

March 13, 2006

The Honorable Dennis P. Will  
Lorain County Prosecuting Attorney  
225 Court Street, Third Floor  
Elyria, Ohio 44035

SYLLABUS:

2006-007

A permanent public employee who performs service in the uniformed services as provided in R.C. 5923.05(A)(1) is entitled by R.C. 5923.05(A)(1) to receive up to one month's leave of absence with full pay in the calendar year in which the uniformed service begins, and an additional one month's leave of absence with full pay in each subsequent calendar year in which uniformed service is performed. Therefore, if a permanent public employee whose compensation and leave are governed by R.C. 5923.05(A)(1) receives a month's leave of absence with full pay for time spent performing uniformed service beginning in September of 2005 and continues performing uniformed service, that employee is entitled to receive an additional month's full pay beginning in January of 2006, and another month's full pay beginning in January of each subsequent year in which the performance of uniformed service continues.



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OPINION NO. 2006-007

The Honorable Dennis P. Will  
Lorain County Prosecuting Attorney  
225 Court Street, Third Floor  
Elyria, Ohio 44035

Dear Prosecutor Will:

We have received your request for an opinion regarding the interpretation of R.C. 5923.05 with respect to the payment of compensation to a public employee who is granted a leave of absence to serve in the uniformed services. You have asked the following question:

Is a public employee who receives full pay for thirty days during leave of absence taken pursuant to R.C. 5923.05 for uniformed service beginning in September 2005, entitled to receive an additional thirty days full pay beginning in January 2006, and in each January thereafter for continual uniformed service?

For the reasons discussed below, we conclude that a permanent public employee who performs service in the uniformed services as provided in R.C. 5923.05(A)(1) is entitled by R.C. 5923.05(A)(1) to receive up to one month's leave of absence with full pay in the calendar year in which the uniformed service begins, and an additional one month's leave of absence with full pay in each subsequent calendar year in which uniformed service is performed. Therefore, if a permanent public employee whose compensation and leave are governed by R.C. 5923.05(A)(1) receives a month's leave of absence with full pay for time spent performing uniformed service beginning in September of 2005 and continues performing uniformed service, that employee is entitled to receive an additional month's full pay beginning in January of 2006, and another month's full pay beginning in January of each subsequent year in which the performance of uniformed service continues.

**Payment provisions of R.C. 5923.05**

Your question concerns R.C. 5923.05, which states, in part:

(A)(1) Permanent public employees who are members of the Ohio organized militia or members of 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 for the time they are performing service in the uniformed services, for periods of up to one month, for each calendar year in which they are performing service in the uniformed services.* (Emphasis added.)

The statute defines “[m]onth” as “twenty-two eight-hour work days or one hundred seventy-six hours within one calendar year,” and “[c]alendar year” as “the year beginning on the first day of January and ending on the last day of December.” R.C. 5923.05(A)(2)(a) and (b). It gives the terms “[p]ermanent public employees” and “uniformed services” the meanings set forth in R.C. 5903.01. R.C. 5923.05(A)(2)(c).<sup>1</sup>

Divisions (B) and (C) of R.C. 5923.05 apply to situations in which uniformed service in a given year lasts for more than a month, so that the benefits provided under division (A) are exhausted. Divisions (B) and (C) provide for varying amounts of payments to supplement the compensation received for uniformed service. *See also* R.C. 5923.05(D); 2000 Op. Att’y Gen. No. 2000-007. Political subdivisions are permitted to pay more than the amounts required by division (B). R.C. 5923.05(E).

Provisions of collective bargaining agreements prevail over the provisions of R.C. 5923.05, “except that no collective bargaining agreement may afford fewer rights and benefits than are conferred under [R.C. 5923.05].” R.C. 5923.05(G); *see also* R.C. 4117.10(A) (“[t]he law pertaining to the leave of absence and compensation provided under section 5923.05 of the Revised Code prevails over any conflicting provisions of such agreements if the terms of the agreement contain benefits which are less than those contained in that section or the agreement contains no such terms and the public authority is the state or any agency, authority, commission or board of the state or if the public authority is another entity listed in division (B) of section 4117.01 of the Revised Code that elects to provide leave of absence and compensation as provided in section 5923.05 of the Revised Code”).

