

**OPINION NO. 86-050****Syllabus:**

1. R.C. 5903.02 entitles a teacher in a local school district, who is a member of the Ohio National Guard, to take a military leave of absence in order to enter active duty with the United States Army. R.C. 5903.02 prohibits the local school district from discharging such person, or otherwise preventing him from performing the military service for which the leave was granted.
2. R.C. 5923.05 entitles a teacher in a local school district, who is a member of the Ohio National Guard and who is serving on active duty with the United States Army, to receive compensation for thirty-one days per year for each year during his military leave of absence. (1962 Op. Att'y Gen. No. 2936, p. 261, syllabus, paragraph three, overruled.)
3. R.C. 5903.03 entitles a teacher in a local school district, who is a member of the Ohio National Guard and who is serving on active duty with the United States Army, to reemployment with the school district when he has completed his active duty with the United States Army, even though he voluntarily entered active duty.
4. R.C. 124.29 does not apply to a teacher in a local school district.
5. Pursuant to 38 U.S.C. §2021(a) and (c), the provisions of 38 U.S.C. §§2021-2026 do not limit the states in

granting to employees greater rights and protections than those granted under §§2021-2026. A local board of education must comply with the terms of R.C. 5903.02 and R.C. 5903.03, regardless of the length of an employee's military duty, even though federal law imposes a limitation upon the time an employee may serve in the Armed Forces and still enjoy those reemployment rights granted by 38 U.S.C. §§2021-2026 upon discharge.

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**To: Rocky A. Coss, Highland County Prosecuting Attorney, Hillsboro, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, July 25, 1986**

I have before me your request for my opinion regarding the military leave of absence of a teacher employed by a local school district. I have rephrased your questions as follows:

1. Does R.C. 5923.05, which grants compensation to a public employee during a military leave of absence for up to thirty-one days in a calendar year, entitle a teacher in a local school district who is on active duty for a period of three years to receive such compensation for each year he serves on active duty?
2. Does R.C. 5903.02 entitle a teacher in a local school district to take a military leave of absence for a period of three years?
3. Does R.C. 5903.03 entitle a teacher in a local school district to reemployment when he has completed his active duty with the military?
4. Does R.C. 124.29 apply to a teacher in a local school district, who is an officer in the National Guard and who seeks a leave of absence for duty not required as part of his commission, so as to deny such teacher reemployment rights?
5. Are R.C. 5903.02, 5903.03, 5923.05, and 124.29 limited in any way by 38 U.S.C. §§2021-2026?

You have indicated the relevant facts are as follows. A commissioned officer in the Ohio National Guard has been employed as a fulltime teacher with a local school district since August of 1973. He has requested a leave of absence for a period of three years in order to serve on active duty with the United States Army.<sup>1</sup> The school district is concerned

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<sup>1</sup> Individuals who serve in the National Guard of Ohio simultaneously serve as members of the National Guard of the United States, see R.C. 5919.01, and as members of a reserve component of the United States Army. See 10 U.S.C. §§261, 3077. See also Johnson v. Powell, 414 F. 2d 1060 (5th Cir. 1969). The Secretary of the Army may order a member of a reserve component to active duty with the Army, with the consent of the member, although a member of the Army National Guard of the United States may not be ordered to active duty without the consent of the governor of the state with which the individual serves. 10 U.S.C. §672(d). You have indicated that the individual received his orders to report for active duty with the United States Army from the Secretary of the Army with the consent of the Governor of Ohio.

with its obligation under state law to grant this request for military leave.

For ease of discussion, I will address your second question first since it pertains to whether the individual is entitled to a military leave of absence. Your second question asks whether R.C. 5903.02 entitles a teacher in a local school district to take a military leave of absence for a period of three years in order to enter active duty with the United States Army. R.C. 5903.02 provides:

A public employee shall be granted a leave of absence to be inducted or otherwise enter military duty. If not accepted for such duty, he shall be reinstated in his position without loss of seniority or status, or reduction in his rate of pay. During such leave of absence, he shall, for all purposes, be considered as having rendered service and as having received his regular rate of pay.

