

February 14, 2000

OPINION NO. 2000-007

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

Dear Prosecutor Baxter:

You have requested an opinion concerning the compensation to be paid to public employees who take leave from their positions in order to serve in the military. Your specific question is whether a county sheriff is required to pay an employee's total wages without any offset for amounts the employee earns while on military leave. Through telephone calls with your representative, we understand that your question concerns the compensation to be paid to an employee for the initial month of military leave in each calendar year, as described in R.C. 5923.05(A).¹

Let us begin with an examination of the law in question. It says, in division (A), that permanent public employees² who are members of the Ohio organized militia or members of

¹ Questions concerning a collective bargaining agreement, raised in your initial request, were withdrawn because they have been addressed by statutory amendment. *See* Am. Sub. S.B. 130, 122nd Gen. A. (1997) (eff. Sept. 18, 1997).

² "Permanent public employee" is defined to mean:

any person holding a position in public employment that requires working a regular schedule of twenty-six consecutive biweekly pay periods, or any other regular schedule of comparable consecutive pay periods, which is not limited to a specific season or duration. "Permanent public employee" does not include student help; intermittent, seasonal, or external interim employees; or individuals covered by personal services contracts.

other reserve components of the armed forces of the United States, including the Ohio National Guard, “are entitled to leave of absence from their respective positions without loss of pay” while they perform service in the uniformed services³ “for periods of up to one month, for each calendar year in which they are performing service in the uniformed services.” R.C. 5923.05(A)(1). A calendar year is a year extending from January through December, and a month is “twenty-two eight-hour work days or one hundred seventy-six hours within one calendar year.” R.C. 5923.05(A)(2).

The law states plainly that the public employees in question are entitled to a leave of absence “without loss of pay” for up to one month each year. R.C. 5923.05(A)(1). It contains no language providing for an offset of military pay from amounts paid to a public employee during this one-month leave of absence.

Division (B) of the statute applies to the same employees who are subject to division (A) but covers instances in which those employees are called or ordered to the uniformed services for longer than a month during a calendar year because of an executive order issued by the president of the United States or an act of Congress. R.C. 5923.05(B). Division (B) provides that during the period designated in the order or act, each such employee is entitled “to a leave of absence and to be paid, during each monthly pay period of that leave of absence,” the lesser of five hundred dollars or the difference between the person’s wage or salary as a permanent public

R.C. 5903.01(A); *see* R.C. 5923.05(A)(1). “Public employment” includes employment by the county or any department or agency of the county. R.C. 5903.01(B). Thus, employment by the county sheriff is public employment. *Id.*; *see* R.C. 5903.01(C); *see also* R.C. 325.17.

³ The following definitions apply:

(G) “Service in the uniformed services” means the performance of duty, on a voluntary or involuntary basis, in a uniformed service, under competent authority, and includes active duty, active duty for training, initial active duty for training, inactive duty for training, full-time national guard duty, and performance of duty or training by a member of the Ohio organized militia pursuant to Chapter 5923. of the Revised Code. “Service in the uniformed services” includes also the period of time for which a person is absent from a position of public or private employment for the purpose of an examination to determine the fitness of the person to perform any duty described in this division.

(H) “Uniformed services” means the armed forces, the Ohio organized militia when engaged in active duty for training, inactive duty training, or full-time national guard duty, the commissioned corps of the public health service, and any other category of persons designated by the president of the United States in time of war or emergency.

R.C. 5903.01; *see* R.C. 5923.05(A)(1).

employee and the amount of pay and allowances received that month as a member of the uniformed services. *Id.* An exception provides that no such payments may be made if the employee receives more as a member of the uniformed services than the employee would receive as a permanent public employee, or if the employee is receiving pay under R.C. 5932.05(A) for the first month of uniformed service in a calendar year. Thus, division (B) of R.C. 5923.05 provides an offset for military pay received by a public employee in circumstances that are subject to its provisions.

The statute goes on to permit a political subdivision to pay its employees amounts in addition to those required by R.C. 5923.05(B), as authorized by the legislative authority. R.C. 5923.05(D). The statute also provides that terms of a collective bargaining agreement govern employees who are subject to the agreement, with the exception that “no collective bargaining agreement may afford fewer rights and benefits than are conferred under [R.C. 5923.05].” R.C. 5923.05(F); *see also* R.C. 4117.10.

Let us turn now to your specific question, which is whether R.C. 5923.05(A) requires that, for the annual one-month period covered by that division, the county sheriff must pay an employee’s wages or salary in full, in addition to any compensation that the employee may receive for military service. As discussed above, division (A) of R.C. 5923.05 states clearly that a public employee who comes under its provisions is entitled to leave of absence “without loss of pay.” R.C. 5923.05(A)(1). As commonly understood, this language indicates that the usual amount of pay should be provided in full. *See* R.C. 1.42 (“[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage”). No statutory provision grants an offset for compensation that the employee receives from another source, and there is no statutory basis for reading such an offset into the statute.

