

OPINION NO. 81-066**Syllabus:**

A full-time state employee who was a member of the Ohio National Guard serving on duty one weekend per month and two weeks out of every year is entitled to one year prior service credit for each year of service with the Ohio National Guard for the purpose of computing the amount of his vacation leave pursuant to R.C. 121.161. (1966 Op. Att'y Gen. No. 66-120, approved and followed; 1918 Op. Att'y Gen. No. 1292, vol. I, p. 857, overruled in part.)

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, November 3, 1981

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

Recently many employees of the state have discovered that pursuant to Section 9.44, Ohio Revised Code, prior service with the Ohio National Guard is transferable to the state for the purpose of computing the amount of vacation leave.

. . . .

Is a person currently employed by the state, having prior service with the Ohio National Guard as a member serving on active duty one weekend per month and two weeks out of every year, entitled to one year prior service credit for each year of service with the Ohio National Guard or only entitled to the actual number of days in which he was on active duty in the Ohio National Guard?

To rephrase the question, does a person who is in the Ohio National Guard as a reserve receive the same amount of prior service credit as a person who was on [full-time] active duty?

I assume that when your request refers to "a member serving on active duty one weekend per month and two weeks out of every year," you mean a member of the Ohio National Guard who normally serves on a part-time basis, and that what your request refers to as "a person on [full-time] active duty" is an Ohio National Guardsman who assumes regular duties on a full-time basis.

I further assume from the wording of your request that the employees seeking prior service credit for time spent in the Ohio National Guard are full-time employees of the state pursuant to R.C. 121.161. R.C. 121.161 states, in part:

Each full-time state employee, including full-time hourly-rate employees, after service of one year with the state, or any political

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Each organization and unit in the Ohio national guard shall assemble for training and instruction, . . . and shall participate in field maneuvers and other exercises, . . . at such times and places and under such rules and regulations as are prescribed by the president of the United States or secretary of defense, pursuant to the "National Defense Act" or by the governor as commander in chief.

R.C. 5919.29 (emphasis added).

subdivision of the state, shall have earned and will be due upon the attainment of the first year of employment, and annually thereafter, eighty hours of vacation leave with full pay. . . . A full-time state employee. . .with eight or more years of service with the state or any political subdivision of the state shall have earned and is entitled to one hundred twenty hours of vacation leave with full pay. A full-time state employee. . .with fifteen or more years of service with the state or any political subdivision of the state shall have earned and is entitled to one hundred sixty hours of vacation leave with full pay. A full-time state employee. . .with twenty-five years of service with the state or any political subdivision of the state shall have earned and is entitled to two hundred hours of vacation leave with full pay. Such vacation leave shall accrue to the employee at the rate of three and one-tenths hours each biweekly period for those entitled to eighty hours per year; four and six-tenths hours each biweekly period for those entitled to one hundred twenty hours per year; and six and two-tenths hours each biweekly period for those entitled to one hundred sixty hours per year; and seven and seven-tenths hours each biweekly period for those entitled to two hundred hours per year. (Emphasis added.)

See also R.C. 325.19(A) (vacation leave for full-time employees in the county service). R.C. 121.161 entitles a full-time state employee to the accrual of vacation leave as specified in that section after service of the designated periods of time with the state or any political subdivision of the state. It is, therefore, necessary to determine whether prior service with the Ohio National Guard constitutes service with the state or one of its political subdivisions.²

R.C. 5923.01, which discusses the militia of the state generally, reads in part as follows:

The militia of the state shall consist of all able-bodied citizens of the state, who are more than seventeen years of age, and not more than sixty-seven years of age except as provided in section 5923.03 of the Revised Code. The militia shall be divided into four classes:

- (A) The Ohio national guard;
- (B) The Ohio naval militia;
- (C) The Ohio defense corps;
- (D) The unorganized militia.

. . . .

"Military forces" includes the Ohio national guard. . . .
(Emphasis added.)

²See R.C. 9.44, which reads 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 leave. The anniversary date of his employment for the purpose of computing the amount of his vacation leave, unless deferred pursuant to the appropriate law, ordinance, or regulation, is the anniversary date of such prior service. (Emphasis added.)

R.C. 9.44, read in conjunction with R.C. 325.19(A) and R.C. 121.161, specifically preserves prior service credit for computing vacation leave for full-time county and state employees. Pursuant to R.C. 9.44, prior service with the state or any political subdivision is to be applied for purposes of computing the rate at which vacation leave is accrued under R.C. 121.161.

It is clear, therefore, that Ohio National Guard members are in the military service of the state.

R.C. 124.01(A) defines the civil service as including "all offices and positions of trust or employment in the service of the state." R.C. 124.11 divides the civil service into the classified and unclassified service and reads in part:

(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter:

. . . .

(6) All commissioned and noncommissioned officers and enlisted men in the military service of the state including military appointees in the office of the adjutant general;

. . . .

