

Note from the Attorney General's Office:

1962 Op. Att'y Gen. No. 62-2936 was overruled in part by
1986 Op. Att'y Gen. No. 86-050.

2936

A LOCAL SCHOOL DISTRICT IS A POLITICAL SUBDIVISION—STATUS OF A SCHOOL TEACHER WITHIN SAID DISTRICT WHO IS A MEMBER OF A RESERVE COMPONENT OF THE ARMED SERVICES—PAY RIGHTS OF SAID TEACHER WHO IS ABSENT BECAUSE OF HIS MILITARY DUTY—§5923.09 R.C., OPINION 1468; OAG, 1960, OPINION 1736, OAG, 1960, OPINION 1158, OAG, 1960.

SYLLABUS:

1. A local school district is a "political subdivision" within the purview of Section 5923.05, Revised Code.

2. With respect to a teacher of such district who was a member of a reserve component of the armed forces of the United States and who entered military service on active duty in 1961 and remained in such status continuously for more than 31 days in 1961, through the date of this opinion, such teacher was an employee under the terms of Section 5923.05, *supra*, at the time of entering upon active duty and is entitled to the compensation he would have received in 31 days of 1961 (unless such has already been paid).

3. Upon entry into active service, such teacher became, under Section 5923.05, Revised Code, an employee on leave of absence for duty, and if he remains on such active duty during the year 1962 he is not entitled to any pay from the school district under that section for the year 1962.

Columbus, Ohio, April 12, 1962

Hon. Harry Friberg, Prosecuting Attorney
Lucas County, Toledo 2, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

“Several cases have arisen in our local school districts where teaching personnel have been called to active military duty. The personnel, all males, were members of reserve components of the Armed Forces of the United States prior to being called. They reported for duty during the months of October and November, 1961, for an indefinite length of time.

“My questions are:

“1. Are these men covered by the provisions of Section 5923.05 so as to entitle them to 31 days pay for service during 1961?

“2. In the event they remain on active duty throughout 1962, would this same Section of the Code entitle them to another 31 days pay for 1962?”

Section 5923.05, Revised Code, reads as follows:

“All officers and employees of the state or the political subdivisions thereof who are members of the Ohio national guard, the Ohio defense corps, the Ohio naval militia, or members of other reserve components of armed forces of the United States are entitled to leave of absence from their respective duties without loss of pay for such time as they are in the military service on field training or active duty for periods not to exceed thirty-one days in any one calendar year.”

The first question to be decided is whether an employee of the state or a political subdivision who is called to active duty from a reserve component of the armed forces for more than 31 days in a calendar year is entitled to any compensation under the provisions of Section 5923.05, *supra*. I believe that this question can be answered by a determination of whether the words in said statute, “for periods not to exceed thirty-one days in any one calendar year,” modify the phrase “leave of absence from their respective duties without loss of pay” or the phrase, “for such time as they are in the military service on field training or active duty.”

I have, on two previous occasions, considered questions dealing with Section 5923.05, *supra*. The syllabus of Opinion No. 1468, Opinions of the Attorney General for 1960, page 423, reads as follows:

“An employee of the state or one of its political subdivisions is entitled under Section 5923.05, Revised Code, to leave of absence for military service without any loss of pay from his employer for a period of not more than 31 days in any one calendar year, regardless of the fact that such employee may be paid for his military service; and the provisions of said section take prece-

dence over any conflicting provisions of a municipal corporation, charter or otherwise.”

Your attention is also called to the following statements made in Opinion No. 1468, *supra*, at pages 425 and 426:

“Section 5923.05, *supra*, pertains to employees of the state and its political subdivisions and clearly provides that an employee may take leave of absence up to 31 days in a year for military service *without loss of pay*. The fact that such employee may be paid for his military service has no bearing since the statute plainly provides that the employee shall receive his regular pay from his employer for the period of military service.

