September 13, 2019

The Honorable Paul J. Gains
Mahoning County Prosecuting Attorney
Administration Building, 6th Floor
21 West Boardman Street
Youngstown, Ohio 44503

SYLLABUS: 2019-031

1. Under R.C. 5923.05, a county is required to offer one month of paid uniformed-services leave for public employees each federal fiscal year, October 1 through September 30. Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-4335, a county must provide other benefits, including accrual of vacation time, for employees on military leave if the county offers other employees such benefits during comparable leaves of absence. (2006 Op. Att'y Gen. No. 2006-007, modified, on the basis of legislative amendment.)

2. Under USERRA, a county is required to contribute to the Ohio Public Employees Retirement System (OPERS) on behalf of an employee on uniformed-services leave during the entirety of the employee's paid leave at the same rate the county contributed to OPERS on behalf of the employee prior to the employee's leave.

3. A collective-bargaining agreement may alter a non-charter county's obligation under R.C. 5923.05 and USERRA to offer paid uniformed-services leave, but only to the extent the agreement affords greater benefits than provided under Ohio and federal law.

4. If a collective-bargaining agreement obligates a non-charter county to offer greater paid uniformed-services leave than is required under R.C. 5923.05 and USERRA, the county must contribute to OPERS on behalf of an employee on paid uniformed-services leave during the entirety of the employee's paid leave at the same rate the county contributed to OPERS on behalf of the employee prior to the employee's leave.

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OPINION NO. 2019-031

The Honorable Paul J. Gains
Mahoning County Prosecuting Attorney
Administration Building, 6th Floor
21 West Boardman Street
Youngstown, Ohio 44503

Dear Prosecutor Gains:

You have requested an opinion regarding the responsibilities of a non-charter county to pay the salary and contribute to the Ohio Public Employees Retirement System (OPERS) on behalf of a county employee while that employee is on military leave.[1] Specifically, you ask the following four questions, which we have modified for ease of discussion:

1. What obligation does a county have under R.C. 5923.05 regarding pay and benefits for public employees on military leave?

2. Does a county have an obligation under Ohio law or the Uniformed Services Employment and Reemployment Rights Act (USERRA) to

[1] For the purpose of this opinion, military leave "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 [R.C. Chapter 5923]." *See* R.C. 5923.05(A)(2)(e) (defining "service in the uniformed services"); R.C. 5923.05(A)(2)(f) (defining "uniformed services" as "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"); *see also* 38 U.S.C. § 4303(13); 20 C.F.R. § 1002.5(l) (defining "[s]ervice in the uniformed services" for purposes of USERRA).

continue to make contributions to OPERS when an employee is on military leave?

3. Can a collective-bargaining agreement alter a county's obligation under R.C. 5923.05 regarding pay for public employees on military leave?

4. Can a collective-bargaining agreement alter a county's obligations under Ohio law or under USERRA to continue to make contributions to OPERS when an employee is on military leave?

R.C. 5923.05 Requires a County to Offer One Month of Paid Military Leave per Federal Fiscal Year to County Employees

Your first question is what are the obligations of a county under R.C. 5923.05 regarding the pay and benefits for public employees on military leave. R.C. 5923.05 provides, in part, as follows:

> 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 a 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 federal fiscal year in which they are performing service in the uniformed services.

R.C. 5923.05(A)(1) (emphasis added). A month is defined as either twenty-two eight-hour work days or one hundred-seventy-six hours—or, in the case of a public-safety employee (such as a firefighter) seventeen twenty-four-hour days or four hundred eight hours within one federal fiscal year. R.C. 5923.05(A)(2)(b). Federal fiscal years run from October 1 through September 30. R.C. 5923.05(A)(2)(a).

We have previously concluded that the plain language of R.C. 5923.05(A), specifically the term "without loss of pay," requires a county to "pay an employee's wages or salary in full, in addition to any compensation that the employee may receive for military service." *See* 2000 Op. Att'y Gen. No. 2000-007, at 2-35. We have also concluded that an employee is entitled to a month of paid military leave each year. *See* 2006 Op. Att'y Gen. No. 2006-007 (syllabus).[2]

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[2] We concluded in 2006 Op. Att'y Gen. No. 2006-007 that an employee was entitled to one month of paid military leave per *calendar* year. At the time the opinion was issued, R.C. 5923.05(A) entitled public employees to one month of leave each calendar year. Since then, the General Assembly has amended R.C. 5923.05(A) to provide public employees one month of leave per *federal fiscal* year. In light of this legislative amendment, we modify 2006 Op. Att'y Gen. No. 2006-007 to reflect the current state of the law, which provides for a renewal of paid

Accordingly, we reaffirm our prior conclusion that R.C. 5923.05 requires a county to offer one month of paid military leave to its public employees.

