

Note from the Attorney General's Office:

1962 Op. Att'y Gen. No. 62-3081 was overruled
by 1989 Op. Att'y Gen. No. 89-012.

3081

AN EMPLOYEE IS ENTITLED AT THE TIME OF SEPARATION TO COMPENSATION FOR VACATION LEAVE WHICH HE DID NOT USE—§325.19, R.C., OPINION 2021, O.A.G., 1961.

SYLLABUS :

Under Section 325.19, Revised Code, an employee is entitled at the time of separation to compensation for any vacation leave to which he was entitled but did not use, either before or after November 4, 1959.

Columbus, Ohio, June 21, 1962

Hon. Ralph A. Hill, Prosecuting Attorney
Clermont County, Batavia, Ohio

Dear Sir :

Your request for my opinion reads as follows :

“In opinion No. 2021, rendered February 24, 1961, you passed upon the accumulation of vacation leave for various county employees.

"A further question concerning this section has been presented to me. Under section 325.19 of the Revised Code as effective November 4, 1959, a county employee or his estate is entitled to the accumulated but unused vacation leave at the time of his separation or upon his death. This was not provided for under the previous section, except for the taking of not to exceed six weeks leave in any one year.

"The question presented is this, does Section 325.19 of the Revised Code as amended, entitle either the employee in case of separation, or his estate, in case of death, to compensation for vacation time earned but unused prior to November 4, 1959?

"As a second part of that question, does the same answer apply whether the full time employee is employed on a monthly basis, an hourly basis, or a per diem basis, since those distinctions appear in the wording of the previous section and the current section.

"This question could apply to a county employee who has been entitled to three weeks of vacation pay, after 15 years service, since 1950. However, in most instances he has used only one week, and in some cases no weeks, in each year since 1950. The accumulation could conceivably amount to thirty weeks."

Section 325.19, Revised Code, as effective November 4, 1959, reads, in part, as follows :

"Each full-time employee in the several offices and departments of the county service, including full-time hourly-rate employees, after service of one year, shall be entitled during each year thereafter, to two calendar weeks, excluding legal holidays, of vacation leave with full pay. Employees having fifteen or more years of county service are entitled, during each year thereafter, to three calendar weeks, excluding legal holidays, of vacation leave with full pay. Two calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the first anniversary of employment and annually thereafter, and three calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the fifteenth anniversary of employment and annually thereafter. The annual leave during any one calendar year may be extended to include unused vacation leave of previous years provided the total leave taken in any one year shall not exceed six weeks. *An employee shall be entitled to compensation for the pro-rated portion of any earned but unused vacation leave to his credit at time of separation.*

* * *

* * *

* * *

"In the case of the death of a county employee, *the unused vacation leave* and unpaid overtime to the credit of any such em-

ployee, *shall be paid* in accordance with section 2113.04 of the Revised Code, or to his estate.” (Emphasis added)

In my Opinion No. 2021, issued on February 24, 1961, I held in the syllabus as follows :

“Pursuant to Section 325.19, Revised Code, a county employee may accumulate vacation leave earned, but not used during his county service, and the payment of such earned but unused vacation leave to an employee upon separation should be at his current rate of pay.”

In said Opinion No. 2021, I did not specifically consider the question whether the accumulation of vacation leave applies to vacation leave due but not taken prior to November 4, 1959. Your first question asks for such consideration : thus, the effect of the amendment made on November 4, 1959 (128 Ohio Laws, 627) to the section must be discussed. Section 325.19, Revised Code, as it existed immediately prior to that date read as follows :

“Each employee in the several offices and departments of the county service, after service of one year, shall be entitled during each year thereafter, to two calendar weeks, excluding legal holidays, vacation leave with full pay. Employees having fifteen or more years of county service are entitled to three calendar weeks of such leave. In special cases as determined by the head of the department or office affected, the annual leave during any one calendar year may be extended to include unused vacation leave of previous years provided the total leave taken in any one year shall not exceed six weeks.

“In the case of a county employee working on a per diem basis, one day vacation leave shall be granted for each twenty-four days worked by such employee. In the case of an employee working on an hourly basis, one day vacation leave shall be granted for each one hundred seventy three and one third hours worked by such employee. In addition to such vacation leave, such county employee, working on a per diem or hourly basis, shall be entitled to eight hours of holiday pay for New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day, of each year, if he is a regular employee with at least six months full time county service prior to the month when such holiday occurs.

“The total vacation leave of such per diem or hourly employee shall not exceed the total vacation leave provided by this section for other county employees.” (126 Ohio Laws, 416)

Under the law as existing immediately prior to November 4, 1959, county employees could not accumulate vacation leave earned but not used in past year, except that the annual leave in a year could be extended to include such unused leave (the total leave in any year not to exceed six weeks). Opinion No. 572. Opinions of the Attorney General for 1951, page 338; Opinion No. 2374, Opinions of the Attorney General for 1958, page 436, at 438; and Opinion No. 6580, Opinions of the Attorney General for 1956, page 388, interpreting similar language of Section 121.161, Revised Code. Thus, it remains to be determined whether Section 325.19, *supra*, as effective November 4, 1959, provides for such accumulation of leave.

The language of the 1959 amendment which appears here pertinent reads as follows :

“§ * * Two calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the first anniversary of employment and annually thereafter, and three calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the fifteenth anniversary of employment and annually thereafter. * * * An employee shall be entitled to compensation for the pro-rated portion of any earned but unused vacation leave to his credit at time of separation.

“* * *

* * *

* * *

“In the case of the death of a county employee, the unused vacation leave and unpaid overtime to the credit of any such employee shall be paid in accordance with section 2113.04 of the Revised Code, or to his estate.”

The language providing that certain weeks of leave “will be earned and will be due” was not added to Section 325.19, *supra*, until November 4, 1959 (128 Ohio Laws, 627). Prior to that time, the section read that employees were “entitled” to certain periods of leave after certain periods of service. But to be “entitled” to leave, an employee had to “earn” that leave even though the section did not then use that language. Thus, where prior to November 4, 1959, an employee was entitled to leave but did not take such leave, such leave was actually “earned but unused vacation leave.”

Accordingly, since Section 325.19, *supra*, states that compensation shall be paid for *any* earned but unused vacation leave at the time of separation, and that “the unused vacation leave” shall be paid in case of

death, I am of the opinion that this includes any leave to which the employee was entitled, but did not use, either before or after November 4, 1959

As to the second part of your question, whether the vacation was earned by an employee on a regular basis, an hourly basis, or a *per diem* basis, the above conclusion will apply. The question to decide in any particular case is whether the employee was legally entitled to vacation leave which he did not take.

In conclusion, it is my opinion and you are advised that under Section 325.19, Revised Code, an employee is entitled at the time of separation to compensation for any vacation leave to which he was entitled but did not use, either before or after November 4, 1959.

Respectfully,

MARK McELROY

Attorney General