August 24, 1998

OPINION NO. 98-026

The Honorable Richard L. Ross
Morgan County Prosecuting Attorney
109 East Main Street
McConnelsville, Ohio 43756-1125

Dear Prosecutor Ross:

We have received your request that we examine some of the conclusions reached in 1989 Op. Att'y Gen. No. 89-096 to determine whether statutory amendments enacted since the opinion was issued affect those conclusions. Your question is how much vacation leave should be credited under R.C. 325.19 to a county employee who works a full-time workweek consisting of fewer than forty hours per week.[1]

[1] You have not asked about employees who are covered by collective bargaining agreements under R.C. Chapter 4117, and this opinion does not consider such employees.

In 1989 Op. Att'y Gen. No. 89-096, a prior Attorney General concluded that, if a county employee had a standard workweek of fewer than forty hours that was set as full time by the appointing authority and the employee was in active pay status for that standard workweek, the employee was entitled to the full amount of vacation leave prescribed by R.C. 325.19(A).[2] 1989 Op. Att'y Gen. No. 89-096 (syllabus, paragraph 11). The vacation time was granted in increments of forty hours and was obviously calculated on the basis of a forty hour workweek. The opinion thus concluded that a full-time employee who worked a thirty-five hour workweek accrued as much vacation leave as a person who worked a forty hour workweek, rather than a proportionate amount of vacation leave. For example, after one year of service a forty hour per week employee would accrue forty hours of vacation leave, or the equivalent of one week. A thirty-five hour per week employee would also accrue forty hours of vacation leave, but that would constitute more than a week's worth of vacation for that employee. The inequities of this interpretation are clear, but the interpretation followed from a literal reading of the statutory language.

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[2] The following portion of R.C. 325.19(A)(1) was in effect when 1989 Op. Att'y Gen. No. 89-096 was issued and remains unchanged:

> Each full-time employee in the several offices and departments of the county service, ... after service of one year with the county or any political subdivision of the state, shall have earned and will be due upon the attainment of the first year of employment, and annually thereafter, eighty hours of vacation leave with full pay. One year of service shall be computed on the basis of twenty-six biweekly pay periods. A full-time county employee with eight or more years of service with the county or any political subdivision of the state shall have earned and is entitled to one hundred twenty hours of vacation leave with full pay. A full-time county employee with fifteen or more years of service with the county or any political subdivision of the state shall have earned and is entitled to one hundred sixty hours of vacation leave with full pay. A full-time county employee with twenty-five years of service with the county or any political subdivision of the state shall have earned and is entitled to two hundred hours of vacation leave with full pay. Such vacation leave shall accrue to the employee at the rate of three and one-tenth hours each biweekly period for those entitled to eighty hours per year; four and six-tenths hours each biweekly period for those entitled to one hundred twenty hours per year; six and two-tenths hours each biweekly period for those entitled to one hundred sixty hours per year; and seven and seven-tenths hours each biweekly period for those entitled to two hundred hours per year.

R.C. 325.19(A)(1); *see also* 1987-1988 Ohio Laws, Part I, 1263 (S.B. 322, eff. March 17, 1989).

The interpretation of R.C. 325.19 adopted in 1989 Op. Att'y Gen. No. 89-096 was based on language granting vacation benefits in increments of forty hours to all full-time employees, *see* R.C. 325.19(A)(1); note 2, *supra*, and on language defining "[f]ull-time employee" to mean "an employee whose regular hours of service for a county total forty hours per week, or who renders any other standard of service accepted as full-time by an office, department, or agency of county service," R.C. 325.19(I)(1). The same interpretation had previously been adopted in 1985 Op. Att'y Gen. No. 85-102 and followed in 1987 Op. Att'y Gen. No. 87-067 (syllabus, paragraph 1).

