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SYLLABUS:

The coordinator of atomic energy activities, provided for by Section 105.77, Revised Code, is a state employee within the purview of Section 121.161, Revised Code, and when a person holding that position is separated from state service, he is entitled to compensation for any earned but unused vacation leave to his credit at the time of separation.

Columbus, Ohio, February 5, 1963

Hon. George E. Wilson

Director

Dept. of Industrial and

Economic Development

State of Ohio

Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"We respectfully request, for clarification, your opinion as to allowable terminal vacation pay for the below listed statutory employee of this department:

"Sec. 105.77 Coordinator of Atomic Energy Activities Buford B. Ruhl. Reference: Related Laws; Sec. 121.161." Section 121.161, Revised Code, reads, in part, as follows:

"Each full-time state employee, including full-time hourly-rate employees, after service of one year with the state, is 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 service with the state 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 fifteenth anniversary of employment and annually thereafter. Upon separation from state service, except for cause, 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.

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"In case of the death of a state 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."

Under Section 121.161, *supra*, a state employee may accumulate vacation leave earned but not used during his state service and, upon separation from state service, except for cause, such an employee should be compensated for any earned but unused vacation leave to his credit at the time of separation. Opinion No. 3548, Opinions of the Attorney General for 1963, issued on January 14, 1963; Opinion No. 1575, Opinions of the Attorney General for 1960, page 531.

I assume that you are concerned with whether the person holding the position of coordinator of atomic energy activities is a state employee within the purview of Section 121.161, *supra*. Your question probably arose as a result of the conclusion of Opinion No. 3548, *supra*, that a state officer, such as the director of finance,

is not such a state employee. The second paragraph of the syllabus of that opinion reads as follows:

"2. A state officer, such as the director of finance, appointed pursuant to Section 121.03, Revised Code, is not a state employee within the purview of Section 121.161, Revised Code, and not subject to the vacation provision of that statute; and where such an officer terminates his state service as an officer, he is not entitled to compensation for earned but unused vacation leave, regardless of what vacation he may or may not have taken during his services as an officer."

In said Opinion No. 3548, it is stated:

"The first question to consider in this opinion is whether an appointive state official, such as the director of finance, is a 'state employee' within the purview of Section 121.161, *supra*, so as to be entitled to compensation for earned but unused vacation leave upon separation from state service.

"While, loosely speaking, all persons who are compensated by the state for services rendered might be considered to be employed by the state, there are definite distinctions between a public office and a public employment. The requisite elements of a public office are: (1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the incumbent must be by virtue of his election or appointment to the office; (3) in the exercise of the duties so imposed, he can not be subject to the direction and control of a superior officer. *State, ex. rel., Morgan v. Board of Assessors*, 15 N.P. (N.S.) 535, 24 O.D. 271 (1914); *State, ex. rel., Attorney General v. Jennings*, 57 Ohio St., 415 (1898); 44 Ohio Jurisprudence 2d, 483, Section 2, and 903, Section 17; 67 Corpus Juris Secundum, 97, Section 2. An incumbent of such an officer is, of course, a public officer; a person holding a position lacking one or more of the above-noted elements, is on the other hand, only an employee.

"Without reviewing the specific duties of the director of finance, I feel it safe to say that as the head of the department of finance he does exercise certain independent duties, relative to state finances and purchasing, a part of the sovereignty of the state. See Chapter 125, and Section 131.17, Revised Code. Also, such exercise is by virtue of his appointment to the office by the governor. Section 121.03, Revised Code. Further, in the exercise of such duties, the director of finance is not subject to the direction

and control of a superior officer; and in this regard, the opinion of Marshall, C. J., in *State, ex rel., v. Baker*, 112 Ohio St., 356, states at page 368:

“ ‘State officials in the executive departments are not in any sense deputies of the Governor, but, on the contrary, possess powers and are charged with duties and have independent discretion and judgment entirely beyond his control, except in those instances where it is otherwise provided.’

Accordingly, I am of the opinion that the director of finance is a public officer rather than a public employee, and the same can be said for the other state officials appointed pursuant to Section 121.03, Revised Code.”

While it was thus held that the directors of administrative departments of the state government (Section 121.03, Revised Code) are officers rather than employees within the vacation statute, the question as to whether any particular position is an office as opposed to an employment depends upon the nature of the position concerned. For example, Opinion No. 3548, *supra*, holds that the director of finance, the director of commerce, the superintendent of insurance, etc., are officers, however assistant directors or deputies in those departments act under the supervision of, and are given duties by, their respective directors, and are thus not officers but employees under the accepted definitions of those terms. Likewise, the instant case will be determined on whether the position in question is a public office rather than a mere employment under said definitions.

Section 105.77, Revised Code, here pertinent, reads as follows:

“The department of industrial and economic development shall serve as adviser to the governor with respect to atomic industrial development within the state and shall plan the development and regulatory activities of the state government relative to the industrial and commercial uses of atomic energy. The department shall, as directed by the governor, represent the governor or the state in matters relating to atomic energy.

“The department shall continuously assemble, review, analyze, and transmit to the governor the studies, recommendations, and proposals of the several departments and agencies of the state government which are prepared pursuant to provisions of Section 4163.03 of the Revised Code.

“The department shall continuously assemble, review, analyze, and transmit to the governor information as to the activities, policies, regulations, and laws of other states and of the United States, and of the United States atomic energy commission, pertaining to the development, control, and use of atomic energy.

“The director of industrial and economic development shall appoint a coordinator of atomic energy activities, who shall perform, under the supervision of the director, all functions and duties of the department of industrial and economic development relative to atomic energy which are set forth in this section. The coordinator shall receive a salary of ten thousand dollars per annum, and shall serve at the pleasure of the director.”

It is doubtful that the duties of the coordinator of atomic energy activities, being of an advisory and informational nature, involve an exercise of duties, a part of the sovereignty of the state. In any event, however, since the coordinator performs “under the supervision of the director,” he is subject to the control of a superior officer, and the position which he holds lacks at least one of the essential elements of a public office. I thus conclude that the coordinator is not a public officer, and since he is employed and compensated by a state department, he is a state employee within the purview of Section 121.161, *supra*.

Accordingly, it is my opinion and you are advised that the coordinator of atomic energy activities, provided for by Section 105.77, Revised Code, is a state employee within the purview of Section 121.161, Revised Code, and when a person holding that position is separated from state service, he is entitled to compensation for any earned but unused vacation leave to his credit at the time of separation.

Respectfully,

WILLIAM B. SAXBE

Attorney General