See, e.g., 32 U.S.C. §305 (setting forth the qualifications persons must meet in order to become eligible for federal recognition as a commissioned officer of the National Guard); 32 U.S.C. §307 (imposing additional requirements for eligibility for federal recognition, including the successful completion of examinations for physical, moral, and professional fitness); 32 U.S.C. §307(c) (issuance of a certificate of eligibility for federal recognition for a particular office). See also 32 U.S.C. §312 (appointment oath); 32 U.S.C. §313 (age limitations); 32 U.S.C. §323 (withdrawal of federal recognition); 32 U.S.C. §324 (discharge of officers).

R.C. 5919.02 goes on to provide requirements for the appointment of general officers in addition to those requirements imposed for the appointment of commissioned officers, as follows:

General officers of the line shall be appointed from the federally recognized eligible commissioned officers of the national guard of this state, who shall have served at least fifteen years as a commissioned officer in the national guard or in another component of the armed forces of the United States, or both. At least ten years of such service shall have been with troops. (Emphasis added.)

From the foregoing statutes it is clear that the Governor's power to appoint commissioned general officers of the line of the Ohio National Guard is limited by the various provisions relating to the appointment of commissioned officers and the specific requirement contained in R.C. 5919.02 that general officers of the Ohio National Guard shall be appointed from those federally recognized eligible

commissioned officers of this state's national guard.¹ While a person who is not a member of the Ohio National Guard may be commissioned as an officer of the Ohio National Guard, as long as the requirements of R.C. Chapter 5919 and federal law are met, R.C. 5919.02 specifically requires that general officers of the Ohio National Guard be selected from the federally recognized eligible commissioned officers of the Ohio National Guard. The requirement that a general officer must have served at least fifteen years as a commissioned officer in the national guard may be fulfilled by service in another state's national guard. In order to be appointed as a general officer of the Ohio National Guard, however, a person must currently be a commissioned officer of the Ohio National Guard.

Accordingly, it is my opinion, and you are advised, that pursuant to R.C. 5919.02, an individual who holds a commission as a general officer in the national guard of another state may not be appointed to the position of general officer of the Ohio National Guard.

¹ Pursuant to R.C. 5919.04 the Governor has the authority to issue regulations governing the appointment of officers of the Ohio national guard. However, no such regulations have been promulgated and any such regulations promulgated under the authority of R.C. 5919.04 may not conflict with the statutory provisions which govern the appointment of commissioned officers of the Ohio National Guard. See Athens Home Telephone Co. v. Peck, 158 Ohio St. 557, 110 N.E.2d 571 (1953).