Further, it has been held that both chartered and non-chartered municipalities are permitted to adopt leave and payment policies that are different from and in conflict with those

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<sup>1</sup> R.C. 5903.01(A) defines “[p]ermanent public employee” 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,” excluding student help, intermittent, seasonal, or external interim employees, and individuals covered by personal services contracts. R.C. 5903.01(H) defines “[u]niformed services” to mean “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.”

set forth in R.C. 5723.05.<sup>2</sup> See Ohio Const. art. XVIII, §§ 2, 3, and 7; *State ex rel. Fraternal Order of Police, Ohio Labor Council, Inc. v. City of Sidney*, 91 Ohio St. 3d 399, 402, 746 N.E.2d 597 (2001) (“[a]n ordinance adopted by a municipality pursuant to its constitutional home-rule authority regarding military leave of its employees prevails over conflicting state law”); *Northern Ohio Patrolmen’s Benevolent Ass’n v. City of Parma*, 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980) (syllabus, paragraph 2) (“[p]ursuant to Sections 2 and 3 of Article XVIII of the Constitution of Ohio, 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”); 2000 Op. Att’y Gen. No. 2000-007 at 2-36 n.4.<sup>3</sup>

Hence, the benefits provided under R.C. 5923.05 may be modified by a collective bargaining agreement or by action of a public employer. This opinion does not consider such modifications, but addresses only the entitlements granted by R.C. 5923.05(A)(1).

### **Timing of benefits under R.C. 5923.05(A)**

To answer your question, it is necessary to begin with an examination of the language of R.C. 5923.05. R.C. 5923.05(A)(1) states that permanent public employees who perform service in the uniformed services, as defined by statute, are entitled to leave of absence without loss of pay for the time they are performing service in the uniformed services, “for periods of up to one month, for each calendar year in which they are performing service in the uniformed services.” The statute thus states plainly that the leave of absence without loss of pay granted by R.C. 5923.05(A)(1) applies for periods of up to one month for each calendar year in which there is performance in the uniformed services. The words “without loss of pay” have consistently been construed to mean “with full pay.” See 2000 Op. Att’y Gen. No. 2000-007.

Express reference in R.C. 5923.05(A)(1) to “each calendar year” in which an individual performs service in the uniformed service compels the conclusion that there is entitlement to a month’s leave of absence with full pay in each calendar year in which service in the uniformed services is performed. Therefore, a permanent public employee who performs service in the uniformed services is entitled to receive up to one month’s leave of absence with full pay in the calendar year in which the performance of service in the uniformed services begins, and to receive an additional one month’s leave of absence with full pay in each subsequent calendar year in which the performance of service in the uniformed services continues. Because the

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<sup>2</sup> On this point, 1960 Op. Att’y Gen. No. 1468, p. 423, which states in the syllabus that the provisions of R.C. 5923.05 “take precedence over any conflicting provisions of a municipal corporation, charter or otherwise,” must be overruled.

<sup>3</sup> A county that adopts a charter is permitted to acquire powers that municipalities hold and to exercise home rule authority. See Ohio Const. art. X, §§ 3 and 4; 2000 Op. Att’y Gen. No. 2000-007 at 2-36 n.4. You have not raised any questions concerning the powers of a chartered county, and this opinion does not consider those powers.

calendar year begins on January first, the entitlement to a month's leave of absence with full pay begins anew each January first. Accordingly, if a permanent public employee whose compensation and leave are governed by R.C. 5923.05(A)(1) receives a month's leave of absence with full pay for time spent performing uniformed service beginning in September of 2005 and continues performing uniformed service, that employee is entitled to receive an additional month's full pay beginning in January of 2006, and another month's full pay beginning in January of each subsequent year in which the performance of uniformed service continues.

### **History of R.C. 5923.05(A)**

As discussed above, the existing language of R.C. 5923.05(A)(1) states plainly that a public employee who performs service in the uniformed services is entitled to receive up to a month's full pay "for each calendar year" during which the individual performs that service. This express language was enacted in response to a court case that construed earlier statutory language to reach a different result.

