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SICK—VACATION CREDIT NOT EARNED DURING MILITARY LEAVE OF ABSENCE—§§121.161, 143.22, 143.29, 325.19, 5903.03, 5903.04, 5923.05, R.C.

SYLLABUS:

A state or county employee is not entitled to earn vacation leave credit under Sections 121.161 or 325.19, Revised Code, during the period of a military leave of absence (not a leave of absence under Section 5923.05, Revised Code) prior to being restored to former office or position under authority of Section 143.22, Revised Code, and/or Sections 5903.03 and 5903.04, Revised Code.

2. A state or county employee is not entitled to earn sick leave credit under Section 143.29, Revised Code, during the period of a military leave of absence (not a leave of absence under Section 5923.05, Revised Code) prior to being restored to former office or position under authority of Section 143.22, Revised Code, and/or Sections 5903.03 and 5903.04, Revised Code.

Columbus, Ohio, January 4, 1963

Hon. James T. Welsh, Director of State Personnel
Ohio Departments Building, Columbus, Ohio

Dear Sir :

I have received your request for my opinion on the following question :

“Is a State employee, or County employee, entitled to earn vacation leave credit as provided under Section 121.161 or 325.19 or sick leave credit as provided under Section 143.29, during the time which he is on a leave of absence for military service without pay, as provided in Sections 143.22, 5903.03 and 5903.04 of the Ohio Revised Code?”

The rights of public employees returned to their positions after periods of military service are treated in two separate chapters of the Revised Code. Section 143.22, Revised Code, provides in pertinent part as follows :

“Any person who, at the time he held or holds an office or position in the public service and has held such office or position for a period of ninety days or more, enlisted or enlists in the armed services of the United States subsequent to December 8, 1941, was or is commissioned in said armed services, or was or is called into said armed services in consequence of an act of congress, the call of the president of the United States, or due to his status in the reserve forces, national guard, or other similar defense organization shall, within thirty days after making application therefor, be restored to the office or position held by him immediately prior to his entering the armed services * * *

“* * * * * * * * *

“Whenever the time or period of employment in the classified service affects the status, rank, rating, increments, or qualifications in any respect, of any person who has served in the armed services of the United States or as contemplated by this section, such person shall be given credit for the period in which he served in such armed services as though such time were served in the course of his regular employment.

“* * * * * * * * *”

Section 5903.03, Revised Code, makes much the same provision as to restoration of public employees to their former positions after military service; and Section 5903.04, Revised Code, makes the following provision as to the rights of employees so restored :

“A public employee restored to a position in accordance with Section 5903.03 of the Revised Code shall not be discharged from such position without cause within one year after such restoration, and, without limiting other rights conferred by this section or other sections of the Revised Code, is considered to have been on furlough or leave of absence during his military duty. He shall be restored without loss of seniority, and upon promotion or advancement following completion of the period of employment required therefor, his seniority date in the advanced position shall place him ahead of all persons previously junior to him and who so advanced during his absence. He shall also, on reinstatement, be entitled to participate in insurance, including pension plans and medical insurance, and other benefits dependent on length of employment, including vacation pay and severance pay, as if he had remained continuously at work; * * *.”

I have recently rendered an opinion in which I concluded that in the case of conflict between Sections 143.22 and 5903.03, Revised Code, Section 143.22, being the latest expression of legislative intent, should be taken to be controlling (Opinion No. 3290, Opinions of the Attorney General for 1962, issued on September 19, 1962.) Sections 5903.03 and 5903.04, having the same legislative history and, in fact, originating in the same enactment of the legislature, viz. 124 Ohio Laws, 81, it is my opinion that the same rule should be applied as to any conflicts between Section 143.22 and Section 5903.04. As to the portions of these sections which apply to your questions, however, it is my opinion that there is no direct conflict and that effect should, therefore, be given to the provisions of each in arriving at an answer to those questions.

Authority for vacation leave for state employees appears in Section 121.161, Revised Code, and, for employees in the county service, in substantially identical language so far as is pertinent to your question, in Section 325.19, Revised Code. Said Section 121.161, Revised Code, provides in part:

“Each full-time state employee, including full-time hourly-rate employees, after service of one year with the state, is entitled, during each year thereafter, to two calendar weeks, excluding legal holidays, of vacation leave with full pay. Employees having fifteen or more years of service with the state are entitled, during each year thereafter, to three calendar weeks, excluding legal holidays, of vacation leave with full pay. Two calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the first anniversary of employment and annually thereafter, and three calendar weeks of leave

with pay will have been earned and will be due an employee upon attainment of the fifteenth anniversary of employment and annually thereafter. Upon separation from state service, except for cause, an employee shall be entitled to compensation for the prorated portion of any earned but unused vacation leave to his credit at time of separation.

