May 26, 2011

The Honorable C. David Warren
Athens County Prosecuting Attorney
Athens County Court House
First Floor
Athens, Ohio 45701

SYLLABUS: 2011-018

The appointment of an assistant county prosecuting attorney as acting county prosecuting attorney pursuant to R.C. 305.02(F) is not a separation from service requiring payment of the assistant county prosecuting attorney's accrued, unused vacation leave under R.C. 325.19(C). (1980 Op. Att'y Gen. No. 80-057 (syllabus, paragraph 1) and 1962 Op. Att'y Gen. No. 3425, p. 931, distinguished.)

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OPINION NO. 2011-018

The Honorable C. David Warren
Athens County Prosecuting Attorney
Athens County Court House
First Floor
Athens, Ohio 45701

Dear Prosecutor Warren:

You have requested an opinion whether the appointment of an assistant county prosecuting attorney as acting county prosecuting attorney pursuant to R.C. 305.02(F) is a separation from service requiring payment of the assistant county prosecuting attorney's accrued, unused vacation leave under R.C. 325.19(C). In your letter you state that you are resigning from the position of county prosecuting attorney and that, pursuant to R.C. 305.02(F), the board of county commissioners is contemplating appointing an assistant county prosecuting attorney to serve as acting county prosecuting attorney until the county central committee appoints a person to the office of county prosecuting attorney pursuant to R.C. 305.02(B).[1] After the person appointed pursuant to R.C. 305.02(B) qualifies and takes office, the assistant county prosecuting attorney will resume his duties as an assistant county prosecuting attorney.

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[1] R.C. 305.02(B) provides, in part, that, if a vacancy occurs in the office of county prosecuting attorney, "the county central committee of the political party with which the last occupant of the office was affiliated shall appoint a person to hold the office and to perform the duties thereof until a successor is elected and has qualified." *See* R.C. 305.02(A) (a person who is appointed to the office of county prosecuting attorney pursuant to R.C. 305.02(B) "shall hold office until a successor is elected and qualified" and authorizing the person to hold that office (1) for the unexpired term of the office or (2) until a successor qualifies after the next general election for state and county officers when the unexpired term of the office does not "expire within one year immediately following the date of such general election"). R.C. 305.02(F) authorizes a board of county commissioners to appoint a person to serve as acting county prosecuting attorney between the occurrence of the vacancy and the time when a person appointed by the county central committee of the political party with which the last occupant of the office of county prosecuting attorney was affiliated qualifies and takes office under R.C. 305.02(B).

R.C. 325.19(C) authorizes a county to compensate an employee for accrued, unused vacation leave upon the employee's separation:[2]

> An employee is entitled to compensation, at the employee's current rate of pay, for the prorated portion of any earned but unused vacation leave for the current year to the employee's credit *at time of separation*, and in addition shall be compensated for any unused vacation leave accrued to the employee's credit, with the permission of the appointing authority, for three years immediately preceding the last anniversary date of employment. (Emphasis added.)

The term "separation," as used in R.C. 325.19(C), is not defined by statute. The Attorney General has interpreted this term for purposes of R.C. 325.19(C) as follows:

> As used in R.C. 325.19, concerning county employees' vacation leave, however, the word "separation" has been interpreted as including such employment actions as: leaving county employment to become employed by another county, 1983 Op. Att'y Gen. No. 83-074; leaving employment with one county appointing authority to become employed by a different appointing authority within the same county, 1981 Op. Att'y Gen. No. 81-001; and leaving county employment to serve as an officer of the county, 1980 Op. Att'y Gen. No. 80-057. *An element common to these three situations is a termination of one's employment*. (Emphasis added.)

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[2] In the syllabus of 2008 Op. Att'y Gen. No. 2008-004, the Attorney General stated that "[a] county appointing authority that has both bargaining unit employees and non-bargaining unit employees has the power under R.C. 325.19(F), upon notification to the board of county commissioners, to adopt for its non-bargaining unit employees an alternative schedule entitling them to be paid for their accrued, unused vacation leave at times other than upon the employees' separation from service or death, where at least one collective bargaining agreement so entitles the appointing authority's bargaining unit employees." In the third syllabus paragraph of 2009 Op. Att'y Gen. No. 2009-009, the Attorney General also determined that "[a] county appointing authority that employs only non-bargaining unit employees has the power under the second sentence of R.C. 325.19(F) to adopt an alternative schedule, upon notification to the board of county commissioners, that increases the minimum vacation benefits to which its employees are entitled, and that supersedes statutory limitations, such as those in R.C. 325.19(C), on such benefits." R.C. 325.19(F) thus authorizes a county appointing authority to adopt an alternative schedule for non-bargaining unit employees that supersedes the limitations in R.C. 325.19(C).

