

OPINION NO. 70-123

Syllabus:

Section 5923.05, Revised Code, requires a school board to pay an employee his full pay for up to 31 days in any one calendar year while the employee is on active duty or training duty with Ohio armed forces or with the reserve components of armed forces of the United States.

To: Neil M. Laughlin, Licking County Pros. Atty., Newark, Ohio
By: Paul W. Brown, Attorney General, September 8, 1970

I have before me your request for my opinion which states in part:

"* * *[P]lease advise if the School Board is obligated to pay the school salary of the teacher who was called upon a temporary basis only in the National Guard or only the difference between what the National Guard paid the school teacher and what he would have received at his regular salary."

To answer your question requires a discussion of Section 5923.05, Revised Code, which states:

"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."

Various past Opinions of the Attorney General have interpreted Section 5923.05, supra. Opinion No. 1468, Opinions of the Attorney General for 1960, states 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 interest of the public welfare.* * *"

The preceding words are as valid today as when written ten years ago, and I fully concur.

While I follow the thinking of my predecessors that all officers and employees of the state or of a political subdivision are entitled to a leave of absence for military service with full pay for a period not to exceed thirty-one days in a calendar year, you have raised a question in your request for my opinion by referring to the case of Muller v. Akron, 116 Ohio App. 417 (1962). The first syllabus of this case states:

"1. An ordinance of the city of Akron which provides for the leave of absence of city employees for

periods of not more than thirty-one days in a calendar year, for service with the armed forces of the United States, and establishes a rate of pay, from the city, calculated on the basis of 'the difference in money between the city pay and his military* * *pay for such period,' although in conflict with the rate of pay provided in Section 5923.05, Revised Code, for similar service, overrides the state law and renders it inoperative by virtue of the powers of local self-government given a city under Section 3, Article XVIII of the Constitution of Ohio."

The factual setting of Muller v. Akron, supra, is distinguishable from the situation with which your opinion request is concerned. The ordinance passed by the City of Akron, recognized by the court as providing for a rate of pay for city employees on military service which differed from the provisions of Section 5923.05, supra, was passed pursuant to the authority of Article XVIII, Section 3 of the Constitution of Ohio, which states:

"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."

Although the City of Akron may have had the authority to pass an ordinance affecting Section 5923.05, supra, boards of education have no power to act in contravention of state law. Verberg v. Board of Education, 135 Ohio St. 246 (1939), held at page 248:

"Boards of education are created by statute, and their jurisdiction is conferred only by statutory provision. Just as any other administrative board or body, they have such powers only as are clearly and expressly granted."

There is no power given to a board of education to pay their employees for a military leave of absence at a different rate than that specified in Section 5923.05, supra, as interpreted by Opinion No. 1468, supra.

You further stated in your request for my opinion:

"* * *In this case, of course, this was only a temporary call-up for an emergency and not entering into the service of active duty as was set forth in the Attorney General Opinion - 1962, #2936.* * *"

You have indicated by the above statement that the activation of a National Guardsman to aid in quelling civil disobedience might not be considered active duty. Section 5923.21, Revised Code, states in part:

"The organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection, or to repel or prevent invasion, and shall be called into service in all cases before the unorganized militia."

Section 5924.01, Revised Code, concerning the applicability of the Uniform Code of Military Justice to the organized militia, makes the following definition:

"Active state duty means full-time duty in the active military service of the state under an order of the governor issued pursuant to authority vested in him by law, and while going to and returning from such duty." (Emphasis added.)

In the absence of a specific distinction by the legislature to the contrary, I can find no reason for viewing the military duty of a member of the National Guard, ordered to active state duty to suppress insurrection, to be anything other than "active duty" covered by Section 5923.05, supra.

It is my opinion, and you are hereby advised, that Section 5923.05, Revised Code, requires a school board to pay an employee his full pay for up to 31 days in any one calendar year while the employee is on active duty or training duty with Ohio armed forces or with the reserve components of armed forces of the United States.