

OPINIONS OF THE SUPREME COURT OF OHIO

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The State ex rel. Mileff, Appellee, v. Mifflin Township et al., Appellants.

[Cite as State ex rel. Mileff v. Mifflin Twp. (1992), Ohio St.3d .]

Public employment -- Veterans' rights -- Under R.C. 5903.01 and 5903.03, a public employee has ninety days from being relieved from military duty, including duty as a reservist, to apply for reemployment with his public employer.

(No. 91-1465 -- Submitted November 10, 1992 -- Decided December 11, 1992.)

Appeal from the Court of Appeals for Franklin County, No. 88AP-108.

Richard Mileff, appellee, filed a complaint for a writ of mandamus in the Court of Appeals for Franklin County to compel appellant Mifflin Township to reemploy him as a fire fighter, restore his seniority, and award him back pay.

Mileff, who was employed as a permanent, full-time fire fighter by Mifflin Township commencing July 30, 1981, received a leave of absence to enter active military duty on December 13, 1982. Mileff enlisted in the Air Force and served as a fire protection specialist. Mileff applied for an early release under the Palace Chase program. He received an honorable discharge from active duty on April 18, 1986, but was obliged to serve in the ready reserve until August 6, 1987.

The Air Force assigned Mileff to reserve duty at Homestead Air Force Base near Miami, Florida. Since he and his wife hoped to live in Florida, he obtained a job as a fire fighter with the Cape Coral, Florida Fire Department. He moved to Cape Coral and commuted to Homestead for reserve duty. Mileff attended weekend training sessions once a month at Homestead and drilled for eight hours on both Saturday and Sunday. He actually fulfilled his reserve obligation in February 1987.

Nevertheless, Mileff decided to return to Ohio and, in a letter dated August 7, 1986, requested the Mifflin Township Fire Department to reemploy him in his former position. The fire department treated his letter as an application for employment and informed him that it had not chosen him for

testing or interview. Mileff pressed the township trustees for reemployment, and appellant Mifflin Township Trustee James M. Abraham, arranged for the fire department to employ him as a new employee with seniority, but subject to probation. Mileff began work on April 7, 1987, but was terminated, during his probation, on September 29, 1987.

Mileff filed the instant complaint seeking reemployment, seniority, and back pay. The court of appeals, on the respondents' motion to dismiss for failure to state a claim, granted a limited writ of mandamus ordering respondents to provide Mileff with a hearing concerning his termination. On appeal to this court, we, in State ex rel. Mileff v. Mifflin Twp. (1990), 49 Ohio St.3d 269, 551 N.E.2d 978, reversed the appellate court's judgment and instructed that court to permit appellants to file an answer and, then, to conduct further proceedings.

On remand, the court of appeals, after conducting further proceedings, again directed appellants to hold a hearing on Mileff's termination. The court ruled that appellants had granted Mileff a leave of absence from employment and could not remove him, under R.C. 505.38, until they held this hearing. The court suggested, without expressing an opinion, that Mileff's failure to seek reemployment within ninety days following his discharge from active duty might form a basis for his dismissal from employment.

The cause is before this court upon an appeal as of right.

Richard M. Wallar, for appellee.

Michael Miller, Prosecuting Attorney, William J. Owen and Donald M. Collins, Assistant Prosecuting Attorneys, for appellants.

Per Curiam. Appellants argue that Mileff failed to apply for reemployment within ninety days of his discharge from active duty and, consequently, was not entitled to reemployment. As to the limited writ requiring appellants to hold a hearing, appellants maintain that, having failed to apply timely for reemployment, Mileff no longer was a permanent employee entitled to a hearing.

R.C. 5903.02 requires a public employer to grant a leave of absence to a public employee who is inducted or otherwise enters military duty. R.C. 5903.03 states:

"A public employee who leaves a position, * * * whether voluntarily or involuntarily, to perform military duty * * * is separated or discharged under honorable conditions, makes application for reemployment within ninety days after he is relieved from military duty * * *, and is still physically qualified to perform the duties of such position, shall be restored to such position if it exists and is not held by a person with greater seniority, or to a position of like seniority, status, and pay. * * *" (Emphasis added.)

R.C. 5903.01(F) defines "military duty" as:

"* * * [T]raining and service performed by a member of the Ohio national guard or Ohio naval militia, or by an inductee, enlistee, reservist, or any entrant into a temporary reserve component of the armed forces of the United States, and time spent in reporting for and returning from such service and

training, or if a rejection occurs, from the place of reporting therefor." (Emphasis added.)

Thus, under R.C. 5903.01 and 5903.03, a public employee has ninety days from being relieved from military duty, including duty as a reservist, to apply for reemployment with his public employer. This contrasts with appellants' position that the time to apply for reemployment runs from the employee's discharge from active duty.

Appellants, in arguing their position, ignore the definition of "military duty" contained in R.C. 5903.01 and, instead, rely on the federal statutes controlling the reemployment of veterans. Under Section 2021(a), Title 38, U.S. Code, a veteran must make application for reemployment within ninety days after he is relieved from active training and service. However, Section 2021(c), Title 38, U.S. Code states:

"The rights granted by subsections (a) and (b) of this section to persons who left the employ of a State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections."

Thus, Ohio may, as it has in this case, grant public employees the greater right of applying for reemployment within ninety days after being released from reserve duty, not just release from active duty. See 1986 Ohio Atty.Gen.Ops. No. 86-050, at 2-270. Moreover, veterans' rights statutes are "* * * to be liberally construed for the benefit of those * * * who serve their country." *Fishgold v. Sullivan Dry Dock & Repair Corp.* (1946), 328 U.S. 275, 285, 66 S.Ct. 1105, 1111, 90 L.Ed. 1230, 1240; accord *Coffy v. Republic Steel Corp.* (1980), 447 U.S. 191, 196, 100 S.Ct. 2100, 2104, 65 L.Ed.2d 53, 59.

Mileff applied for reemployment on August 7, 1986, which was before he was relieved from duty as a reservist in February 1987. This application was timely. Mileff, consequently, had a clear legal right to reemployment, appellants had a clear legal duty to reemploy him, and Mileff, having no adequate remedy at law, is entitled to a writ in mandamus.

Accordingly, we modify the court of appeals' judgment and grant a writ ordering appellants to reemploy Mileff with seniority dating from July 30, 1981, R.C. 5903.02, and to award him appropriate back pay from August 7, 1986, until the date of his reinstatement.

Judgment modified
and writ granted.

Moyer, C.J., Sweeney, Holmes, Douglas, Wright, H. Brown
and Resnick, JJ., concur.