“* * * * * * * *”

My immediate predecessor, in answer to the question whether, in the case of a state employee restored to his former position after military leave of absence, time spent in the military should be counted toward the fifteen years of service required to qualify for three weeks vacation, concluded that such time should be so counted (Opinion No. 2200, Opinions of the Attorney General for 1958, page 354). I am in accord with that conclusion and am also of the opinion that it applies with equal force to employees in the county service. I do not, however, construe either the statutes or that opinion to authorize the actual earning of vacation leave credit in the state or county service while the employee is on leave of absence for military service without pay.

I am aware that certain statutory language, particularly that about participation in “vacation pay” in Section 5903.04, *supra*, might be construed by some to authorize such earning of vacation leave credit. I am unwilling, however, to adopt such a construction for several reasons. First, the language is subject of the other construction having reference to qualification for three week’s vacation, which, in view of the general tenor of that section and the references in Section 143.22, *supra*, to “status” or “qualifications,” seems to me the more reasonable of the two. In addition, I would be most reluctant, absent explicit statutory language, to imply a right to paid vacation from the state or county for periods when the employee was actually being paid and given vacation leave by a different employer, viz. The United States Government. (For an example of such explicit pay authorization see Section 5903.05, Revised Code.) It can not be contended that the sections above quoted having to do with rights of restoration to office or position after military leave of absence, require the state or county to pay the employee’s salary for the period of that leave of absence. In my opinion it can no more successfully be contended that they require the state or county to pay the employee for vacation leave during the same period.

Turning now to the second question presented, authority for sick leave for both state and county employees is contained in Section 143.29, Revised Code, which provides in pertinent part as follows:

“Each full-time employee, whose salary or wage is paid in whole or in part by the state, and each full-time employee in the various offices of the county service and municipal service, and each full-time employee of any board of education, shall be entitled for each completed month of service to sick leave of one and one-fourth work days with pay. Employees may use sick leave, upon approval of the responsible administrative offices of the employing unit, for absence due to illness, injury, exposure to contagious disease which could be communicated to other employees, and to illness or death in the employee’s immediate family. Unused sick leave shall be cumulative up to ninety work days, unless more than ninety days are approved by the responsible administrative officer of the employing unit. The previously accumulated sick leave of an employee who has been separated from the public service may be placed to his credit upon his re-employment in the public service. An employee who transfers from one public agency to another shall be credited with the unused balance of his accumulated sick leave. * * *

“* * * * * * * * *”

I have recently rendered an opinion on the possible application of this section to a school teacher who had been reemployed after a period of military service. (Opinion No. 1846, Opinions of the Attorney General for 1960, page 698). I there concluded that sick leave was not accumulated during the period of military service; and, although that opinion did not specifically consider the possible application of Section 143.22, *supra* or Sections 5903.03 and 5903.04, *supra*, I remain of the opinion that the conclusion there reached was correct and applies with equal validity to all state and county employees. Sick leave earned at the rate of 1¼ days per month of service as provided in Section 143.29, *supra*, is not a matter of “status, rank, rating, increments or qualifications” as those terms are used in Section 143.22, *supra*. Nor, is it a “benefit dependent upon length of service” as that phrase is used in Section 5903.04, *supra*. As in the case of vacation leave, then, I am constrained to conclude that a state or county employee is not entitled to earn sick leave while on military leave of absence.

You will note that my above conclusions as to vacation and sick leave do not apply to the case where under Section 5823.05, Revised Code, an employee takes a leave of absence of not over 31 days in a year to

engage in military activities, and during that period remains on the public payroll. I am of the opinion that in such a case the employee does earn vacation and sick leave during the time that he is away on military duties.

In specific answer to your questions, therefore, it is my opinion and you are advised that a state or county employee is entitled to earn neither vacation leave credit under Sections 121.161 or 325.19, Revised Code, nor sick leave credit under Section 143.29, Revised Code, during the period of a military leave of absence (not a leave of absence under Section 5923.05, Revised Code) prior to being restored to former office or position under authority of Section 143.22, Revised Code, and/or Sections 5903.03 and 5903.04, Revised Code.

Respectfully,
MARK McELROY
Attorney General