No public employer shall refuse to employ or shall discharge any person because of being a member of the Ohio national guard, the Ohio military reserve, the Ohio naval militia, the armed services of the United States or their auxiliaries, or such other services as are specified in section 124.29 of the Revised Code, or prevent him from performing any military service he may be called upon to perform by proper authority. (Emphasis added.)

For purposes of R.C. 5903.01-.08, a "public employee" is defined as "any person holding a position in public employment." R.C. 5903.01(A). "Public employment" is defined as "employment by the state, or any county, municipal corporation, or other civil or political subdivision, including any department or agency thereof." R.C. 5903.01(B). Since a local school district is a political subdivision, see 1962 Op. Att'y Gen. No. 2936, p. 261, a teacher employed by a local school district is, for purposes of R.C. 5903.02, a public employee. Further, a local school district is a public employer for purposes of R.C. 5903.02. See R.C. 5903.01(C) (defining "public employer" as "any government, department, or agency mentioned in division (B) of [R.C. 5903.01]").

"Military duty" is defined in division (F) of R.C. 5903.01 as:

training and service performed by a member of the Ohio national guard or Ohio naval militia, or by an inductee, enlistee, reservist, or any entrant into a temporary reserve component of the armed forces of the United States, and time spent in reporting for and returning from such service and training, or if a rejection occurs, from the place of reporting therefor.

The individual about whom you ask is a member of the Ohio National Guard and a member of a reserve component of the United States Army, who has been called into active service with the United States Army pursuant to 10 U.S.C. §672(d). See note one, supra. Such service is clearly military duty within the purview of R.C. Chapter 5903. Since the teacher is, for purposes of R.C. Chapter 5903, a public employee, he must be granted the requested leave of absence. Since R.C. 5903.02 sets no limitation on the period of time for which an employee may remain on military leave of absence and enjoy the rights granted under R.C. 5903.02, I conclude that R.C. 5903.02

entitles the teacher about whom you ask to take a leave of absence for military duty for the requested three-year period. During that time, R.C. 5903.02 prohibits the employer from discharging such person, who is a member of the Ohio National Guard and the armed services of the United States, or otherwise preventing him from performing the military service for which the leave was granted.

You also ask about the application of R.C. 5923.05 to a teacher who requests military leave to enter active duty for three years. This section provides:

All officers and employees of the state or the political subdivisions thereof who are members of the Ohio national guard, the Ohio military reserve, 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.

In this instance, the individual was called to active duty as a member of the Ohio National Guard and as a member of a reserve component of the United States Army. Further, the individual is an employee of a political subdivision of the state. 1962 Op. No. 2936 (syllabus, paragraph one) (concluding that a local school district is a political subdivision for purposes of R.C. 5923.05). Thus, it is clear that the individual is entitled, pursuant to R.C. 5923.05, to leave without loss of pay for a period not to exceed thirty-one days during the calendar year in which he takes a leave of absence from the school district to enter active duty. See 1962 Op. No. 2936. The question remains whether he is entitled to payment from the school district for up to thirty-one days during each succeeding year in which he is in active service and not performing duties for the school district.

In 1962 Op. No. 2936, one of my predecessors considered the extent to which an employee of the state or a political subdivision who is called to active duty for more than thirty-one days in a calendar year is entitled to compensation under R.C. 5923.05. The opinion concludes that the phrase, "for periods of not to exceed thirty-one days in any one calendar year," modifies the phrase "leave of absence from their respective duties without loss of pay," rather than the phrase, "for such time as they are in the military service on field training or active duty." The original version of R.C. 5923.05 [G.C. 5273-2] provided for compensation to employees only while on "training duty." G.C. 5273-2 was amended by 122 Ohio Laws 66 (Am. Sub. S.B. 167, eff. May 12, 1947) to substitute the words "field training or active duty" for the words "training duty." See 1941 Op. Att'y Gen. No. 4261, p. 805. 1962 Op. No. 2936 concludes that, by adding the words "active duty," the legislature must have been aware that one called to active duty was likely to serve for an indefinite period of time, probably more than thirty-one days. Accordingly, an employee may receive compensation for thirty-one days while on active service even though he serves for more than thirty-one days in a calendar year.