The conclusion that no offset applies to payments under division (A) of R.C. 5923.05 finds support in the fact that an offset provision appears in division (B) of the statute. R.C. 5923.05(B). When the General Assembly has intended that compensation paid to a public employee be offset by military compensation, it has expressly so provided. The absence of such an offset for the month-long period covered by division (A) of R.C. 5923.05 indicates that no such offset was intended. *See generally Kiefer v. State*, 106 Ohio St. 285, 289-90, 139 N.E. 852, 854 (1922). It is concluded, accordingly, that when a county sheriff provides compensation pursuant to R.C. 5923.05(A) to a permanent public employee who serves in the uniformed services, the sheriff must pay the employee’s wages or salary in full, without allowing any offset for amounts earned by the employee while on military leave.

This conclusion is consistent with the manner in which the statute has been construed in the past. In *Northern Ohio Patrolmen’s Benevolent Ass’n v. City of Parma*, 61 Ohio St. 2d 375, 377, 402 N.E.2d 519, 521 (1980), the Ohio Supreme Court stated: “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 any monetary compensation awarded to such

employee from the military.”⁴ The same conclusion was reached in 1974 Op. Att’y Gen. No. 74-022, which states: “The benefits conferred upon all state employees by [R.C. 5923.05] clearly preclude any attempt on the part of a state university to reduce the employee’s regular salary during such leave.” 1974 Op. Att’y Gen. No. 74-022, at 2-109; *see also* 1970 Op. Att’y Gen. No. 70-123; 1960 Op. Att’y Gen. No. 1736, p. 625; 1941 Op. Att’y Gen. No. 4028, p. 657. *See generally* 1986 Op. Att’y Gen. No. 86-050. The statute has been amended from time to time in various respects, but the language providing for leave of absence “without loss of pay” has remained constant. *See, e.g.*, 1941 Op. Att’y Gen. No. 4028, p. 657, at 663 (quoting G.C. 5273-2).

For the reasons discussed above, it is my opinion, and you are advised, that when a county sheriff provides compensation pursuant to R.C. 5923.05(A) to a permanent public employee who serves in the uniformed services, the sheriff must pay the employee’s wages or

⁴ *Northern Ohio Patrolmen’s Benevolent Ass’n v. City of Parma* concerned a municipal ordinance providing that the amounts paid to employees in situations described in what is now R.C. 5923.05(A) would be offset by amounts of military pay or compensation received. The court found that the ordinance and the statute were in direct conflict and concluded that it was within the power of a non-chartered municipality to enact the ordinance because it dealt with a matter of substantive local self-government. The court also noted that such an ordinance, if enacted by a chartered municipality, would prevail over the state law irrespective of any conflict. *See* Ohio Const. art. XVIII, §§ 2, 3, and 7; *Mullen v. City of Akron*, 116 Ohio App. 417, 188 N.E.2d 607 (Summit County 1962); *see also* 1970 Op. Att’y Gen. No. 70-123. *But see* 1960 Op. Att’y Gen. No. 1468, p. 423 (finding that R.C. 5923.05 takes precedence over conflicting provisions enacted by a municipal corporation); *Otten v. City of Cincinnati*, 10 Ohio Op. 276 (C.P. Hamilton County 1937) (same). The *Northern Ohio Patrolmen’s* case thus held that, pursuant to Ohio Const. art. XVIII, §§ 2 and 3, “a non-chartered municipality has the power to mandate by ordinance the amount of compensation paid to its employees who are on leave of absence as members of the armed forces reserve.” *Northern Ohio Patrolmen’s Benevolent Ass’n v. City of Parma*, 61 Ohio St. 2d 375, 375, 402 N.E.2d 519, 520 (1980) (syllabus, paragraph 2). Hence, as authorized by the Ohio Constitution, municipalities may adopt provisions that vary the compensation requirement of R.C. 5923.05(A).

A county that adopts a charter pursuant to Ohio Const. art. X, §§ 3 and 4 may exercise home rule authority and may acquire municipal powers. *See* 1996 Op. Att’y Gen. No. 96-043; 1994 Op. Att’y Gen. No. 94-095; *see also* R.C. 301.22. Your county has not adopted a charter, and this opinion does not address the powers of a chartered county.

The Honorable Kevin J. Baxter

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salary in full, without allowing any offset for amounts earned by the employee while on military leave.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

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SYLLABUS:

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