When 1989 Op. Att'y Gen. No. 89-096 was issued, R.C. 325.19(A) contained only one exception to the general grant of vacation benefits. That exception appeared in R.C. 325.19(A)(2) and stated:

> Full-time employees granted vacation leave under division (A)(1) of this section who are in active pay status in a biweekly pay period for less than eighty hours or the number of hours of service otherwise accepted as full-time by their employing office or department shall accrue a number of hours of vacation leave during that pay period that bears the same ratio to the number of hours specified in division (A)(1) of this section as their number of hours in active pay status, excluding overtime hours, bears to eighty or the number of hours of service accepted as full-time, whichever is applicable.

See 1987-1988 Ohio Laws, Part I, 1263 (S.B. 322, eff. March 17, 1989). This language now appears in R.C. 325.19(A)(3).

By its terms, this exception applies to full-time employees "who are *in active pay status* in a biweekly pay period *for less than* eighty hours or *the number of hours of service* otherwise *accepted as full-time* by their employing office or department." R.C. 325.19(A)(3) (emphasis added). In other words, this exception applies to full-time employees who, in a particular pay period, are in active pay status for fewer than the number of hours accepted by the employer as full-time service. It might, for example, apply to an individual who was granted a day's leave of absence without pay during a particular pay period. This exception, however, does not address the vacation leave accrual of a full-time employee who, in a particular pay period, is in active pay status for the total number of hours of service accepted as full time. Therefore, this language did nothing to obviate the apparent inequity evident in the literal reading of the statute, as described above.

Since the issuance of 1989 Op. Att'y Gen. No. 89-096, however, the General Assembly has addressed the disparity between hours worked and vacation granted as analyzed in that opinion, and has adopted the following language:

> Full-time employees granted vacation leave under division (A)(1) of this section who render any standard of service other than forty hours per

> week as described in division (I) of this section and who are in active pay status in a biweekly pay period, shall accrue a number of hours of vacation leave during each such pay period that bears the same ratio to the number of hours specified in division (A)(1) of this section as their number of hours which are accepted as full-time in active pay status, excluding overtime hours, bears to eighty hours.

R.C. 325.19(A)(2); *see* 1989-1990 Ohio Laws, Part I, 449, 452 (Sub. S.B. 58, eff. July 18, 1990) (amending R.C. 325.19). Under this language, a full-time employee who renders a standard of service other than forty hours per week and who is in active pay status in a biweekly pay period accrues an amount of vacation leave that is proportionate to the number of hours accepted as full time. In other words, a full-time employee who works a thirty-five hour week rather than a forty hour week accrues vacation on the basis of a thirty-five hour workweek rather than a forty hour workweek. *See* 1989-1990 Ohio Laws, Part I, 449 (Sub. S.B. 58, eff. July 18, 1990) (title) (including among purposes "to specify that county employees who are considered full-time employees but whose hours of service regularly total less than 40 hours per week are entitled to accrue vacation leave based upon such lesser regular work week").

Because of this statutory change, the conclusions reached in 1989 Op. Att'y Gen. No. 89-096 (syllabus, paragraph 11), 1987 Op. Att'y Gen. No. 87-067 (syllabus, paragraph 1), and 1985 Op. Att'y Gen. No. 85-102 are no longer valid and must be overruled. Under current law, a county employee whose standard workweek set as full time by the appointing authority consists of fewer than forty hours per week and who is in active pay status for such standard workweek is entitled to a proportionate amount of vacation leave calculated on a biweekly basis as prescribed in R.C. 325.19(A)(2).

In a telephone conversation, you asked that we consider what action should be taken by an office, department, or agency of county service that has continued to grant vacation leave under the standard prescribed by 1989 Op. Att'y Gen. No. 89-096 (syllabus, paragraph 11) after the enactment of the current language of R.C. 325.19(A)(2). Your question is whether changes should be made in amounts of vacation leave credited to particular employees.