Your question concerns the meaning of the term "separation" for purposes of R.C. 325.19(C). This opinion therefore does not consider whether an assistant county prosecuting attorney may be paid his accrued, unused vacation leave under an alternative schedule entitling non-bargaining unit employees to be paid for their accrued, unused vacation leave at times other than upon the employees' separation from service.

1994 Op. Att'y Gen. No. 94-009 at 2-38 (qualified and questioned on other grounds by 2008 Op. Att'y Gen. No. 2008-004 and modified, in part on other grounds, by 2009 Op. Att'y Gen. No. 2009-009); *accord* 2005 Op. Att'y Gen. No. 2005-018 at 2-170 and 2-171 (qualified and questioned on other grounds by 2008 Op. Att'y Gen. No. 2008-004; modified, in part on other grounds, by 2009 Op. Att'y Gen. No. 2009-009; and overruled, in part on other grounds, by 2009 Op. Att'y Gen. No. 2009-009); 1991 Op. Att'y Gen. No. 91-050 at 2-258 and 2-259 (qualified and questioned on other grounds by 2008 Op. Att'y Gen. No. 2008-004 and overruled on other grounds by 2009 Op. Att'y Gen. No. 2009-009); 1962 Op. Att'y Gen. No. 3425, p. 931; *see also* 2009 Op. Att'y Gen. No. 2009-009 at 2-63 n.7 ("[r]etirement from county service constitutes 'separation' for purposes of R.C. 325.19(C)," citing 1994 Op. Att'y Gen. No. 94-009). *See generally* R.C. 325.19(E) (payment for accrued, unused vacation leave must be paid by the county upon an employee's death); 1968 Op. Att'y Gen. No. 68-086 (syllabus, paragraph 2) (overruled, in part on other grounds, by 1981 Op. Att'y Gen. No. 81-001) ("[w]here unused vacation leave was accrued from October 30, 1965 through February 8, 1967, with permission of a prior appointing authority in accordance with [R.C. 325.19], it is a valid obligation of the present appointing authority and may be paid subsequent to the date that such employee was separated from the county service").

The basis for this interpretation of the term "separation," as used in R.C. 325.19(C), was explained in 1962 Op. Att'y Gen. No. 3425, p. 931. This opinion considered whether a person employed as a clerk of a board of county commissioners who leaves that position to accept appointment to the office of county treasurer may be paid his accrued, unused vacation leave under R.C. 325.19. In concluding that the person may be paid such compensation, the opinion at pages 932-33 explained:

> It appears to me clear that the intent behind [R.C. 325.19] must be deemed to be that an employee shall not lose the benefit of vacation time earned but not taken when he leaves the position in which he earned it. This being the case, I … conclude that a "separation" in this context is *any change in position wherein the employee would not be able to carry over earned vacation credit to the new position*.
>
> In the situation about which you ask, the new position is that of county treasurer, an elective office ([R.C. 321.01]). The office of treasurer being an elective county office, a person serving in that office would not be entitled to vacation as an "employee in (one of) the several offices and departments of the county" under [R.C. 325.19]. [(1962 Op. Att'y Gen. No. 3239, p. 667)]. Furthermore, a search of the code reveals no other section which would allow carry over of prior earned vacation time to the credit of a county treasurer while he held such office. I must conclude, therefore, that when a county employee leaves his position and accepts appointment to the office of county treasurer there is no way in which earned, but unused, vacation credit could be carried over into the new office and, consequently, such a change must be deemed a "separation" within the meaning of [R.C. 325.19], and the employee in question is entitled to any earned but unused vacation leave to his credit at time of separation. (Emphasis added.)

Accord 1980 Op. Att'y Gen. No. 80-057 at 2-223.

Prior opinions of the Attorney General have thus determined that a "separation" occurs for purposes of R.C. 325.19(C) when a change in employment status or position prevents a person from using accrued, unused vacation leave in his new position. 1987 Op. Att'y Gen. No. 87-074 at 2-481; 1981 Op. Att'y Gen. No. 81-001 at 2-2; 1980 Op. Att'y Gen. No. 80-057 at 2-223; 1962 Op. Att'y Gen. No. 3425, p. 931, at 932. Accordingly, if the appointment of an assistant county prosecuting attorney as acting county prosecuting attorney prevents the assistant county prosecuting attorney from retaining and using accrued, unused vacation leave, the assistant county prosecuting attorney may be paid that accrued, unused vacation leave under R.C. 325.19.

Pursuant to R.C. 305.02(F), a board of county commissioners may appoint an assistant county prosecuting attorney to hold the office of county prosecuting attorney "as an acting officer and to perform the duties thereof between the occurrence of the vacancy and the time when" a person appointed by the county central committee under R.C. 305.02(B) qualifies and takes the office of county prosecuting attorney. In such a situation, an assistant county prosecuting attorney does not take or claim title to the office of county prosecuting attorney. Instead, the assistant county prosecuting attorney performs the duties of the county prosecuting attorney until a person appointed by the county central committee qualifies and takes the office of county prosecuting attorney in accordance with R.C. 305.02(B).

