

2614.

OHIO NATIONAL GUARD — MEMBERS — OFFICERS, EMPLOYEES OF STATE, NAVAL MILITIA, OFFICERS RESERVE CORPS, ENTITLED TO LEAVES OF ABSENCE FROM DUTIES, FOR SUCH TIME AS IN MILITARY SERVICE ON TRAINING DUTY — NO LOSS OF PAY — PERIODS NOT TO EXCEED FIFTEEN DAYS IN ANY ONE CALENDAR YEAR — STATE EXAMINERS AND ASSISTANTS — ENTITLED TO LEAVES OF ABSENCE, WITH COMPENSATION, PERIOD NOT TO EXCEED TWELVE DAYS, EXCLUDING SUNDAYS, IN EACH YEAR.

## SYLLABUS:

*All officers and employees of the state who are members of the Ohio National Guard, the naval militia or the officers reserve corps, shall be entitled to leaves of absence from their respective duties for such time as they are in the military service on training duty, without loss of pay, for periods not to exceed fifteen days in any one calendar year, including Sundays; and in addition thereto state examiners and assistant state examiners are entitled to leaves of absence with compensation for a period not exceeding twelve days, excluding Sundays, in each year.*

Columbus, Ohio, August 3, 1940.

Bureau of Inspection and Supervision of Public Offices,  
Columbus, Ohio.

Gentlemen:

This will acknowledge receipt of your request for my opinion which reads as follows:

“We are submitting herewith a letter from one of our assistant state examiners in which he requests three weeks military leave, with full pay, to attend field training exercises with the Ohio National Guard, 37th Division Signal Company; also, in addition, twelve days with pay as annual vacation.

Section 276, General Code, provides in part—

‘State examiners and assistant state examiners shall receive the

following compensation for each day necessarily employed by them in the discharge of such duties as may be assigned to them and for each day absent on leave, not exceeding twelve days in each year; \* \* \*

Section 5273-2, General Code, provides for leave of absence on military duty without loss of pay while in training, for not to exceed fifteen days in any one calendar year.

Will you kindly examine the enclosed request of said assistant state examiner for five weeks leave of absence with full pay, and advise us if in your opinion, the appointing authority is required to allow the request in full or may he allow only fifteen days with full pay under the provisions of the law above referred to, or any other law applicable to this question."

Generally the hours of service and vacation periods of state employees are governed by Section 154-20, General Code, which reads as follows:

"All employes in the several departments except the State highway department shall render not less than eight hours of labor each day, Saturday afternoons, Sundays and days declared by law to be holidays excluded, except in cases in which, in the judgment of the director, the public service will thereby be impaired. Each employe in the several departments shall be entitled during each calendar year to fourteen days leave of absence with full pay. In special and meritorious cases where to limit the annual leave to fourteen days in any one calendar year would work peculiar hardship, it may, in the discretion of the director of the department, be extended. No employe in the several departments, employed at a fixed compensation, shall be paid for any extra services, unless expressly authorized by law."

Special provisions are made for the employment, compensation and vacation of state examiners and assistant state examiners in Section 276, General Code, which section, so far as pertinent, has been correctly quoted in your inquiry. The difference in the provisions for vacation periods of state examiners and assistant state examiners is apparently due to the fact that such examiners are compensated on a per diem basis instead of a fixed salary, with the result that all state employes may be on leave of absence or vacation for two weeks, if Sundays be counted.

As you have also noted in your inquiry, Section 5273-2, General Code, provides leaves of absence for state officers and employes while on military duty and for the continuance of their salaries during such absences for a period not exceeding fifteen days in any one calendar year. This section reads as follows:

"All officers and employes of the state or the political sub-

divisions thereof, who are members of the Ohio National Guard, naval militia or the officers reserve corps shall be entitled to leave of absence from their respective duties without loss of pay for such time as they are in the military service on training duty for periods not to exceed fifteen days in any one calendar year.”

Sections 154-20, 276 and 5273-2, General Code, can be harmoniously construed, therefore such construction must be applied in preference to any construction that might interpret them as being in conflict. Applying such construction to the case of the assistant state examiner mentioned in your inquiry, it is my opinion that he is entitled, without loss of compensation, to a leave of absence while on duty in the military service of the Ohio National Guard for a period not to exceed fifteen days, and in addition he is entitled to a leave of absence for vacation purposes not exceeding twelve days.

The same conclusion is reached as to a municipal employee by the Common Pleas Court of Hamilton County in the case of *Otten v. Cincinnati*, 10 O. O. 276, decided December 28, 1937, the first branch of the syllabus therein reading as follows:

“1. A municipality cannot refuse an employee compensation for a leave of absence with pay for vacation purposes, in addition to a leave of absence granted with pay for attendance at the encampment of the Ohio National Guard.”

In that case the court upheld the constitutionality of Section 5273-2, General Code.

I have been unable to find any authority for allowing compensation to state employees on leaves of absence for military duty for any period exceeding fifteen days in any one calendar year. I must therefore conclude that the Legislature intended that if an employee be absent on military duty for more than fifteen days in any one calendar year, he is not entitled to any compensation during the absence for such purpose in excess of that period. Furthermore, since the provisions of Section 5273-2 General Code, apply to all state employees alike, I must conclude that any Sundays falling within the period of absence of an employee while on military duty, shall be included in the fifteen days allowable with compensation for such absence.

Answering your question specifically, it is my opinion that all officers and employees of the state who are members of the Ohio National Guard,

the naval militia or the officers reserve corps, shall be entitled to leaves of absence from their respective duties for such time as they are in the military service on training duty, without loss of pay, for periods not to exceed fifteen days in any one calendar year, including Sundays; and in addition thereto state examiners and assistant state examiners are entitled to leaves of absence with compensation for a period not exceeding twelve days, excluding Sundays, in each year.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.