I note, however, that 1962 Op. No. 2936 also concludes that, although an individual is entitled to receive pay for up to thirty-one days in any one calendar year, he may not receive additional pay in the following calendar year unless he returns

to service with the school district, after which he again changes his status from an employee to an employee on leave of absence for military service. 1962 Op. No. 2936 concludes such change of status must occur before the employee may be granted additional pay under R.C. 5923.05. I do not concur with this aspect of the former opinion. If the reasoning of the opinion were followed, the officer about whom you ask would be entitled to thirty-one days of leave without loss of pay for the first year of leave, but he would not be entitled to additional compensation for thirty-one days in each of the succeeding two years since he would not be changing his employment status during that time. I do not believe that such a change of status is a prerequisite to receiving up to thirty-one days of paid leave in succeeding calendar years.

R.C. 5923.05 entitles an employee to leave without loss of pay for a period of up to thirty-one days "in any one calendar year." The statute, therefore, merely limits the number of days in each calendar year for which a public employee on a military leave of absence may be compensated by his employer. R.C. 5923.05 does not, however, require the employee to render service to the public employer during that time. See R.C. 5903.02 (during a military leave of absence, a public employee "shall, for all purposes, be considered as having rendered service [to the public employer]"). Further, R.C. 5923.05 places no limitation on the number of years for which a public employee may be granted a military leave of absence and be compensated by the public employer. See Northern Ohio Patrolmen's Benevolent Association v. City of Parma, 61 Ohio St. 2d 375, 377, 402 N.E.2d 519, 521 (1980) ("R.C. 5923.05 mandates that the city pay each employee on military leave of absence his or her full salary for a maximum of 31 days every calendar year irrespective [of military pay]" (emphasis added)). See generally Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946) (veterans rights statutes are "to be liberally construed for the benefit of those who...serve their country"); accord Coffy v. Republic Steel Corp., 447 U.S. 191, 196 (1980). Consequently, if an individual is an employee of the state or a political subdivision at the time he enters active duty, he is entitled to a maximum of thirty-one days of compensation per year for each year during which he serves on military duty. In light of my disagreement with 1962 Op. No. 2936, I must overrule paragraph three of the syllabus of that opinion.

Your third question asks whether the teacher is entitled to reemployment by the school district upon termination of his military leave. R.C. 5903.03 provides, in part, that:

A public employee who leaves a position, on or after June 27, 1950, whether voluntarily or involuntarily, to perform military duty, or was performing military duty on June 27, 1950, is separated or discharged under honorable conditions, makes application for reemployment within ninety days after he is relieved from military duty or from hospitalization continuing after discharge for a period of not more than one year, and is still physically qualified to perform the duties of such position, shall be restored to such position if it exists and is not held by a person with greater seniority, or to a position of like seniority, status, and pay. If he is not qualified to perform the duties of such position by reason of disability sustained during such service, he shall be placed in such other position, the duties of which he is qualified to

perform, as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances of his case. (Emphasis added.)

See R.C. 5903.04 (rights of employee restored to position after military leave of absence). Since I have determined that, for purposes of R.C. Chapter 5903, the teacher about whom you ask is a public employee leaving to perform military duty, R.C. 5903.03 grants him the right to reemployment, assuming he satisfies the conditions set forth in that statute, i.e., honorable discharge, timely application for reemployment, and physical qualification to perform the duties of his position. See also R.C. 3319.13.

You expressed a concern which exists among the local school board members as to whether the rights provided by R.C. 5903.03 are affected by the voluntariness of an employee's appointment to serve in the military. R.C. 5903.03 expressly states that a "public employee who leaves a position...whether voluntarily or involuntarily...shall be restored to such position" (emphasis added). The court, in City of Washington v. Mongold, 12 OBR 144 (C.P. Fayette County 1983), considered the case of a patrolman-dispatcher who voluntarily entered the armed services. Upon discharge, the individual sought reinstatement to his former position. The court determined that, "Ohio Revised Code Sections 5903.03 and 5903.04 govern the right of a public employee to be returned to his position following the performance of military duty, whether that duty was voluntary or involuntary." Id. at 145. Since the clear intent of the legislature in enacting R.C. 5903.03 was to include those public employees who voluntarily participate in the military, the officer about whom you ask may not be denied those rights to which he is entitled under R.C. Chapter 5903 merely because he voluntarily entered active duty.

