

VACATION—EMPLOYEE OF COUNTY—TERMINATION OF EMPLOYMENT—RESIGNATION OR REMOVAL—PROPER CAUSE—NO RIGHT TO PAY FOR PERIOD TO WHICH HE WOULD HAVE BEEN ENTITLED HAD HE REMAINED EMPLOYED—NO PART OF VACATION TAKEN—DURING EMPLOYMENT—SECTION 2394-4a G. C.

SYLLABUS:

An employee of a county, after the termination of his employment either by resignation or removal for proper cause, has no right to pay for a vacation period to which he would have been entitled under the provisions of Section 2394-4a, of the General Code, had he remained in his employment, no part of such vacation having been taken while he was so employed.

Columbus, Ohio, July 25, 1951

Hon. Marvin A. Kelly, Prosecuting Attorney
Scioto County, Portsmouth, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

"This office has been requested to furnish an opinion upon the following question:

"I. Does a person whose employment with the county has been terminated have any right to claim pay for vacation leave as provided for by law (Section 2394-4a or otherwise), no part of the vacation provided for thereunder having been taken by the said employee at the time of the termination of employment?

"Further, the question here involves more than one employee, one or more of whom voluntarily relinquished their employment, and others who were discharged by the head of the office."

Section 2394-4a, General Code, to which you refer, is a comparatively new enactment, having become effective September 8, 1947. It reads as follows:

"Each employee in the several offices and departments of the county service shall be entitled during each calendar year beginning January first, to two calendar weeks, excluding legal holidays, vacation leave with full pay. Employees who have less than one year of service, shall be entitled to one working day

vacation leave with full pay for each month of service during said calendar year.

"In the case of a county employe working on a per diem basis, one day vacation shall be granted for each twenty-four days worked by such employe; and in the case of an employe working on an hourly basis, one day vacation leave shall be granted for each one hundred and ninety-two hours worked by such employe; provided, however, that the total vacation leave of such per diem or hourly employe shall not exceed the total vacation leave provided herein for other county employes."

In an opinion rendered by one of my predecessors, found in 1944 Opinions of the Attorney General, page 575, the question raised was stated as follows:

"If a city employe has earned a vacation with pay under the terms of a local salary ordinance, but is deceased before securing the benefit of such vacation allowance, may payment of said vacation allowance be made to said employe's estate or beneficiary, subsequent to the date of death of said employe?"

The syllabus of the opinion reads as follows:

"If a city employe has earned the right to a vacation with pay under the terms of a lawful salary ordinance, but dies before receiving the benefit of such vacation, payment of such vacation allowance may not be made to the employe's estate or beneficiary subsequent to his death."

In the correspondence relating to that request it was suggested that under the circumstances presented, vacation pay should be construed as a vested right in one who had worked, but who had not received his vacation.

In the course of that opinion, it was stated that as a matter of sound public policy even in the absence of any authorizing statute, leaves of absence for vacation or sickness are desirable and should be read into all contracts of public employment, following the general policy adopted in private business and usually in state and federal governments. It was further suggested that the theory which underlies the granting of such vacation periods is that they give employes an opportunity for relaxation, rest or change of occupation and thereby produce a higher morale and increase the efficiency of such public employes. I quote the following from the opinion in question:

"If the purpose of a vacation is to refresh the employe so that he may return to his work in better condition for continued

service, then it is obvious that the purpose wholly fails if the employe dies before he has had his vacation. The only vested right that can possibly be asserted is the right *to the vacation*, and as incident thereto the right to receive the pay which he would have received had he continued on duty. The pay which he receives is not a bonus, but is his salary or wage *for the period when he is on vacation*. The salary or compensation of a public position is regarded in the law merely as an incident to the holding of an office or public employment."

It is stated in 43 American Jurisprudence, page 136:

"Compensation does not constitute any part of the public office to which it is annexed. It is a mere incident to the lawful title or right to the office and belongs to the officer *so long as he holds the office.*"

The case of State ex rel. Clinger vs. White, 143 Ohio St., 175, involved the right of a prosecuting attorney who had been inducted into the military service, to receive the salary of his office, while absent and in such service. The court held that he had that right, and in its opinion quoted from 46 Corpus Juris, 1014 as follows:

"The person rightfully holding an office is entitled to the compensation attached thereto; this right does not rest upon contract, and the principles of law governing contractual relations and obligations in ordinary cases are not applicable. * * * *The right to the compensation attached to a public office is an incident to the title to the office and not to the exercise of the functions of the office; hence, the fact that officers have not performed the duties of the office does not deprive them of the right to compensation, provided their conduct does not amount to an abandonment of the office.*"

The fair implication from the last sentence in the above quotation is that of the action of the officer amounts to an abandonment of the office, then his right to receive the salary pertaining to the office terminates at once. The same result would ensue if an employe abandons or resigns from his position, and, it certainly cannot be claimed that one would be entitled to vacation pay incident to an employment from which he has voluntarily severed himself. I quote again from the 1944 Opinion:

"Likewise, if the incumbent of an office or public employment were to tender his resignation to take effect instantly, he would certainly be so completely severed from his office or position that he could not be heard to claim the right to be paid for

a vacation period to which he would have been entitled had he continued in the service. In other words, it appears to me obvious that the right to vacation pay necessarily presupposes that one remains in the service, at least until the end of the vacation period. One who is entitled to a vacation might tender his resignation to take effect at the end of the vacation period and receive his pay for that period. That right would be predicated upon the fact that he still holds the office."

This reasoning would apply even more strongly to one who had been removed from his position for proper cause.

In State ex rel Bonsall v. Case, 172 Wash., 242, 19 P. (2d) 927, it was held:

"A state employe not taking vacation during twelve months prior to time employment ceased, was not entitled to payment for such period."

The statute under consideration read as follows:

"Each subordinate officer and employe of the several offices, departments and institutions of the state government shall be entitled, during each twelve months' period, to fourteen days' leave of absence with full pay."

The court in the opinion said:

"The statute by its express language, would appear to contemplate that the one receiving a vacation on pay must be a subordinate officer or employe at the time the vacation is taken. We see nothing in the statute which would authorize the payment for a vacation period to one who had been an employe of the state, subsequent to the time that his service ended."

To like effect: Nicholson v. Amar, 7 Cal. App. (2d) 290, 45 P. (2d) 697; Vaughn v. U. S., 45 Ct. Cl. (F.) 525; Harrison v. U. S., 26 Ct. Cl. (F.) 259.

Accordingly, in specific answer to your question, it is my opinion that an employe of a county, after the termination of his employment either by resignation or removal for proper cause, has no right to pay for a vacation period to which he would have been entitled under the provi-

sions of Section 2394-4a, of the General Code, had he remained in his employment, no part of such vacation having been taken while he was so employed.

Respectfully,

C. WILLIAM O'NEILL

Attorney General