

OPINION NO. 71-093

Syllabus:

1. The phrase "active pay status", as used in Section 325.19, Revised Code, means being on the county payroll.

2. When a county employee is tardy, or is ill but out of sick leave, the appointing authority is not permitted under Section 325.19, Revised Code, to reduce the amount of vacation time which the employee accumulates for the period in which the tardiness or absence occurs.

To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio
By: William J. Brown, Attorney General, December 30, 1971

You have requested my opinion as to whether, under certain circumstances, Section 325.19, Revised Code, permits an appointing authority in your county to reduce the amount of vacation time accrued by county employees. Your letter reads in part as follows:

"It has been the policy of one of the appointing authorities in this County, when an employee is late for work or is ill, but out of sick leave, to 'reduce the amount of vacation time that the employee accumulates for the period in which this lateness or absence occurs'. The vacation time accumulated for the pay period is reduced by the proportion which the late time or absence bears to the eighty hour standard pay period.

"Your opinion is requested as to whether this practice is permitted by Section 325.19 of the Ohio Revised Code, and as to the meaning of the phrase 'active pay status' as used in Section 325.19.

"We have noted that you have previously ruled that vacation leave credit may not be earned during a period of military leave of absence, during which an employee would not be on the payroll. 1963 OAG No. 3518. The Department of State Personnel, in its Supplement No. 1 to Memo No. 3C, dated February 12, 1971, has taken the view that when an employee is not on the payroll he is not in active pay status [and also] when he has been removed, at the direction of the appointing authority, because he is on military leave, unpaid leave of absence, or on some other form of unpaid absence.

Therefore, we have assumed that 'active pay status' means being on the payroll. We can find nothing in the Ohio Revised Code to indicate that vacation time accrues according to the amount of time that the employee works during a pay period, in contrast to the provision for sick leave found in Section 143.29, which directly relates the amount accrued to hours of service."

The pertinent part of the statute, Section 325.19, supra, reads 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, is entitled during each year thereafter, to two calendar weeks, excluding legal holidays of vacation leave with full pay. * * * Such vacation leave shall accrue to the employee upon each successive annual recurrence of the anniversary date of his employment provided, the anniversary date may be deferred because of periods of time which the employee is not in active pay status. * * *"

It is clear that this Section provides that, at the end of each full year during which a county employee has been in active pay status, he is entitled to a specified amount of accrued vacation leave with full pay, and that he does not accrue such leave during periods when he is not in active pay status. One of my predecessors so interpreted the Section in an Opinion to which you refer, Opinion No. 3518, Opinions of the Attorney General for 1963. It was there held that a state or county employee, who is on leave of absence without pay because of service in the Armed Forces, is not in active pay status and does not accrue vacation leave under Section 325.19, supra. My predecessor was careful to point out, however, that, under the special provision of Section 3923.05, Revised Code, a state or county employee may be on leave of absence on field training or military service for a period of 31 days without loss of pay. In such a case the employee remains in active pay status and may accrue vacation leave under Section 325.19, supra. If the employee's military duty is not to exceed 31 days he is entitled to leave of absence without loss of pay and remains in active pay status; if his military leave of absence exceeds 31 days he is not in active pay status. I agree, therefore, with your conclusion that "active pay status" means being on the county payroll.

I can find no statutory authority for the practice of reducing the amount of vacation time accrued by an employee in active pay status because of tardiness, or because he is ill and has no remaining sick leave. Under Section 325.19, supra, the employee is entitled to a specified amount of vacation leave at the conclusion of each year he serves in active pay status. Furthermore, it has been held by one of my predecessors that the employee is entitled to a pro-rated portion of his vacation leave for the current year if he is separated from service before the close of that year. Opinion No. 666, Opinions of the Attorney General for 1963. But there is no provision for depriving an employee of leave to which he has already become entitled.

On the other hand, the Revised Code provides other means for dealing with an employee who is incompetent or who neglects his duty. He is subject to a reduction in pay, to suspension, or to removal. Section 143.27, Revised Code, provides in pertinent part as follows:

The tenure of every officer or employee in the classified service of the state and the counties, cities, city health

districts, general health districts, and city school districts thereof, holding a position under sections 143.01 to 143.48, inclusive, of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of state personnel or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office."

The Administrative Rules of the Director of State Personnel, in implementation of this statutory authority, make provision for treatment of an habitual absentee. Section PL-25-03 provides as follows:

"Any employee in the classified service who absents himself from duty habitually or for three or more successive duty days, without leave and without notice to his superior officer of the reason for such absence may be subject to removal for neglect of duty under provisions of Section 143.27, Revised Code.

"This rule does not require an appointing authority to initiate removal action if he determines it unwarranted nor does it preclude removal action for a shorter period of absence if the absence is of sufficient seriousness."

The Rules also provide for the case of an employee who is incapacitated and has exhausted his sick leave. Section PL-25-02 provides in pertinent part as follows:

"When an employee becomes physically incapacitated for the performance of the duties of his position, the appointing authority may, at the request of such employee and with the consent of the Director of State Personnel, transfer him to a vacant position of lower grade which he has the ability to fill.

"When an employee becomes physically incapacitated for the performance of the duties of his position and does not request transfer to a position of lower grade, or is physically incapacitated for the performance of the duties of any position, he shall receive a 'Disability Leave,' provided his disability continues beyond his accumulated sick leave rights and provided the procedure established in this rule is followed."

And Section PL-26-04 provides as follows:

"If illness or disability continues past the time covered by earned sick leave, the employee shall be either granted a leave of absence in accordance with PL-21-03 or given a disability leave in accordance with PL-25-02. If a leave of absence is granted and illness or disability continues past expiration of the leave, a disability leave shall then be granted."

See State, ex rel. Sommers v. Department of Highways, 174 Ohio St. 569 (1963); State, ex rel. Lamb v. Swisher, 112 Ohio St. 707 (1925).

In view of the foregoing, I conclude that the amount of vacation time a county employee accumulates cannot be reduced in relation to hours missed because of tardiness or because of illness not charged off against sick leave.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. The phrase "active pay status", as used in Section 325.19, Revised Code, means being on the county payroll.
2. When a county employee is tardy, or is ill but out of sick leave, the appointing authority is not permitted under Section 325.19, Revised Code, to reduce the amount of vacation time which the employee accumulates for the period in which the tardiness or absence occurs.