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PUBLIC EMPLOYEE — REINSTATEMENT AFTER MILITARY SERVICE — NOT APPLICABLE TO RE-ENLISTMENT—§§143.22 R.C., 5903.03 R.C.

SYLLABUS :

1. Sections 143.22 and 5903.03, Revised Code, both deal with the right of a public employee who has entered military service to reinstatement in his position in the public service upon termination of military service; but in case of conflict between the two sections, Section 143.22, as the latest expression of the legislature, should take precedence.

2. The provisions of Section 143.22, Revised Code (and Section 5903.03, Revised Code), do not apply to a person who enters military service and who, by re-enlisting, displays an intent to remain on extended active duty; but such provisions do apply to a person who entered military service originally in 1952, left such service and became a public employee in 1958, enlisted in the U. S. Navy in 1960, and received an honorable discharge in 1961, as the 1960 enlistment could not be considered to be a *re-enlistment* displaying an intent to *remain* on extended active duty within the purview of Section 143.22.

Columbus, Ohio, September 19, 1962

Hon. Minor C. Kershner, Chairman, State Personnel Board of Review
State Office Building, Columbus 15, Ohio

Dear Sir:

In your request for opinion you state:

"The State Personnel Board of Review respectfully requests your opinion as to the interpretation of Sections 143.22, and 5903.01 to 5903.05, inclusive, of the Revised Code as they apply to the rights of public employees to reinstatement to positions in the public service following termination of military service under honorable conditions."

You then state a fact situation as follows:

- "(1) 'R' entered military service on August 16, 1952;
- "(2) He was originally appointed to a position with the Chillicothe Fire Department in November, 1958;
- "(3) He resigned from his position effective August 27, 1960, in a letter dated August 15, 1960, which stated 'I am resigning my position as fireman due to re-enlisting in the United States Navy.';
- "(4) That he entered military service in the U. S. Navy in August, 1960;
- "(5) That 'R' was discharged from the U.S. Navy effective December 21, 1961, under honorable conditions;
- "(6) 'R' applied for reinstatement to the position in the Fire Department within the ninety day period provided for in the Ohio Code;
- "(7) 'R' has not been reinstated as of July 20, 1962."

Your questions are as follows:

- "(1) Is 'R' eligible for reinstatement under the circumstances?
- "(2) Should this Board order his reinstatement under the provisions of Section 5903.05 R.C.?
- "(3) Which section of the Ohio Code should be considered to be controlling by this Board?
- "(4) Is it possible that one section would be controlling for one period of service and the other for another?"

Section 143.22, Revised Code, reads, in part, as follows:

“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 stautus 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, provided such person is at such time physically able to perform the duties of such office or position; but this section does not apply to elective public officials, appointive public officials serving fixed terms, or officers serving at the pleasure of the governor. Such application for restoration shall be made to the appointing officer of such person within a period of ninety days after receipt of an honorable discharge or certificate or other evidence showing satisfactory completion of his period of service. If any person entitled to the benefits of this section is unable to perform the duties of such office or position at the expiration of thirty days from the date of his application for restoration thereto because of temporary physical disability, he shall be restored to such office or position when such physical disability is removed, if such physical disability is removed within one year from the date of his application.

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“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.”

Section 5903.02, Revised Code, reads, in part, as follows:

“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.

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Section 5903.03, Revised Code, reads, in part, as follows:

“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 re-employment 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. * * *”

Section 5903.05, Revised Code, provides that the state civil service commission shall enforce the provisions of Section 5903.03, *supra*. By virtue of Section 143.011, Revised Code, enacted in 1959 (128 Ohio Laws, 1049), the functions of the state civil service commission are now vested in the department of state personnel. Said Section 5903.05, reads as follows:

“The state civil service commission shall issue regulations for the enforcement of sections 5903.02 to 5903.04, inclusive, of the Revised Code. The departments and agencies of this state and of the civil and political subdivisions thereof shall comply with such regulations and orders issued pursuant thereto. Whenever the commission finds, upon appeal of the person concerned that any such department or agency has failed or refuses to comply with such section or the regulations thereunder, it shall issue an order specifically requiring such department or agency to comply and to compensate the person for any loss of salary or wages suffered by reason of such failure to comply, less any amount received through other employment, unemployment compensation, or readjustment allowances. Any such compensation ordered to be paid shall be in addition to and payable out of the appropriations currently available for salaries and expenses of the department or agency, and such appropriations shall be available for such purpose.”

An interpretation of Section 143.22 and 5903.01 to 5903.05, inclusive, Revised Code, requires an examination of the legislative history of these sections.

Section 486-16a, General Code, the predecessor of Section 143.22, Revised Code, was first enacted in May 1941, during the period of the first peace-time draft and just before our entry into the second world

war (119 Ohio Laws, 743). At that time the section pertained only to a person who, at the time he held a public position, was called into service. The section was amended, however, in 1943 (120 Ohio Laws, 151) to include persons who enlisted in the service subsequent to December 8, 1941, as well as those who were called into service, and a new sentence was added to the end of the section reading as follows:

“The provisions of this act shall not apply to persons who enter the armed services after the termination of the present war with the Axis powers.”

