

1468

AN EMPLOYEE OF THE STATE OR ONE OF ITS POLITICAL SUBDIVISIONS IS ENTITLED TO LEAVE OF ABSENCE FOR MILITARY SERVICE WITHOUT ANY LOSS OF PAY FOR A PERIOD NOT MORE THAN 31 DAYS—§5923.05, R.C.

SYLLABUS:

An employee of the state or one of its political subdivisions is entitled under Section 5923.05, Revised Code, to leave of absence for military service without any loss of pay from his employer for a period of not more than 31 days in any one calendar year, regardless of the fact that such employee may be paid for his military service; and the provisions of said section take precedence over any conflicting provisions of a municipal corporation, charter or otherwise.

Columbus, Ohio, June 17, 1960

Hon. James A. Rhodes, Auditor of State
State of Ohio, Columbus, Ohio

Dear Sir:

I have your request for my opinion reading as follows:

"It has been the policy of the State Auditor's office to approve full payrolls for such officers and employees of the State and for the Bureau of Inspection and Supervision of Public Offices to render no findings for the officers and employees of the political subdivisions of the State who are in the military service on field training or active duty of the Ohio National Guard, the Ohio Defense Corps, the Ohio Naval Militia or members of other reserve components of the armed forces of the United States when such personnel are on field training for periods not to exceed thirty-one days in any one calendar year.

"Recently there has been directed to our attention a ruling by a municipal legal officer that this statute extends only to the reimbursement of an employee on temporary military service for the difference between the sum or sums received from his military organization and the normal remuneration he would have received from his public service with the state or one of its political subdivisions.

"We have been guided by the decision of the Common Pleas Court in the case of *Otten v. Cincinnati*, 10 Ohio Opinions, 276 and by the opinion of the Attorney General, 1932 O.A.G. No. 4553.

"Will you, accordingly, please render your formal opinion as to whether or not a person on military leave, as is provided for by Section 5923.05 of the Revised Code, is entitled to his full pay as a public officer or employee together with the payment received from the military department while he is on active duty."

In Opinion No. 4553, Opinions of the Attorney General for 1932, page 950, the syllabus reads as follows:

"Where a state employe regularly employed by the state is a member of the National Guard, he is entitled to leave of absence from his duties during the time he is in attendance at the field training for a period not to exceed fifteen days and he is entitled to his regular salary or compensation without deduction for such absence."

Opinion No. 4553, *supra*, dealt with an interpretation of the then existing Section 5273-2, General Code, which then read:

“All officers and employes of the state, the several counties, cities and city school districts thereof, who are members of the Ohio national guard, naval militia, or officers reserve corps, shall be entitled to leave of absence from their respective duties, without loss of pay or time, for such time as they are in military service on training duty under the orders of the governor of the state of Ohio as the commander in chief, in case of the national guard and the naval militia, or competent authority in case of the officers’ reserve corps, for periods not to exceed 15 days in any one calendar year. * * *”

The same section of law was construed in the case of *Otten v. Cincinnati*, 10, Ohio Opinions 276 (Court of Common Pleas, Hamilton County, 1937), in which the question concerned the right of a municipal employee to vacation leave in the same year in which he took fifteen (15) days leave of absence for military service. The first headnote of this case reads as follows:

“1. Municipal Corporations

A municipality can not refuse an employee compensation for a leave of absence with pay for vacation purposes, in addition to a leave of absence granted with pay for attendance at the encampment of the Ohio National Guard. * * *”

Former Section 5273-2, General Code, is now Section 5923.05, Revised Code, which reads:

“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.”

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.

It appears that your question is concerned with an employee of a municipal corporation and his rights to his municipal pay when on leave of absence for military service. If the provisions of Section 5923.05, *supra*, are applicable to employees of municipal corporations then, of course, the employee is entitled to his full pay while on such leave of absence. The question arises, however, whether the provisions of such section are applicable where the municipal corporation has adopted its own provisions in conflict with those of Section 5923.05, *supra*, pertaining to the payment of an employee for the period that he is on leave of absence for military service. Pertinent in this question are the provisions of Section 3 of Article XVIII, Ohio Constitution, reading as follows:

“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.”

The salary to be paid a municipal employee is certainly a question of local government. On the other hand, Section 5923.05, *supra*, is unquestionably a general law. Whether a local provision which is in conflict with Section 5923.05 is valid under the constitutional provision, therefore, depends on whether such provision is a police, sanitary or other similar regulation.

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 interests of the public welfare. To allow a municipal regulation, such as here considered, to defeat the purpose of Section 5923.05, *supra*, would tend to discourage participation in the armed forces programs and would not be in the interests of the public safety. Accordingly, I conclude that the provisions of Section 5923.05, *supra*, are of a police or similar nature and take precedence over the provisions of a municipal corporation in conflict therewith.

Answering your specific question, therefore, it is my opinion and you are advised that an employee of the state or one of its political subdivisions is entitled under Section 5923.05, Revised Code, to leave of absence for military service without any loss of pay from his employer for a period of not more than 31 days in any one calendar year, regardless of the fact that such employee may be paid for his military service; and the provisions of said section take precedence over any conflicting provisions of a municipal corporation, charter or otherwise.

Respectfully,
MARK McELROY
Attorney General