OPINION NO. 77-062

Syllabus:

1. A fire department employee who is reinstated pursuant to R.C. 124.50 is not entitled to credit for prior years of service for determining his salary.

2. A fire department employee who is reinstated pursuant to R.C. 124.50 is entitled to credit for prior years of service for determining the amount of his vacation time, as set forth in R.C. 9.44.

3. A fire department employee who is reinstated pursuant to R.C. 124.50 is entitled to credit for his prior unused balance of accumulated sick leave, as set forth in R.C. 124.38.

4. A municipal ordinance providing for reinstatement of firemen and patrolmen is an exercise of the power of local self-government under Article XVIII of the Ohio Constitution. An ordinance passed by a charter city which deals with local self-government is valid even though it is at variance with a state statute, while an ordinance passed by a non-charter city which is concerned with local self-government is invalid where it is at variance with a state statute.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William J. Brown, Attorney General, October 12, 1977

Your request for my opinion poses the following questions:

> 1. In a municipality where fire department employees are paid an increased salary and bonus longevity payments dependent upon the number of years in service, is a fire department employee who is reinstated pursuant to section 124.50, Ohio Revised Code, entitled to credit for his prior years of service for determining his salary, in view of the statute's abrogation of seniority credit?
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> 2. When a fire department employee is reinstated pursuant to Section 124.50, is he entitled to credit for prior years of service for determining the amount of his vacation time, as set forth in R.C. 9.44?
>
> 3. When a fire department employee is reinstated pursuant to Section 124.50 is he entitled to credit for his prior unused balance of accumulated sick leave, as set forth in Section 124.38?

R.C. 124.50, as amended by Am. H.B. 513 (eff. 8-9-74), provides in pertinent part as follows:

> . . . Any person holding an office or position under the classified service in a fire department or a police department, who resigns therefrom, may be reinstated to the rank of fireman or policeman, upon the filing of a written application for reinstatement with the municipal or civil service township civil service commission and a copy thereof with the chief of the fire department, or chief of the police department, and upon passing a physical examination disclosing that the person is physically fit to perform the duties of the office of fireman or policeman, the application for reinstatement shall be filed within one year from the date of resignation. Any person reinstated pursuant to the authority of this paragraph shall not receive credit for seniority earned prior to resignation and reinstatement, and shall not be entitled to reinstatement to a

> position above the rank of fireman or patrolman, regardless of the position the person may have held at the time of his resignation.

With respect to your first question, R.C. 124.50 specifically provides that one shall not receive credit for seniority earned prior to resignation and reinstatement, nor is he entitled to be reinstated to a position above the rank of fireman or patrolman irrespective of the position he held at the time of resignation. Thus, under the terms of R.C. 124.50, a person who is reinstated pursuant to R.C. 124.50 may be considered an original appointee to the particular position. He may not hold a position above the rank of fireman or patrolman regardless of the position he held at the time of resignation. The statute makes clear that a reinstated fireman or patrolman may not receive any seniority credit for his prior years of service. Nothing in the statute suggests that the general rule against seniority renewal should not be applied to salary computation.

Furthermore, R.C. 124.44, as amended by Am. Sub. H.B.1 (eff. 6-13-75) provides for the promotion of patrolmen as follows:

> No positions above the rank of patrolman in the police department shall be filled by original appointment. Vacancies in positions above the rank of patrolman in a police department shall be filled by promotion from among persons holding positions in a rank lower than the position to be filled. No position above the rank of patrolman in a police department shall be filled by any person unless he has first passed a competitive promotional examination . . . An increase in the salary or other compensation of anyone holding a position in a police department, beyond that fixed for the rank in which such position is classified, shall be deemed a promotion. . . (emphasis added)

R.C. 124.45, as amended by Am. H.B. 513 (eff. 8-9-74), provides for the promotion of firemen in similar terms:

> Vacancies in positions above the rank of regular fireman in a fire department shall be filled by competitive promotional examinations. . .

Under the terms of R.C. 124.50, such a fire department employee is considered an original appointee, and he may not hold a position above the rank of fireman or patrolman. A reinstated employee may be promoted to a position above the rank of fireman but only if he takes a competitive promotional examination as required by R.C. 124.45.

With respect to your second question, however, R.C. 9.44, as amended by Sub. H.B. 202 (eff. 8-27-70) provides in pertinent part as follows:

> A person employed, other than as an elective officer, by the state or any political subdivision of the state, earning

> vacation credits currently, is entitled to have his prior service with any of these employers counted as service with the state or any political subdivision of the state, for the purpose of computing the amount of his vacation time. . .