Pursuant to R.C. 124.11, Ohio National Guard members are included in the unclassified service of the state. Based on the language of R.C. 124.11, I hereby overrule, to the extent that it is inconsistent with this opinion, 1918 Op. Att'y Gen. No. 1292, vol. 1, p. 857, which concluded that enlisted men and officers in the military service of the state are not included in the state civil service. See State ex rel. Stanton v. Zangerle, 117 Ohio St. 436, 159 N.E. 823 (1927) (a plain and unambiguous statute leaves no occasion to resort to statutory construction).

From a reading of R.C. 124.11 and R.C. 5923.01, I conclude that time served in the Ohio National Guard is time spent in state service. See 1977 Op. Att'y Gen. No. 77-009 (members of the Ohio National Guard are in the service of the state). R.C. 121.161, therefore, entitles a full-time state employee to prior service credit for time served with the Ohio National Guard.

The second part of your question is whether a full-time state employee is entitled, for purposes of computing vacation leave to which he is entitled under R.C. 121.161, to one year prior service credit for each year in which he served two full weeks and on weekends in the Ohio National Guard.

Having closely examined R.C. Chapter 5919, I am unable to see any distinction between the service obligations of full-time and part-time members of the Ohio National Guard. See R.C. 5919.02 ("[a]ll commissioned officers of the Ohio national guard"); R.C. 5919.05 ("[e]ommissioned officers of the Ohio national guard"); R.C. 5919.071 ("[a]ny person, commissioned or warranted as an officer in the Ohio national guard"); R.C. 5919.09 ("[o]riginal enlistments in the Ohio national guard and all subsequent enlistments"); R.C. 5919.10 ("[a]ll men enlisting in the Ohio national guard"); R.C. 5919.11 ("[a]ll commissioned officers and warrant officers of the Ohio national guard"). It appears, therefore, that Ohio National Guard service obligations are rendered for the entire period of an enlistment or a commission and are denominated in "years." R.C. 5919.10;³ R.C. 5919.13.⁴ I conclude, therefore,

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All men enlisting in the Ohio national guard shall sign an enlistment contract and subscribe to the following oath of enlistment: "I do hereby acknowledge to have voluntarily enlisted this. . . day of. . . ., 19. . . , as a soldier in the national guard of the United States and of the state of Ohio, for a period of. . . year. . . ., under the conditions prescribed by law, unless sooner discharged by proper authority. . . ."

R.C. 5919.10 (emphasis added).

⁴Any commissioned officer who has served as a member of the Ohio national guard for a period of ten years, five of which have been as a commissioned officer. . . ." R.C. 5919.13 (emphasis added).

that an Ohio National Guardsman, whether full-time or part-time throughout the period of enlistment or commission, remains in the service of the state.⁵

In 1966 Op. Att'y Gen. No. 66-120, one of my predecessors was asked to opine on a question quite similar to the one presented by your request. I believe that Op. No. 66-120 affirmatively answers your question. Op. No. 66-120, at 2-224 to 2-225, states in part:

Section 121.161. . .and Section 325.19[A]⁶. . .only require that an employee be presently a full-time employee. . . . There is no requirement in either of these sections that he need always have been a full-time employee. The critical term in both statutes is "years of service," and from a reading of both this term and the statutes as a whole no other conclusion can be reached than that these "years of service" can be rendered as either a part-time or full-time employee. To reach any other conclusion would require reading the term "years of service" as actually meaning "years of full-time service." (Emphasis added.)

It is, therefore, my opinion, and you are accordingly advised, that a full-time state employee who was a member of the Ohio National Guard serving on duty one weekend per month and two weeks out of every year is entitled to one year prior service credit for each year of service with the Ohio National Guard for the purpose of computing the amount of his vacation leave pursuant to R.C. 121.161. (1966 Op. Att'y Gen. No. 66-120, approved and followed; 1918 Op. Att'y Gen. No. 1292, vol. I, p. 857, overruled in part.)

⁵ Part-time Ohio National Guardsmen have broader service obligations than your request reveals. The governor may call an Ohio National Guardsman into active state military service at any time within the guardsman's period of enlistment or commission, except when the guardsman is in the actual service of the United States. See generally U.S. Const. art. II, §2; Ohio Const. art. III, §10; Ohio Const. art. IX, §4; R.C. 5923.21; 1931 Op. Att'y Gen. No. 3175, vol. I, p. 572. Because an Ohio National Guardsman is subject to call at any time, his service is not limited to a specific number of hours or days as is the case generally with state employees.

⁶ R.C. 325.19 was amended subsequent to Op. No. 66-120 by Am. H.B. 333, 113th Gen. A. (1980) (eff. May 13, 1980) to authorize a board of county commissioners to grant vacation leave to part-time county employees. See R.C. 325.19(B). Since I understand from your letter that the individual in question is a state employee, I am not addressing the question of whether a part-time county employee granted vacation leave pursuant to R.C. 325.19(B) is entitled to count prior service with the state or any political subdivision of the state for the purpose of computing vacation leave.