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“Here we are dealing with a question involving a municipal employee, but in determining the answer to the question we must consider the reasons behind the provisions of Section 5923.05, *supra*. In this regard, it appears clear that the ‘no loss of pay’ provision was designed to encourage enlistment in components of the armed forces of the state and nation. Such armed forces are, of course, essential to the safety and general welfare of the people of this state, and any regulations encouraging the existence and strengthening of these forces must be presumed to be in the interests of the public welfare. * * *”

The syllabus of Opinion No. 1736, Opinions of the Attorney General for 1960, page 625, reads as follows:

“A metropolitan housing authority established pursuant to the provisions of Section 3735.27, *et seq.*, Revised Code, is a political subdivision of the state within the purview of Section 5923.05, Revised Code, and the employees of such an authority are entitled to leave of absence for military service without any loss of pay for a period of not more than thirty-one days in any one calendar year regardless of the fact that such employees may be paid for such military service. (Opinion No. 1468, Opinions of the Attorney General for 1960, approved and followed.)”

It will be noted from the above quoted material that, although the immediate question herein was not at issue, the natural interpretation of the language of Section 5923.05, *supra*, was to grant the employee leave without loss of pay for up to 31 days.

It should also be noted that the statute specifically refers to military service on “field training or active duty.” As was pointed out by the then Attorney General in Opinion No. 4261, Opinions of the Attorney General

for 1941, page 805, the legislature in enacting Section 5273-2, General Code, must be considered to have been aware of the difference between "training duty" and "active duty." The then Attorney General held in Opinion No. 4261, *supra*, that since Section 5923.05, Revised Code, then Section 5273-2, General Code, only provided at that time for no loss of compensation when on "training duty," an employee called to "active duty" was not entitled to compensation. Section 5273-2, *supra*, was amended by the 97th General Assembly (122 Ohio Laws, 66) by substituting the words "field training or active duty" in place of the words "training duty."

As the Attorney General in 1941 held that the legislature must be considered to have been aware of the difference between training duty and active duty, so must I hold that, when the words "active duty" were added to Section 5923.05, *supra*, in 1947, the legislature must be considered to have been aware of the fact that a member of a reserve component of the armed forces who is called to active duty is likely to serve for an indefinite period of time, but probably more than 31 days. With such knowledge there would be a presumption against a legislative intention that the phrase "for periods not to exceed thirty-one days" would modify "field training or active duty," since such interpretation would, in most cases of service on active duty, work against the obvious purpose of the statute, that is, to encourage enlistment in such reserve components by guaranteeing against loss of compensation. As between the two interpretations possible herein, such intent can be accomplished only by a construction which would prevent loss of pay not to exceed 31 days while on "active duty."

In this respect, your attention is called to 50 Ohio Jurisprudence 2d, 139, Statutes, Section 169, which reads as follows:

"The primary and paramount rule in the interpretation or construction of statutes is to ascertain, declare, and give effect to the intention of the legislature if it is possible so to do.

"Negatively stated, the rule is that the construction adopted should not be such as to defeat the obvious intention of the legislature or do violence to it, wholly or partially. It is not the function of a court to give to a statute an operation which the legislature does not intend."

Considering the foregoing, I must conclude that the phrase, "for periods of not to exceed thirty-one days in any one calendar year" as

used in Section 5923.05, *supra*, modifies the phrase, "leave of absence from their respective duties without loss of pay," and therefore an employee who otherwise qualified under said section is not prevented from receiving the compensation he would have received in 31 days in a calendar year, merely because he served more than 31 days of such year on active duty in the armed forces of the United States.