In 1993, the Ohio Supreme Court considered the language then appearing in R.C. 5923.05, which provided leave of absence without loss of pay for military service "for periods not to exceed thirty-one days in any one calendar year." *Snide v. Columbus Bd. of Educ.*, 66 Ohio St. 3d 626, 627, 614 N.E.2d 754 (1993). The Ohio Supreme Court held that, under this language, an employee was "entitled to receive thirty-one days of compensation for the calendar year in which he or she takes a military leave of absence to go on active duty, but not for subsequent calendar years of a multi-year leave of absence." *Id.* (syllabus).<sup>4</sup>

In response to the *Snide* case, the General Assembly enacted language inserting the term "for each calendar year in which military duty is performed," to specify that a leave of absence with full pay is required for each calendar year in which service is performed. 1993-1994 Ohio Laws, Part I, 1821, 1832 (Sub. S.B. 172, eff. Sept. 29, 1994). In explanation of this language and other changes made to R.C. 5923.05, the General Assembly included the following uncodified language within that legislation:

In amending section 5923.05 of the Revised Code, the General Assembly declares its intention to supersede the effect of the holding of the Ohio Supreme

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<sup>4</sup> A dissenting opinion cited *Northern Ohio Patrolmen's Benevolent Ass'n v. City of Parma*, 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980), 1986 Op. Att'y Gen. No. 86-050, and other authorities in support of a contrary conclusion. *Snide v. Columbus Bd. of Educ.*, 66 Ohio St. 3d 626, 628, 614 N.E.2d 754 (1993) (Sweeney, J., dissenting). The majority opinion relied, instead, on 1962 Op. Att'y Gen. No. 2936, p. 261 at 266, which had been overruled in relevant part by 1986 Op. Att'y Gen. No. 86-050. In light of the amendment of R.C. 5923.05 and the conclusions reached in this opinion, the partial overruling of 1962 Op. Att'y Gen. No. 2936 is affirmed. See 1986 Op. Att'y Gen. No. 86-050 at 2-265 to 2-266.

Court decision in Snide v. Columbus Board of Education, 66 Ohio St. 3d 626 (1993), insofar as that decision relates to the military leave to which public employees are entitled; and to provide military leave consistent with the reemployment rights provided to veterans by Chapter 43 of Title 38 of the United States Code.

1993-1994 Ohio Laws, Part I, 1821, 1837 (Sub. S.B. 172, eff. Sept. 29, 1994) (sec. 4, uncodified); *see also* Ohio Legisl. Serv. Comm'n, 120-SB172 LSC Analysis (Preliminary Summary) (06-24-94) at 7 (Sub. S.B. 172 supersedes the effect of *Snide v. Columbus Board of Education* case by providing that public employees who are members of the named military organizations are entitled to leave with pay for such time as they are performing military duty "for periods not to exceed 22 eight-hour work days or 176 hours in any one calendar year, for each calendar year in which military duty is performed").

The language of R.C. 5923.05(A) has been changed in other respects since the enactment of Sub. S.B. 172, but the term "for each calendar year" has been retained. This term was clearly intended to require that payment of the benefit provided by R.C. 5923.05 be made in each calendar year in which continuing uniformed service is performed. In light of this legislative enactment, there is no question but that R.C. 5923.05(A)(1) provides entitlement for one month's leave of absence with full pay for each calendar year in which a permanent public employee performs service in the uniformed services, whether the service begins in that calendar year or continues from the preceding year.

### Conclusions

For the reasons discussed above, it is my opinion, and you are advised, that a permanent public employee who performs service in the uniformed services as provided in R.C. 5923.05(A)(1) is entitled by R.C. 5923.05(A)(1) to receive up to one month's leave of absence with full pay in the calendar year in which the uniformed service begins, and an additional one month's leave of absence with full pay in each subsequent calendar year in which uniformed service is performed. Therefore, if a permanent public employee whose compensation and leave are governed by R.C. 5923.05(A)(1) receives a month's leave of absence with full pay for time spent performing uniformed service beginning in September of 2005 and continues performing uniformed service, that employee is entitled to receive an additional month's full pay beginning in January of 2006, and another month's full pay beginning in January of each subsequent year in which the performance of uniformed service continues.

Respectfully,



JIM PETRO  
Attorney General