Your fourth question concerns the applicability of R.C. 124.29 to a teacher in a local school district who is an officer in the National Guard seeking a leave of absence for duty not required as part of his commission. More specifically, you have inquired whether the last sentence of R.C. 124.29 supercedes R.C. 5903.02 and R.C. 5903.03, thereby denying the person about whom you ask the right to reemployment. The relevant portions of R.C. 124.29 state:

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 of the United States....

This section applies to all persons who enter on extended active duty with the armed services of the United States to perform such military services as they may be called upon to perform by proper authority. The provisions of this section do not apply to any person, who, by re-enlisting displays an intent to remain on extended active duty in the armed

services of the United States. Nor does this section apply to any commissioned officer, who, voluntarily, enters on extended active duty beyond that required on accepting a commission. (Emphasis added.)

From the facts you have provided it appears that the individual, a commissioned officer, voluntarily entered on extended active duty beyond that required on accepting his commission.

It is first necessary to address whether R.C. 124.29 is applicable to an employee of a local school district. R.C. 124.29 encompasses any person who holds a position "in the public service" (and who has held such position for at least ninety days). "Public service" is not statutorily defined for purposes of R.C. 124.29, and, broadly construed, the term could include employment with any school district. R.C. 124.29, however, is part of R.C. Chapter 124 governing persons employed in the civil service, which includes "all offices and positions of trust or employment in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof." R.C. 124.01(A). I believe that R.C. 124.29 must be read in pari materia with the other provisions of R.C. Chapter 124 and construed in light of the general intent and purpose of R.C. Chapter 124--the government of the civil service systems in this state. See 1982 Op. Att'y Gen. No. 82-008 at 2-29 ("the placement of a statute may serve as an aid when construing ambiguous statutory language").

In this regard, my interpretation of R.C. 124.29 is similar to that utilized in Doughton v. Village of Mariemont, 16 Ohio App. 3d 382, 476 N.E.2d 720 (Hamilton County 1984), to interpret R.C. 124.38 and R.C. 124.39, which, inter alia, govern the accumulation of sick leave of employees previously and currently in the "public service." In Doughton, it was argued by the employee of a village that R.C. 124.38 and R.C. 124.39 are not civil service statutes but general statutes of statewide effect which must be uniformly applied throughout the state. In responding to this argument the court stated:

We find that R.C. 124.38 and 124.39 are part of the Ohio civil service provisions, and, as such, are inapplicable to the village of Mariemont. R.C. 124.38 and 124.39 are included in R.C. Chapter 124, which is commonly known as the Civil Service Act. R.C. Chapter 124 contains the statutes pertaining to Ohio civil service employment, including merit and fitness, classification, requirements and employee benefits. The physical placement of R.C. 124.38 and 124.39 within R.C. Chapter 124 along with all of the other civil service statutes logically mandates the conclusion that R.C. 124.38 and 124.39 are part of the civil service provisions, and we so hold.

16 Ohio App. 3d at 382-83, 476 N.E.2d at 721. But see 1969 Op. Att'y Gen. No. 69-070 (applying R.C. 124.38 to a local board of education); 1963 Op. Att'y Gen. No. 500, p. 506 (applying R.C. 124.38 to villages).

Based on the reasoning in Doughton, it is my conclusion that the terms of R.C. 124.29 apply only to employees within the civil service. Since a local school district is not one of the entities enumerated in R.C. 124.01(A), which defines "civil service," employment with a local school district does not constitute employment in the civil service. See In re Ford, 3

Ohio App. 3d 416, 446 N.E.2d 214 (Franklin County 1982). Thus, R.C. 124.29 does not apply to an employee of a local school district.

Your final question concerns the effect of federal law, specifically 38 U.S.C. §§2021-2026, on state law provisions governing reemployment rights.<sup>2</sup> It is my understanding that several school board members believe that federal law should supercede Ohio law since federal law appears to provide more limited protections than state law.