The section was again amended in 1946 (121 Ohio Laws, 770), but the basic provisions remained the same, including the reference to the “present war with the Axis powers.” The 99th General Assembly amended the section in 1951 (124 Ohio Laws, 36 and 341), which was during the Korean emergency, to delete the reference in the last sentence of the section regarding “the present war with the Axis powers,” and to substitute therefor the following:

“The provisions of this act shall not apply to persons who enter the armed services after the *present emergency is declared terminated by the Congress or President of the United States.*”

(Emphasis added)

At the same session of the General Assembly in 1951, Sections 5266-1 to 5266-6, inclusive, General Code, were enacted (124 Ohio Laws, 81). These sections are the same now as they were in 1951, although they are now known as Sections 5903.01 to 5903.05, inclusive, Revised Code. Section 143.22, Revised Code, was again amended, however, after the end of the Korean emergency in 1955 (126 Ohio Laws, 833). The last sentence in the section referring to the “present emergency” was deleted and a new paragraph was substituted therefor reading as follows:

“This section shall apply to all persons who enter on extended active duty with the armed services of the United States to perform such military service as they may be called upon to perform by proper authority. *However, the provisions of this section shall not apply to any person, who, by reenlisting displays an intent to remain on extended active duty in the armed services of the United States.* Nor shall this act apply to any commissioned officer, who voluntarily, enters on extended active duty beyond that required on accepting a commission.”

(Emphasis added)

Said Section 143.22 was further amended by the 104th General Assembly in House Bill No. 1, effective January 10, 1961, to make certain style changes, and now reads as set forth at the outset of this opinion.

Having examined the legislative history of the sections here concerned, the question then remains as to how they should be interpreted or construed. In this regard, it is stated in 50 Ohio Jurisprudence 2d, 210, Statutes, Section 230, as follows:

“Consistency in statutes is of prime importance, and it is the duty of the court to attempt to harmonize and reconcile laws. That is, a statute or section should, if possible, be so construed as to harmonize and reconcile its provisions with other laws or sections so that all of them may stand. * * *”

In attempting to harmonize the sections in question, the first thing which is apparent is the difference in dates. A public employee who left a position before June 27, 1950 and was not performing military duty on June 27, 1950 does not come within the terms of Section 5903.03, *supra*, although he would come within the terms of Section 143.22, *supra*, if he enlisted in the armed services subsequent to December 8, 1941, or was called in or commissioned in the armed services at any time. Another difference in the two sections is that under Section 143.22, *supra*, a person must have held the position in the public service for a period of ninety days or more before entry into the armed services in order to qualify. There is no such requirement in Section 5903.03, *supra*. The statement in Section 143.22, *supra*, that the provisions of said section do not apply to any person who, by re-enlisting, displays an intent to remain on extended active duty. Since the recent amendment to Section 143.22, *supra*, represent the latest expression of legislative intent regarding the rights of public employees to reinstatement following termination of military service, it is my opinion that Section 5903.03, *supra*, should be construed so as to harmonize and reconcile its provisions with those of section 143.22, *supra*, as amended.

Thus, before answering questions one and two, I shall answer question three by saying that section 143.22, *supra*, is controlling over Section 5903.03, *supra*, whenever there is any doubt. I further answer question four by saying that a period of military service commencing and terminating before June 27, 1950 is controlled by Section 143.22, *supra*.

Coming now to questions one and two, the facts as set forth in your letter of request show that “R” was originally appointed as a public em-

ployee on August 16, 1952, when he first entered military service. Section 143.22, *supra*, begins as follows:

“Any person who, at the time he held or holds an office or position in the public service. * * *”

Section 5903.03, *supra*, begins as follows:

“A public employee who leaves a position. * * *”

Obviously, neither section applies to “R” insofar as his military service in 1952 is concerned because he was not a public employee at that time.

When “R” entered military service in 1960, however, he was a public employee. He is eligible for reinstatement, therefore, under either Section 143.22, *supra*, or Section 5903.03, *supra*, unless his entry into military service in 1960 constituted “re-enlisting” within the meaning of Section 143.22, *supra*.

It will be noted, however, that said Section 143.22, refers to a re-enlisting with an intent *to remain* on extended active duty. This language definitely implies that the person who re-enlists is serving in the armed forces at the time of the re-enlistment and chooses to remain on active duty. In the instant case “R” was not on active duty when he enlisted in 1960 and could not be said to have re-enlisted with an intent *to remain* on extended active duty, within the purview of Section 143.22, *supra*.

Thus, in answer to your first two questions, it is my opinion that “R” is eligible for reinstatement under the circumstances outlined in your letter of request, and the state personnel board of review may order his reinstatement under the provisions of Section 5903.05, Revised Code.

Accordingly, it is my opinion and you are advised.

1. Sections 143.22 and 5903.03, Revised Code, both deal with the right of a public employee who has entered military service to reinstatement in his position in the public service upon termination of military service; but in case of conflict between the two sections, Section 143.22, as the latest expression of the legislature should take precedence.

2. The provisions of Section 143.22, Revised Code (and Section 5903.03, Revised Code), do not apply to a person who enters military service and who, by re-enlisting, displays an intent to remain on extended active duty; but such provisions do apply to a person who entered military

service originally in 1952, left such service and became a public employee in 1958, enlisted in the U. S. Navy in 1960, and received an honorable discharge in 1961, as the 1960 enlistment could not be considered to be a *re-enlistment* displaying an intent to *remain* on extended active duty within the purview of Section 143.22.

Respectfully,

MARK MCELROY

Attorney General