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VACATIONS; STATE EMPLOYEES, COMPUTATION OF TIME SPENT IN "SERVICE WITH THE STATE"—§121.161 R.C.—TIME IN ARMED FORCES, RE-ENTRY OF STATE SERVICE—§143.22 R.C.

SYLLABUS:

Under the provisions of Section 143.22, Revised Code, time spent by an individual in one of the armed services of the United States between December 8, 1941, and his discharge in December, 1945, where such individual was an employee of the state at the time of his entry into such armed service, and had been such employee for at least ninety days prior thereto, may be deemed spent in "service with the state" for the purpose of computing paid vacation rights under Section 121.161, Revised Code.

Columbus, Ohio, June 5, 1958

Hon. Floyd C. Moon, Director
Department of Liquor Control, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"In order to state the facts of the question which will be presented to you, the following hypothet is submitted for your consideration.

"From August of 1940 until September of 1942, Mr. X was employed as an Inspector for the State Highway Department. From September of 1942 until December of 1945, Mr. X was on military leave with the Armed Service of the United States. From December, 1945 until June of 1947, Mr. X was not an employee of the State in any capacity. Mr. X again became an employee of the State in June of 1947 as an investigator for the Department of Liquor Control, and is still employed in that capacity.

"Sections 143.21 and 143.22 of the Revised Code, while applicable to returning service men, do not provide a clear answer to this problem. Also, there is doubt if the provisions of Chapter 5903., on Veterans' Rights are applicable to persons who served in World War II.

Section 121.161 of the Revised Code provides for three weeks' vacation for employees having fifteen or more years of

service with the State. Under the facts as set out above, Mr. X would have fifteen years' service if the period which he served in the Armed Forces can be included in his service with the State. If it cannot be included, then there is no question involved as Mr. X would not have the necessary fifteen years. Therefore, our question to you is as follows:

> "When computing the time necessary to entitle a State employee to three weeks' vacation, may that period which the individual served in the Armed Forces be considered as State service for this purpose when the individual involved did not seek restoration of employment within ninety days after his separation from the Armed Forces.
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> "In view of the fact that the vacation season is almost upon us, a reply to this question at your earliest convenience would be greatly appreciated."

Section 121.161, Revised Code, provides for vacation leave of state employees and so far as here pertinent, reads:

> "Each full-time state employee, including full-time hourly-rate employees, after service of one year with the state, is entitled, during each year thereafter, to two calendar weeks, excluding legal holidays, vacation leave with full pay. Employees having fifteen or more years of service with the state are entitled to three calendar weeks of such leave. * * *"

Chapter 5903., Revised Code, to which you refer, contains Section 5903.02, Revised Code, which reads 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.
>
> "No public employer shall refuse to employ or shall discharge any person because of being a member of the Ohio national guard, the Ohio defense corps, the Ohio naval militia, the armed services of the United States or their auxiliaries, or such other services as are specified in Section 143.22 of the Revised Code, or prevent him from performing any military service he may be called upon to perform by proper authority." (Emphasis added)

Section 5903.04, Revised Code, expressly refers to the benefits to which veterans, upon reinstatement in the state service, may claim as "including vacation pay."

This chapter, however, was not enacted until 1951. See Amended Substitute Senate Bill No. 216, 99th General Assembly, 124 Ohio Laws, 81. In that bill an emergency provision is set out, in Section 10, as follows:

> "This act is hereby declared to be an emergency measure necessary for the immediate protection and preservation of the public peace, health and safety. The reason for such necessity lies in the fact that its enactment into law at the earliest possible time will prevent discrimination in case any personnel is called for drill or periods of active service during the present emergency and employment practices against persons who are serving or are about to serve their country in the armed forces. Therefore this act shall go into immediate effect."

This reference to the possibility of a call to "active service during the present emergency" quite plainly indicates that this legislation was designed to apply to those serving during such "present emergency" and not to veterans who had served in an earlier period. I conclude, therefore, that this chapter is not applicable to the case you describe.

You state that the veteran in question was discharged from the military service in December, 1945, was privately employed until June, 1947, and in that month re-entered the state service in a department other than that in which he had previously served.

In effect, at the date of such re-entry into the state service, was Section 486-16a, General Code, enacted effective July 10, 1946. See 121 Ohio Laws, 770. This section read in part:

> "Any person who at the time he held or holds an office or position under the classified 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 into 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. 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.

"* * *

"Whenever the time or period of employment in the classified service affects the *status,* rank, rating or qualifications in any respect *of any person who has served in the armed services of the United States as contemplated by this section* such person shall be given credit for the period in which he served in such armed services *as though such time were served in the course of his regular employment.* * * *" (Emphasis added)

In the case at hand, the veteran did not apply for restoration within the statutory period of ninety days after discharge, nor was he "restored" pursuant to such an application. Rather, he re-entered the state service some eighteen months after discharge. However, the second portion of Section 486-16a, General Code, as quoted above, as now codified in Section 143.22, Revised Code, *is not limited* to veterans restored to a position by reason of such an application but to *"any* person who has served in the armed services of the United States as contemplated by this section." What is the service "contemplated by this section?" Quite clearly, this refers as indicated by the first sentence in this section, to any person who (1) entered the armed service "subsequent to December 8, 1941," and (2) was at the date of such entry an officer or employee under the classified service, and had been such for ninety days or more.

Because the individual in question meets these conditions, he was entitled, upon his re-employment in 1947, to have the period of his military service counted as though served in the course of his state employment in any respect in which that would affect his "status." His "status," as to paid vacation rights, was then determined as provided in Section 154-20, General Code, now codified as Section 121.161, Revised Code. Although this section was amended effective October 11, 1955, to give greater weight to length of "service," I perceive no reason why, under such amended formula, the time spent in the armed services of the United States subsequent to December 8, 1941, should not be counted as a part of the "fifteen * * * years of service with the state."

Accordingly, it is my opinion that under the provisions of Section 143.22, Revised Code, time spent by an individual in one of the armed services of the United States between December 8, 1941 and his discharge in December, 1945, where such individual was an employee of the state at the time of his entry into such armed service, and had been such employee for at least ninety days prior thereto, may be deemed spent in

"service with the state" for the purposes of computing paid vacation rights under Section 121.161, Revised Code.

Respectfully,
WILLIAM SAXBE
Attorney General