

OPINION NO. 87-030**Syllabus:**

Except in the circumstances enumerated in R.C. 5919.34(D), the Adjutant General may seek repayment of an educational grant from a former member of the Ohio National Guard who has failed to complete the term of enlistment he was serving at the time the grant was paid on his behalf under that section, but only for those grants made on or after July 1, 1983.

To: Raymond R. Galloway, Adjutant General's Department, Worthington, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 29, 1987

I have before me your request for my opinion concerning the application of R.C. 5919.34(D) which authorizes the Adjutant General to bring legal action for repayment of educational grants paid on behalf of National Guard members who subsequently fail to complete their terms of enlistment.

R.C. 5919.34 establishes a program in which National Guard members who meet certain criteria are eligible for educational grants to attend eligible institutions of higher education as full-time undergraduate students. This program originated in 1978, when the General Assembly enacted R.C. 5910.07 in 1977-1978 Ohio Laws, Part II, 2156 (Am. H.B. 228, eff. Feb. 1, 1978). Since the enactment of R.C. 5910.07 (currently at R.C. 5919.34), the scheme for providing educational grants in conjunction with the Ohio National Guard program has been amended several times.¹ The amendment about which you ask became effective July 1, 1983, and added the following language to R.C. 5919.34:

(D)Except as otherwise provided in this section, a member of the Ohio national guard who fails to complete the term of enlistment he was serving at the time an educational grant was paid on behalf of him under this section is liable to this state for repayment of all educational grants paid on behalf of him under this section, plus interest at the rate of ten per cent per annum calculated from the dates the grants were paid. The adjutant general may recover in a civil action the amount of the grants and the interest provided for in this section and the expenses incurred in prosecuting the action, including court costs and reasonable attorneys' fees. If the attorney general represents the adjutant general in such action, court costs and reasonable attorneys' fees awarded by the court, based upon the time spent preparing and presenting the case, shall be paid to the general revenue fund. A member of the national guard is not liable under this division if his failure to complete the term of enlistment he was serving at the time an educational grant was paid on behalf of him under this section is due to his death, discharge from the national guard due to his disability, or his enlistment, for a term not less than his remaining term in the national guard, in the active or reserve forces of the United States armed forces.

1983-1984 Ohio Laws, Part II, 2872, 3249-50 (Am. Sub. H.B. 291, eff. July 1, 1983).

R.C. 5919.34(D) thus authorizes the Adjutant General, upon the failure of a grantee to complete the term of enlistment he was serving at the time a grant was made, to recover "the amount of the grants and the interest provided for in this

¹ 1979-1980 Ohio Laws, Part I, 1915, 2119 (Am. Sub. H.B. 204, eff. July 30, 1979); 1983-1984 Ohio Laws, Part II, 2872, 3248 (Am. Sub. H.B. 291, eff. July 1, 1983) (renumbering R.C. 5910.07 as R.C. 5919.34); H.B. 504, 116th Gen. A. (1986) eff. Sept. 8, 1986).

section and the expenses incurred in prosecuting the action, including court costs and reasonable attorneys' fees." R.C. 5919.34(D) imposes upon such a grantee liability to the state "for repayment of all educational grants paid on behalf of him under this section, plus interest at the rate of ten per cent per annum calculated from the dates the grants were paid." Prior to this amendment, R.C. 5910.07, predecessor of R.C. 5919.34, imposed no obligation of repayment upon a person who failed to complete his term of enlistment. You question, therefore, whether R.C. 5919.34(D) authorizes the Adjutant General to recover for grants made on behalf of a person who fails to complete the term of enlistment he was serving at the time a grant was paid, even where such grant was paid prior to July 1, 1983, the date on which division (D) was added to R.C. 5919.34.

Pursuant to R.C. 1.48, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." R.C. 1.48. Kiser v. Coleman, 28 Ohio St. 3d 259, 262, ___ N.E.2d ___, ___ (1986) ("[i]f there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment"). Since R.C. 5919.34(D) is not expressly retroactive, and since there is no indication that the General Assembly intended that statute have retroactive application, I must presume that it is intended to apply prospectively only. See generally Smith v. Ohio Valley Insurance Co., 27 Ohio St. 2d 268, 276, 272 N.E.2d 131, 136 (1971), cert. denied, 405 U.S. 921 (1972) (note 3, giving illustrations of language expressing a clear intention that the statute apply retrospectively). In order to read R.C. 5919.34(D) as having only a prospective application, the Adjutant General's authority must be viewed as being limited to seeking repayment of those educational grants made after July 1, 1983.

Support for this conclusion is found in Kiser v. Coleman, supra, in which the Ohio Supreme Court examined the possible retroactive application of R.C. 5313.07 and 5313.08 which deal with the rights of vendors and vendees under land installment contracts. The court noted that, prior to the enactment of R.C. Chapter 5313., the law "granted to vendors of a land contract the right to declare the vendee's forfeiture for breach of such land contract without legal proceedings where such right was contractually agreed upon by the parties....Further, such forfeiture became effective upon notice....Judicial relief was limited to equitable considerations alone" (citations omitted). 28 Ohio St. 3d at 261, ___ N.E.2d at ___. The enactment of R.C. 5313.07 and 5313.08, however, changed the common law and limited the availability of forfeitures to specific circumstances. After finding that nothing in the statutes under examination indicated the legislature's intent that the statutes have other than prospective application, the court presumed, pursuant to R.C. 1.48, that the statutes were not intended to operate retrospectively.