Municipal corporations, under their constitutional home-rule authority, may "adopt provisions that vary the compensation requirement of R.C. 5923.05(A)." 2000 Op. Att'y Gen. No. 2000-007, at 2-36 n.4. The Supreme Court has expressly held that both chartered and non-chartered municipal corporations may provide fewer benefits than R.C. 5923.05(A). *State ex rel. FOP, Ohio Labor Council 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"); *N. Ohio Patrolmen's Benevolent Ass'n v. City of Parma*, 61 Ohio St. 2d 375, 378, 402 N.E.2d 519 (1980); *see also Lam v. City of Cleveland*, 338 F. Supp. 3d 662, at 670 (N.D. Ohio 2018); *Mullen v. City of Akron*, 116 Ohio App. 417, 420, 188 N.E.2d 607 (Summit County 1962) ("[i]f an employee serves as a member of the armed forces of the United States during a leave of absence, the municipality, under its constitutional power of local self-government, has the right to fix the compensation to be paid him by the municipality during his leave of absence for service in the armed forces").

Counties, by contrast, are creatures of statute with only those powers provided by law, either expressly or by necessary implication. 2018 Op. Att'y Gen. No. 2018-005, at 2-41. The Ohio Constitution grants counties the authority to adopt a charter and exercise home-rule authority under such a charter. Ohio Const. art. X, §§ 3-4; 2000 Op. Att'y Gen. No. 2000-007, at 2-36 n.4. Even if courts would follow the reasoning of the Supreme Court in *FOP v. Sidney* and *NOPBA v. Parma*, *supra*—that is, even if they would hold that a charter county has similar home-rule authority as a municipality and may provide fewer benefits than R.C. 5923.05—a non-chartered county, such as Mahoning County is without power to exercise home-rule authority to provide fewer benefits than required under R.C. 5923.05.

You also ask about a county's obligations to provide benefits, in addition to salary or wages, to employees while those employees are on military leave. Political subdivisions, such as counties, are subject to the Uniformed Services Employment and Reemployment Rights Act (USERRA). *See* 38 U.S.C. §§ 4303(4)(A), 4331(a); 20 C.F.R. § 1002.39. Generally, USERRA protects employees from discrimination on the basis of their military status. *See* 38 U.S.C. § 4301(a)(3). A person who is absent from employment due to service in the uniformed service is "deemed to be on furlough or leave of absence while performing such service." 38 U.S.C. § 4316(b)(1)(A). The employee is "entitled to such other rights and benefits not determined by seniority as are generally provided by the employer . . . to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service." 38 U.S.C. § 4316(b)(1)(B).

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military leave entitlement at the beginning of each fiscal year, October 1, rather than at the beginning of each calendar year.

Therefore, "[a]s a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence *only if* the employer provides that benefit to similarly situated employees on comparable leaves of absence." 20 C.F.R. § 1002.150(c) (emphasis added); *see also* 38 U.S.C. § 4303(2) (defining "benefit" to include "bonuses, severance pay, supplemental unemployment benefits, [and] vacations"); 20 C.F.R. § 1002.5(b) (same).

Accordingly, we conclude that R.C. 5923.05 and USERRA require a county to provide other benefits, including accrual of vacation time, during an employee's military leave if the county provides such benefits to other employees during comparable leaves of absence.

A County Must Continue Contributing to OPERS while an Employee is on Paid Military Leave

Your second question is whether a county must continue to contribute to OPERS while an employee is on paid military leave.