R.C. 9.44 specifically provides that one who is employed by the state or political subdivision of the state is entitled to credit for his prior years of service with the state or political subdivision for the purpose of computing vacation time.

R.C. 1.51 provides in pertinent part as follows:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconciliable, the special or local provision prevails. . .

Therefore, it seems clear that R.C. 9.44 is controlling so than when a fire department employee is reinstated pursuant to R.C. 124.50, he is entitled to credit for prior years of service for determining the amount of his vacation time.

With respect to your third question, R.C. 124.38, as amended by Am. H.B. 513 (eff. 8-9-74) provides in pertinent part as follows:

> . . . Unused sick leave shall be cumulative without limit. . . The previously accumulated sick leave of an employee who has been separated from the public service, shall be placed to his credit upon his re-employment in the public service, provided that such re-employment takes place within ten years of the date on which the employee was last terminated from public service. . .

R.C. 124.38 thus specifically provides that one who is employed in the public service is entitled to credit for previously accumulated sick leave upon his re-employment in the public service. Therefore, it seems clear that R.C. 124.38 is controlling so that when a fire department employee is reinstated pursuant to R.C. 124.50, he is entitled to credit for his prior unused balance of accumulated sick leave.

It should be noted however, that your question involves municipal employees, so that it is necessary to consider the powers of local self-government under Article XVIII of the Ohio Constitution, which provides in pertinent part as follows:

> Sec. 3 Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

> . . .
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> Sec. 7 Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

In State, ex rel. Canada v. Phillips, Dir., 168 Ohio St. 191 (1958), the Ohio Supreme Court stated in the syllabus as follows:

> 1. The appointment of officers in the police force of a city represents the exercise of a power of local self-government within the meaning of those words as used in Sections 3 and 7 of Article XVIII of the Ohio Constitution.
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> . . .
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> 5. The mere fact that the exercise of a power of local self-government may happen to relate to the police department does not make it a police regulation within the meaning of the words "police regulations" found in Section 3 of Article XVIII of the Constitution.

These conclusions support the proposition that a municipal ordinance providing for reinstatement of firemen and patrolmen would be an exercise of the power of local self-government and not a "police regulation."

In Leavers v. City of Canton, 1 Ohio St. 2d 33, 37 (1964), the Ohio Supreme Court reviewed the powers of local self-government under Article XVIII, Section 3 of the Ohio Constitution and set forth the following rules of guidance:

> An ordinance dealing with police regulations passed by either a charter or non charter city, which is at variance with state law, is invalid.
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> An ordinance passed by a charter city, which is not a police regulation but which deals with local self-government, is valid and effective even though it is at variance with a state statute.
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> An ordinance passed by a non-charter city, which is not a police regulation but deals with local self-government is valid where there is no statute at a variance with the ordinance.
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> An ordinance passed by a non-charter city, which is not a police regulation but is concerned with local self-government is invalid where such ordinance is at variance with a state statute.

A distinction must, therefore be made between charter and non-charter cities. The Court indicated that an ordinance passed by a charter city which deals with local self-government is valid even though it is at variance with a state statute, while an ordinance passed by a non-charter city which is concerned with local self-government is invalid where it is at variance with a state statute.

Therefore, a charter city may enact a valid ordinance providing for reinstatement of fire department employees even though it is at variance with R.C. 124.50. However, a municipal ordinance enacted by a non-charter city which is at variance with the state statute would be invalid and unenforceable.

In specific answer to your questions, it is my opinion and you are so advised that:

1. A fire department employee who is reinstated pursuant to R.C. 124.50 is not entitled to credit for prior years of service for determining his salary.

2. A fire department employee who is reinstated pursuant to R.C. 124.50 is entitled to credit for prior years of service for determining the amount of his vacation time, as set forth in R.C. 9.44.

3. A fire department employee who is reinstated pursuant to R.C. 124.50 is entitled to credit for his prior unused balance of accumulated sick leave, as set forth in R.C. 124.38.

4. A municipal ordinance providing for reinstatement of firemen and patrolmen is an exercise of the power of local self-government under Article XVIII of the Ohio Constitution. An ordinance passed by a charter city which deals with local self-government is valid even though it is at variance with a state statute, while an ordinance passed by a non-charter city which is concerned with local self-government is invalid where it is at variance with a state statute.