Earlier opinions considered what steps should be taken if state or county employees had not been credited with the full amounts of vacation leave to which the employees were entitled. Those opinions concluded that there was implied authority to correct payroll records to reflect the full amounts of vacation benefits that the employees should have received. *See* 1989 Op. Att'y Gen. No. 89-088; 1987 Op. Att'y Gen. No. 87-067 (syllabus, paragraph 2); 1982 Op. Att'y Gen. No. 82-073.

A different question arises, however, when an employee was granted more than the amount of vacation leave to which the employee was entitled pursuant to statute. In such circumstances, it is important to note that the amounts of vacation leave prescribed by R.C.

325.19(A) are merely minimum amounts that an appointing authority must grant to employees in the county service. An appointing authority that is empowered to hire county employees and fix their compensation may, if it chooses, grant them vacation leave in excess of the minimum entitlement prescribed by statute. *See Cataland v. Cahill*, 13 Ohio App. 3d 113, 114, 468 N.E.2d 388, 390 (Franklin County 1984) ("[s]ick leave and vacation leave prescribed by statute are minimums only and, where the appointing authority is authorized to establish compensation of employees, either sick-leave or vacation-leave benefits in addition to the minimums prescribed by statute may be granted as part of compensation"); *see also* 1991 Op. Att'y Gen. No. 91-050. Therefore, although an appointing authority was not required to grant the amounts of vacation leave contemplated by 1989 Op. Att'y Gen. No. 89-096 after the current language of R.C. 325.19(A)(2) was adopted, the appointing authority was permitted to grant those greater amounts of vacation leave.

When an appointing authority chooses to grant benefits in an amount greater than the amount required by statute, the appointing authority cannot retroactively revoke those benefits. *See Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 34, 406 N.E.2d 1098, 1100 (1980) (discussing sick leave credits granted in excess of the amount required by R.C. 124.38 and stating: "The sick leave credits once earned became a vested right of plaintiffs. Such accrued credits could not be retroactively revoked"). Hence, there is no need for an appointing authority that granted vacation leave in excess of the minimum required by statute to take any action with respect to that vacation leave.

An appointing authority continues to have the power to grant vacation leave in excess of the minimum prescribed by the current provisions of R.C. 325.19, in accordance with applicable provisions of law. *See generally, e.g.*, 1995 Op. Att'y Gen. No. 95-027; 1979 Op. Att'y Gen. No. 79-026. An appointing authority may choose, instead, to grant only the minimum amount required under R.C. 325.19. However, if that amount is less than the amount formerly granted, a change in the vacation leave policy may take effect only prospectively. *See Ebert v. Stark County Bd. of Mental Retardation*.

For the reasons discussed above, it is my opinion and you are advised, as follows:

1. A county employee whose standard workweek set as full time by the appointing authority consists of fewer than forty hours per week and who is in active pay status for such standard workweek is entitled to a proportionate amount of vacation leave calculated on a biweekly basis as prescribed in R.C. 325.19(A)(2). (1989 Op. Att'y Gen. No. 89-096 (syllabus, paragraph 11), 1987 Op. Att'y Gen. No. 87-067 (syllabus, paragraph 1), and 1985 Op. Att'y Gen. No. 85-102, overruled on the basis of statutory change.)

2. An appointing authority that is empowered to hire county employees and fix their compensation may, if it chooses, grant them vacation leave in excess of the minimum entitlement prescribed by statute.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

August 24, 1998

The Honorable Richard L. Ross
Morgan County Prosecuting Attorney
109 East Main Street
McConnelsville, Ohio 43756-1125

SYLLABUS: 98-026

1. A county employee whose standard workweek set as full time by the appointing authority consists of fewer than forty hours per week and who is in active pay status for such standard workweek is entitled to a proportionate amount of vacation leave calculated on a biweekly basis as prescribed in R.C. 325.19(A)(2). (1989 Op. Att'y Gen. No. 89-096 (syllabus, paragraph 11), 1987 Op. Att'y Gen. No. 87-067 (syllabus, paragraph 1), and 1985 Op. Att'y Gen. No. 85-102, overruled on the basis of statutory change.)

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