USERRA applies to pension benefits provided by state and local governments. 38 U.S.C. § 4318(a)(1)(A); 20 C.F.R. § 1002.260(a). Under USERRA, it is clear that an employer must make contributions to a pension plan at the time of *reemployment* of a person returning from military leave to the same extent as the employer contributes to the pension plan on behalf of other employees. USERRA provides that "[a]n employer reemploying a person . . . shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service." 38 U.S.C. § 4318(b)(1). Consequently, for benefits that are contingent on employee contributions, the reemployed person "shall be entitled to accrued benefits . . . only to the extent the person makes payment to the plan with respect to such contributions[.]" 38 U.S.C. § 4318(b)(2). An employer is not required to make up contributions for accrued benefits during a person's military leave until the person is reemployed. *Id.*; 20 C.F.R. § 1002.262(a). USERRA, therefore, assumes that a reemployed person entitled to pension benefits for military service will have taken *unpaid* military leave and the employer will then make the necessary pension contributions after the employee returns to work. *See* 20 C.F.R. § 1002.262(d) ("[t]he employee is not required to *make up* the full amount of employee contributions or elective deferrals that he or she missed making during the period of service. If the employee does not make up all of the missed contributions or elective deferrals, his or her pension may be less than if he or she had done so") (emphasis added); 20 C.F.R. § 1002.265(b) ("[i]n a contributory defined benefit plan, the employee will need to make up contributions in order to have the same benefit as if he or she had remained continuously employed during the period of service").[3]

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[3] Under predecessors to USERRA, the courts consistently held that employers were obligated to make pension payments to employee pension plan's to fulfill one of the purposes of the law, "[p]rotecting veterans from the loss of such rewards when the break in their employment

Your question, however, concerns the county's obligations to make OPERS contributions *during* an employee's *paid* military leave. Our opinions have consistently interpreted the words "without loss of pay" in R.C. 5923.05(A) as meaning "with full pay." 2006 Op. Att'y Gen. No. 2006-007, at 2-64; 2000 Op. Att'y Gen. No. 2000-007, at 2-36. Service credit under the public employees' retirement system is tied to employee and employer contributions to an OPERS pension plan. *See* R.C. 145.01(A)(3). Each public employee who contributes to OPERS must contribute up to ten percent of his or her income to the retirement system, depending on the actions of the retirement board. R.C. 145.47(A). In addition, each public employer must contribute up to fourteen percent of each employee's income to OPERS on behalf of the employee. R.C. 145.48(A). Therefore, for each paycheck provided to an employee, the public employer contributes a portion of that paycheck, established by the retirement board, to the retirement system on behalf of the employee. *See id.* Moreover, a member of OPERS may purchase military service credit for time spent in military service. R.C. 145.301(B)(1). The General Assembly has expressly provided that "[c]redit shall not be granted for any period of duty *during which the member was contributing to the retirement system*." R.C. 145.301(B)(3) (emphasis added). In other words, the legislature has contemplated the situation raised by your question, in which an employee is on paid military leave under R.C. 5923.05. In that situation, an employee automatically contributes up to ten percent of his or her income while on leave, and the employer contributes up to fourteen percent of the employee's income, to OPERS, by virtue of the employee's paid status. *See* R.C. 145.47-.48.

Therefore, we are of the opinion that, while a county employee who is a member of OPERS is on paid military leave, the county is obligated to continue contributing to OPERS during the entirety of the paid leave at the same rate the county contributed to the retirement system prior to the employee's commencement of leave.[4]

A Collective-Bargaining Agreement between a County and County Bargaining Unit May Provide Greater Paid Military Leave Rights than Provided under R.C. 5923.05 or USERRA

Your third question is whether a collective-bargaining agreement between a county and a bargaining unit of county employees may alter the obligations of a county to offer paid military leave to employees.

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resulted from their response to the country's military needs." *Alabama Power Co. v. Davis*, 431 U.S. 581, at 594 (1977); *see also Raypole v. Chemi-Trol Chemical Co.*, 754 F.2d 169, at 171-172 (6th Cir. 1985).

[4] This opinion does not address the obligations of a public employer to contribute to OPERS or another Ohio state pension system during the *unpaid* leave of an employee or after an employee returns from unpaid leave and, for example, purchases service credit. *See* R.C. 145.301; *see also* 38 U.S.C. § 4318; 20 C.F.R. §§ 1002.259-.267.

Two statutes govern whether a collective-bargaining agreement may alter the obligations of a county with respect to providing paid military leave rights. The first, R.C. 5923.05(G), provides as follows:

> Any permanent public employee of a political subdivision whose employment is governed by a collective-bargaining agreement with provision for the performance of service in the uniformed services shall abide by the terms of that collective-bargaining agreement with respect to the performance of that service, *except that no collective-bargaining agreement may afford fewer rights and benefits than are conferred under this section*. (Emphasis added.)