Coming now to the question of whether a local school district is a political subdivision of the state within the purview of Section 5923.05, *supra*, your attention is once again called to Opinion No. 1736, *supra*, the syllabus of which is quoted above, and which opinion contains the following statement at pages 626 and 627:

"There appears to be no statutory definition of 'political subdivisions' as used in Section 5923.05, *supra*, and although I have made an extensive search of the case law in Ohio dealing with this subject, I have been unable to find any court decision which directly answers this question. In the case of *Wolf vs. City of Columbus*, 98 Ohio App., 333, however, the court, in dealing with a similar question, stated on page 336:

"In 72 Corpus Juris Secundum, 223, we find the term "political subdivision" defined as follows:

"The term is broad and comprehensive and denotes any division of a state made by the proper authorities thereof, acting within their constitutional powers, for the purpose of carrying out those functions of the state which by long usage and inherent necessities of government have always been regarded as public; a division of a parent entity for some governmental purpose.'

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" * * * In their public capacity they function as agents or instrumentalities of the state government and therefore constitute political subdivisions.'"

Also, in my Opinion No. 1158, Opinions of the Attorney General for 1960, page 111, in which I was considering whether a port authority could be considered a political subdivision within the sales tax exemption law, I stated at page 112:

"A 'political subdivision' of the state must, therefore, refer to (1) a limited geographical area within the state, (2) wherein a public agency is authorized by law to exercise some governmental function."

As to the definition of a school district, 48 Ohio Jurisprudence 2nd, 414, Schools, Section 31, reads in part as follows:

“Under the declaration of the Constitution that provision shall be made by law for the organization, administration, and control of the public school system of the state supported by public funds, the General Assembly has the power to establish school districts and to provide for their government and administration. The General Assembly has exercised this power, and the organization of the public school system in Ohio is by school districts, organized to promote education and carry into effect the provisions of the Constitution in respect thereto.

“A school district is merely a geographical division of territory devised for the convenience of its inhabitants, organized as a mere agency of the state in maintaining its public schools, and all of its functions are of a public nature. It is a mere territorial and political division of the state established exclusively for public purposes and connected with the administration of local government—a mere subdivision of the state for political pur-

poses and agencies in the administration of public laws. * * *”

Considering the foregoing quoted matter, I am of the opinion that a local school district, for the purpose of Section 5923.05, Revised Code, must be considered to be a political subdivision.

And as a teacher employed in a local school district is undoubtedly an employee of such political subdivision, the answer to your first question must be in the affirmative.

The answer to your second question is wholly dependent upon whether an employee who is a member of a reserve component of the armed forces of the United States and who leaves the employ of the state or a political subdivision to go on active duty, is an employee of the state or the political subdivision within the purview of Section 5923.05, *supra*, while so serving. It will be seen from an examination of Section 5923.05, *supra*, that the essence of that statute is to provide a leave of absence from duty without loss of pay for up to 31 days, when an employee who is a member of a reserve component of the armed forces of the United States is in military service on field training or active duty. The statute, therefore, requires, as a condition to receipt of the benefits provided therein, that an employee change his status from an employee to an employee on leave of absence for military service and such change of status must occur prior to granting of up to 31 days pay within a calendar year.

Since in the question presented herein, the servicemen in question changed from "employees" to "employees on leave of absence for military service" in 1961 and have remained in said latter category, they are not at this time eligible to receive the benefit of the provisions of Section 5923.05, *supra*, for the calendar year 1962, and will not be so eligible unless they return to the status of an employee and subsequently, during 1962, enter military service on field training or active duty.

In accordance with the above, I am of the opinion and you are advised:

1. A local school district is a "political subdivision" within the purview of Section 5923.05, Revised Code.

2. With respect to a teacher of such district who was a member of a reserve component of the armed forces of the United States and who entered military service on active duty in 1961 and remained in such status continuously for more than 31 days in 1961, through the date of this opinion, such teacher was an employee under the terms of Section 5923.05, *supra*, at the time of entering upon active duty and is entitled to the compensation he would have received in 31 days of 1961 (unless such has already been paid).

3. Upon entry into active service, such teacher became, under Section 5923.05, Revised Code, an employee on leave of absence for duty, and if he remains on such active duty during the year 1962 he is not entitled to any pay from the school district under that section for the year 1962.

Respectfully,

MARK MCELROY

Attorney General