As stated in 1990 Op. Att'y Gen. No. 90-070 at 2-300, which considered whether a person appointed as acting county coroner under R.C. 305.02(F) is required to be a resident of the county he serves:

> R.C. 305.02(F) is silent as to the necessary qualifications to serve as an acting officer. The term "acting officer" is defined generally as a "[t]erm used to designate, not an appointed incumbent, but merely a *locum tenens*, who is performing the duties of an office to which he himself does not claim title." *Black's Law Dictionary* 25 (5th ed. 1979). *Thus, an acting officer appointed under R.C. 305.02(F) does not claim title to the office in which he is serving in an "acting" capacity. Rather, he is merely designated to perform the duties of such office for a limited time*, i.e., "between the occurrence of the vacancy and the time when the officer appointed by the central committee qualifies and takes the office," R.C. 305.02(F). Thus, in the situation you describe, a person appointed as acting coroner need not possess all the qualifications which would be required if he sought appointment or election to such office, *since he will not serve as such officer, but will only perform the duties of the office for a limited time*. (Emphasis added.)

An assistant county prosecuting attorney who is appointed acting county prosecuting attorney pursuant to R.C. 305.02(F) thus does not take or claim title to the office of county prosecuting attorney, but merely performs the duties of that office temporarily. 1990 Op. Att'y Gen. No. 90-070 at 2-300; *see also* Ohio Ethics Comm'n, Advisory Op. No. 2000-03, slip op. at 4 (persons appointed as acting officers under R.C. 305.02(F) "are not appointed to fill a vacancy for an unexpired term in an elective office. Rather, they perform the duties of the office until the appropriate appointing authority appoints an official to fill the unexpired term as provided in R.C. 305.02(B) or (D)"); *Black's Law*

Dictionary 1193 (9th ed. 2009) (an "acting officer" is "[o]ne performing the duties of an office—usu. temporarily—but who has no claim of title to the office"). *See generally State v. Bernstein,* 25 Ohio Law Abs. 291, 296 (Ct. App. Cuyahoga County 1937) (a chief deputy county treasurer who is appointed as acting county treasurer performs "such additional duties as were necessary to be performed by him as titular head of the office of Treasurer").

From this it follows that an assistant county prosecuting attorney who serves as acting county prosecuting attorney maintains his status as an employee, and as such is not prohibited from retaining and using accrued, unused vacation leave while serving as acting county prosecuting attorney.[3] Moreover, so long as an assistant county prosecuting attorney who is appointed acting county prosecuting attorney does not resign his position as an assistant county prosecuting attorney, there is no change in his employment status that prevents him from retaining and using accrued, unused vacation leave while serving as acting county prosecuting attorney. *See generally* 1987 Op. Att'y Gen. No. 87-074 (syllabus, paragraph 2) ("[f]ormer employees of the City of Cincinnati at the Cincinnati Community Correctional Institute who are now full time employees of the county sheriff, and who have elected, pursuant to R.C. 145.033, to continue their membership in the city retirement system, are not entitled upon their retirement thereunder to receive payment of their accrued, unused vacation leave benefits under the terms of R.C. 325.19(C) when, subsequent to such retirement, they continue to work as full time employees of the county sheriff"). This means that the appointment of an assistant county prosecuting attorney as acting county prosecuting attorney is not a separation from service requiring payment of the assistant county prosecuting attorney's accrued, unused vacation leave under R.C. 325.19(C).

In conclusion, it is my opinion, and you are hereby advised that the appointment of an assistant county prosecuting attorney as acting county prosecuting attorney pursuant to R.C. 305.02(F) is not a separation from service requiring payment of the assistant county prosecuting attorney's accrued, unused vacation leave under R.C. 325.19(C). (1980 Op. Att'y Gen. No. 80-057 (syllabus, paragraph 1) and 1962 Op. Att'y Gen. No. 3425, p. 931, distinguished.)

Respectfully,

MICHAEL DEWINE
Ohio Attorney General

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[3] 1980 Op. Att'y Gen. No. 80-057 and 1962 Op. Att'y Gen. No. 3425, p. 931 concluded that, if a county employee leaves county employment to serve as a county officer within the same county, the county is required to pay the employee his accrued, unused vacation leave under R.C. 325.19(C). These opinions have no application to the situation you have presented to us because we have determined that an assistant county prosecuting attorney who is appointed acting county prosecuting attorney pursuant to R.C. 305.02(F) does not hold title to the office of county prosecuting attorney.