The court in Kiser then went on to analyze whether retroactive application of R.C. 5313.07 and 5313.08 would violate Ohio Const. art. II, §28. That section states in pertinent part: "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts...." The court summarized the prohibition of art. II, §28, as follows:

In French v. Dwiggin (1984), 9 Ohio St. 3d 32, 33, the court noted with approval that: "'Section 28, Article II***prohibiting the passage of retroactive laws, has application to laws affecting substantive rights, and has no reference to laws of a remedial nature providing rules of practice, courses of procedure or methods of review,***'" citing Kilbreath v. Rudy (1968), 16 Ohio St. 2d 70 [45 O.O.2d 370], paragraph one of the syllabus. Substantive law is defined in Kilbreath, at 72, as "that which creates duties, rights, and obligations," while procedural or remedial law "prescribes the methods of enforcement of rights or obtaining redress." Id.

28 Ohio St. 3d at 262, ___ N.E.2d at ___. Based upon this analysis, the court found that R.C. 5313.07 created new substantive rights, explaining that:

Upon payment of twenty percent of the purchase price or payments extending over five years, the defaulting vendee has been effectively granted an equity of redemption in the property. Further, the statutes would destroy the vested rights of [the vendors] to foreclosure according to the terms of their contract, i.e., upon default and without judicial process....The contractual right of possession which was in the vendee only so long as the contract was in force was established as a legal right in the vendee by R.C. 5313.07, which would exist despite the enforceability of the contract.

In Goodale v. Fennell (1875), 27 Ohio St. 426, this court effectively held that any change in the law which impairs the rights of either party, or amounts to a denial or obstruction of the rights accruing by contract, is repugnant to the Constitution. This the statutes at issue clearly do. Thus, the retroactive application of R.C. 5313.07 and 5313.08 to land installment contracts which were in existence at the time of the enactment of these statutes is violative of Section 28, Article II of the Ohio Constitution which prohibits the enactment of retroactive laws or laws impairing the obligation of contracts.

28 Ohio St. 3d at 263, ___ N.E.2d at ___. Like the situation considered in Kiser, it appears that application of R.C. 5919.34(D) to loans made prior to July 1, 1983, the effective date of that division, would affect substantive rights by now imposing upon the recipient of an educational grant an obligation which did not exist at the time the grant was made. Such application appears, therefore, to constitute a retroactive application of the law, as prohibited by Ohio Const. art. II, §28. Further, retroactive application of R.C. 5919.34(D) would grant the Adjutant General the power to recover for grants made at a time when there existed no authority for such recovery.

Although I am unaware of any case determining the nature of the right of an individual to receive a grant of this type, several cases have discussed similar types of statutory benefits and have found an individual's interest to accrue at the time the benefit is conferred. See, e.g., Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 34, 406 N.E.2d 1098, 1100 (1980) ("sick leave credits once earned became a vested right of plaintiffs. Such accrued credits

could not be retroactively revoked"); Herrick v. Lindley, 59 Ohio St. 2d 22, 391 N.E.2d 729 (1979) (syllabus) ("[p]ursuant to the language of R.C. 145.561 and 3307.711, Public Employees Retirement System and State Teachers Retirement System retirees have a vested right to receive a retirement allowance or similar benefit at the rate fixed by law when such benefit was conferred"); State ex rel. McLean v. Retirement Board, Public Employees Retirement Fund, 161 Ohio St. 327, 119 N.E.2d 70 (1954) (syllabus, paragraph one) ("[t]he right of a member of [PERS] to disability retirement allowance is governed by the statutes in force when such member becomes eligible for and is granted such retirement, and that right can not be reduced or denied by subsequent legislation"). As summarized in Lakenren v. Kosydar, 44 Ohio St. 2d 199, 201, 339 N.E.2d 814, 815 (1975), "[t]he prohibition against retroactive laws...is a bar against the state's imposing new duties and obligations upon a person's past conduct and transactions, and it is a protection for the individual who is assured that he may rely upon the law as it is written and not later be subject to new obligations thereby." See also Lawrence Railroad Co. v. Commissioners of Mahoning County, 35 Ohio St. 1 (1878) (syllabus, paragraph one) ("[t]he legislature can not create a liability for acts as to which there was no liability when they were committed..."). Thus, it appears that only those conditions imposed by statute at the time a grant is made may affect a grantee's rights and liabilities with respect to the receipt of such grant.

Based on the foregoing, it is my opinion, and you are hereby advised that, except in the circumstances enumerated in R.C. 5919.34(D), the Adjutant General may seek repayment of an educational grant from a former member of the Ohio National Guard who has failed to complete the term of enlistment he was serving at the time the grant was paid on his behalf under that section, but only for those grants made on or after July 1, 1983.