Thus, R.C. 5923.05(G) states that a collective-bargaining agreement may not provide fewer rights than are provided for under R.C. 5923.05(A). The General Assembly enacted the operative language under division (G) in 1997. 1997-1998 Ohio Laws, Part IV, 7806, 7875 (Am. Sub. S.B. 130, eff., in part, Sept. 18, 1997) (amending division (F) of R.C. 5923.05, the predecessor to current division (G)). This enactment followed the enactment of pertinent language in the second statute governing paid military leave under collective-bargaining agreements, R.C. 4117.10. That statute provides that R.C. 5923.05 shall prevail over conflicting language in collective-bargaining agreements

> if the terms of the agreement contain benefits *which are less* than those contained in [R.C. 5923.05] 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 [R.C. 4117.01(B)] that elects to provide leave of absence and compensation as provided in [R.C. 5923.05].

R.C. 4117.10(A)(2) (emphasis added); *see also* 1991-1992 Ohio Laws, Part I, 66, 109-110 (Sub. S.B. 3, eff., April 17, 1991); R.C. 4117.01(B) (including "county" in the definition of "public employer").

Considering the two statutes together, it is clear that a collective-bargaining agreement may alter a county's obligations to provide paid military leave to employees governed by the bargaining agreement, but only to the extent the agreement requires the county to provide greater benefits than the benefits R.C. 5923.05 provides. This is particularly evident because R.C. 5923.05(G) was enacted after R.C. 4117.10(A)(2). *State v.* Frost, 57 Ohio St. 2d 121, 125, 387 N.E.2d 235 (1979) ("[i]t is axiomatic that it will be assumed that the General Assembly has knowledge of prior legislation when it enacts subsequent legislation"). Accordingly, for R.C. 5923.05 to prevail over a less generous collective-bargaining agreement, the county is not required to "elect" to provide compensation in accordance with R.C. 5923.05. *See* Legislative Service Comm'n, Final Bill Analysis, Sub. H.B. 449 (2010) (R.C. 5923.05 "entitles all permanent public employees to the military leave of absence and compensation benefits it provides if a collective-bargaining agreement 'affords fewer rights and benefits.' This

entitlement does not depend upon election").[5] Put simply, a collective-bargaining agreement involving a non-charter county that provides greater military leave benefits than R.C. 5923.05 prevails over the statute.

If a Collective-Bargaining Agreement Provides Greater Paid Military Leave Rights to County Employees, the County Must Continue Contributing to OPERS during the Entirety of the Paid Military Leave

Your final question is whether a county must continue to contribute to OPERS during an employee's paid military leave if the employee is subject to a collective-bargaining agreement that requires the county to offer more generous paid military leave than is required under R.C. 5923.05. As discussed above, a county must continue to contribute to OPERS on behalf of an employee on paid military leave to the same extent as if the employee were not on leave. Therefore, if a collective-bargaining agreement between a non-charter county and a county bargaining unit provides for greater paid military leave than R.C. 5923.05, the county must contribute to OPERS during the entirety of the employee's paid military leave.

Conclusions

Based on the foregoing, it is our opinion, and you are hereby advised as follows:

1. Under R.C. 5923.05, a county is required to offer one month of paid uniformed-services leave for public employees each federal fiscal year, October 1 through September 30. Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-4335, a county must provide other benefits, including accrual of vacation time, for employees on military leave if the county offers other employees such benefits during comparable leaves of absence. (2006 Op. Att'y Gen. No. 2006-007, modified, on the basis of legislative amendment.)

2. Under USERRA, a county is required to contribute to the Ohio Public Employees Retirement System (OPERS) on behalf of an employee on uniformed-services leave during the entirety of the employee's paid leave at the same rate the county contributed to OPERS on behalf of the employee prior to the employee's leave.

3. A collective-bargaining agreement may alter a non-charter county's obligation under R.C. 5923.05 and USERRA to offer paid uniformed-

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[5] *Compare State ex rel. FOP, Ohio Labor Council v. City of Sidney*, 91 Ohio St. 3d 399, 402, 746 N.E.2d 597 (2001) (discussing "election" under R.C. 4117.10(A) with respect to a municipal ordinance and collective-bargaining agreement).

services leave, but only to the extent the agreement affords greater benefits than provided under Ohio and federal law.

4. If a collective-bargaining agreement obligates a non-charter county to offer greater paid uniformed-services leave than is required under R.C. 5923.05 and USERRA, the county must contribute to OPERS on behalf of an employee on paid uniformed-services leave during the entirety of the employee's paid leave at the same rate the county contributed to OPERS on behalf of the employee prior to the employee's leave.

Respectfully,

DAVE YOST
Ohio Attorney General