The provisions of 38 U.S.C. §§2021-2026 are known as the Veterans Reemployment Rights Act. 38 U.S.C. §2021, upon which the reemployment rights of members of reserve components of the armed forces who enter upon active duty are based, see 38 U.S.C. §2024(b)(1) and (2), entitles a person who was in the employ of a state or political subdivision thereof to be restored to his position without loss of seniority, with various qualifications, and to receive other benefits, similar to those provided by state law. See 38 U.S.C. §2021(b)(3) (any person who holds a position with a state or political subdivision thereof "shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a reserve component of the armed forces"). See generally Schaller v. Board of Education, 449 F. Supp. 30 (N.D. Ohio 1978); Peel v. Florida Department of Transportation, 443 F. Supp. 451 (N.D. Fla. 1977), aff'd, 600 F. 2d 1070 (5th Cir. 1979). Persons are entitled to the reemployment rights and benefits provided by §2021 if the total of active duty "does not exceed four years (plus in each case any additional period in which such person was unable to obtain orders relieving such person from active duty)." 38 U.S.C. §2024(b)(1). 38 U.S.C. §2024(b)(2) provides that:

Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under subsection (b)(1) of this section extended by such member's period of such active duty, but not to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve component. With respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended, the provisions of this subsection shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

Thus, federal law imposes a limitation upon the time an employee may serve in the Armed Forces and still enjoy various reemployment rights upon discharge. R.C. Chapter 5903 contains no such limitations.

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<sup>2</sup> Because I have determined that R.C. 124.29 does not apply to the individual about whom you have asked, I am not considering the effect of federal law on that provision.



With regard to the relationship between state and federal law in this matter, 38 U.S.C. §2021(a) provides that, "[n]othing in this chapter shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter" (emphasis added). Accord 38 U.S.C. §2021(c). See Peel v. Florida Department of Transportation, 443 F. Supp. at 455 ("[t]he States are free to establish additional rights or protections for State or local employees than those provided by the VRR Act"); City of Washington v. Mongold, 12 OBR at 145 ("Public Law 93-508 and 94-286 which deals with the Military Selective Service Act provides for reemployment on a federal level and makes it clear that the federal law cannot refuse to comply with any additional rights given to a public employee...through state or local ordinances or statutes....Furthermore, the States must comply with the Selective Service Act and specifically subsection 2021"). It is, therefore, apparent that public employers in Ohio must grant eligible persons those rights and benefits specified in R.C. Chapter 5903, regardless of the number of years such persons spend in military duty, even though federal law limits the time an employee may serve in the Armed Forces and be entitled to the reemployment rights granted by 38 U.S.C. §§2021-2026.

Accordingly, it is my opinion, and you are advised, that:

1. R.C. 5903.02 entitles a teacher in a local school district, who is a member of the Ohio National Guard, to take a military leave of absence in order to enter active duty with the United States Army. R.C. 5903.02 prohibits the local school district from discharging such person, or otherwise preventing him from performing the military service for which the leave was granted.
2. R.C. 5923.05 entitles a teacher in a local school district, who is a member of the Ohio National Guard and who is serving on active duty with the United States Army, to receive compensation for thirty-one days per year for each year during his military leave of absence. (1962 Op. Att'y Gen. No. 2936, p. 261, syllabus, paragraph three, overruled.)
3. R.C. 5903.03 entitles a teacher in a local school district, who is a member of the Ohio National Guard and who is serving on active duty with the United States Army, to reemployment with the school district when he has completed his active duty with the United States Army, even though he voluntarily entered active duty.
4. R.C. 124.29 does not apply to a teacher in a local school district.
5. Pursuant to 38 U.S.C. §2021(a) and (c), the provisions of 38 U.S.C. §§2021-2026 do not limit the states in granting to employees greater rights and protections than those granted under §§2021-2026. A local board of education must comply with the terms of R.C. 5903.02 and R.C. 5903.03, regardless of the length of an employee's military duty, even though federal law imposes a limitation upon the time an employee

may serve in the Armed Forces and still enjoy those reemployment rights granted by 38 U.S.C. §§2021-2026 upon discharge.