

OPINION NO. 71-042

Syllabus:

1. A board of trustees of a county tuberculosis hospital may agree with an organization of its employees to provide them time off with pay on a day declared in the agreement to be a holiday, such as Good Friday, and

2. A board of trustees of a county tuberculosis hospital may agree with an organization of its employees to grant an employee time off, without charge against sick leave, on the day of the funeral of a member of such employee's family.

To: Vincent E. Gilmartin, Mahoning County Pros. Atty., Youngstown, Ohio
By: William J. Brown, Attorney General, August 17, 1971

I am in receipt of your request for my opinion, which you state as follows:

"The Board of Trustees [of a county tuberculosis hospital] entered into a collective bargaining agreement with their employees which provides that the employees be entitled to time off with pay on certain holidays including Good Friday. Also, the employees were granted time off without credit against sick leave on the day of the funeral of a member of their family.

"Since the time of entering into this agreement with their employees, it has been called to the attention of the Board that such time off allowances are not specifically granted under existing State statutes. The Trustees, therefore, would like your opinion as to whether they may honor their agreement with their employees and grant the time off set out in their agreement even though there is no specific statute which provides for a Good Friday holiday or provides for time off by reason of a funeral in the family."

The important role of labor organizations in representing the interests of employees of the State and its political subdivisions and instrumentalities, has been recognized by legislative enactment authorizing the checkoff of dues of such organizations from the wages of public employees. Section 9.41, Revised Code. In context with that general role of an organization, your question involves the power of the public employer to agree with such organization respecting certain financial fringe benefits for the employees, namely, the fringes ordinarily referred to as holiday pay and funeral

leave. For clarity, I will discuss the question of holiday pay first and in greater detail.

Holidays are listed and provided for generally as to regular employees in the county service by Section 325.19, Revised Code, which, in pertinent part, is as follows:

"In addition to such vacation leave, such county employee, working on a per diem basis, hourly basis, or salary basis, is entitled to eight hours of holiday pay for New Year's Day, Washington-Lincoln Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day, of each year on and after January 1, 1971, if he is a regular employee with at least six months full-time county service prior to the month when such holiday occurs, except that interruption of service due to illness or injury caused or induced by the actual performance of official duties and not by an employee's negligence shall not affect such employee's right to holiday pay. Holidays shall occur on the days specified in section 1.14 of the Revised Code. In the event that any of the aforesaid holidays fall on Saturday, the Friday immediately preceding shall be observed as the holiday. In the event that any of the aforesaid holidays fall on Sunday, the Monday immediately succeeding shall be observed as the holiday. If an employee's work schedule is other than Monday through Friday, he is entitled to holiday pay for holidays observed on his day off regardless of the day of the week on which they are observed."

(There is no reason to doubt but that such language applies to employees of a county tuberculosis hospital, Section 339.33, infra.)

Good Friday is omitted from the holidays listed above. The precise question here, therefore, is whether or not the list is intended to be a minimum holiday allowance or a maximum one.

One of my predecessors has held that a public office might be closed on a legal holiday, i.e., Columbus Day, as defined in Section 5.21, Revised Code, and listed in Section 1.14, Revised Code, and employees be paid therefor, even though the holidays listed at that time in Section 325.19, supra, omitted Columbus Day (Opinion No. 65-217, Opinions of the Attorney General for 1965, dealing with the form of statute at 131 Ohio Laws, 220, 221). In effect, it was his view that the list contained in Section 325.19, supra, was a minimum holiday allowance.

That Opinion rested on the views expressed in Opinion No. 3480, Opinions of the Attorney General for 1954, which dealt

with the right of public officers to initiate closing of their offices in keeping with changing community patterns. It was held there that a public officer could close the office on Saturday and, indeed, on Wednesday or Thursday afternoon. While no specific consideration was given to employee compensation as a result of such closing, there would appear to have been no doubt about the continuance of the regular wage or salary allowance. A reduction of hours without change of weekly or monthly compensation, however, is either an increase in hourly rate or the addition of a fringe benefit of time paid for but not worked.

My immediate predecessor reached a similar result respecting pay for holidays not listed in Section 325.19, supra, by pointing to the statutory right and duty of the public employer to "fix the compensation" of his employees, within the limits of appropriated funds. Opinion No. 69-134, Opinions of the Attorney General for 1969.

In the last cited Opinion, my predecessor quoted with approval from Opinion No. 1405, Opinions of the Attorney General for 1964, as follows:

"I can conceive of no reason why county employees may not be paid an overtime rate or be given compensatory time off for time worked in excess of an established work week or work day so long as such overtime rate or compensatory time off is part of a uniform plan."

The latter Opinion approved the payment of overtime and allowance of compensatory time off when overtime was worked.

This viewpoint was reasserted last in Opinion No. 70-012, Opinions of the Attorney General for 1970, approving pay for legal holidays not listed in Section 325.19, supra.

The foregoing Opinions establish that not only legal holidays may be observed and pay allowance made, whether or not also listed in Section 325.19, supra, but that considerable latitude is afforded the officers of the county service to prescribe and adjust working time and pay allowances for time not worked.

Boards of trustees of county tuberculosis hospitals, just as sheriffs, are delegated the power (through Section 339.33, Revised Code, giving them "* * * all the powers conferred by sections 339.21 to 339.30, inclusive, of the Revised Code, upon the board of trustees of a district hospital* * *") to appoint and fix the compensation of nurses and other employees. Such power is delegated by Section 339.30, Revised Code, which, in pertinent part, is as follows:

"Upon the recommendation of the administrator, the board of trustees shall appoint a medical director unless the administrator has also been appointed as medical director, and other physicians and nurses for service within

and outside the hospital, and such other employees as are necessary for the proper operation of the hospital, and shall fix their compensation."

Statutory recognition is also given to the need for flexible compensation policies on the part of a hospital board in order to attract and hold professional and other trained personnel, classes of employees in such generally acknowledged short supply currently as to threaten crisis in health care for the general public. Section 339.33, supra, allows the establishment of vacation leave policies for employees of such hospitals, in excess of those prescribed for other employees in the county service, in order to be competitive in the health care labor market. Such provision is as follows:

"* * * * * * * * * * *"

"Notwithstanding section 325.19 of the Revised Code, the board of trustees of a county tuberculosis hospital may grant to its full-time employees, including full-time hourly rate employees, after service of one year such additional vacation leave with full pay as the board determines to be customary and usual in the hospital field in its community.

"* * * * * * * * * *"

It is possible to argue that the flexibility of a board of trustees of a county tuberculosis hospital in establishing compensation policies is limited in substantial part to vacation allowances because that area has been singled out for mention. Taking that specific provision together with the generally broad powers of officers in the county service, as established by my predecessors, however, such restrictive interpretation is not warranted. Rather, the powers of such officers must be liberally construed to permit flexibility and adjustment to customs and practices in related institutions just as county officers generally were held to possess authority to adjust to office closing practices in their localities. Opinion No. 3480, supra.

I must conclude, therefore, that a board of trustees of a county tuberculosis hospital has power to prescribe and make pay allowance for holidays other than those listed in Section 325.19, supra. It goes almost without saying that such power is not unlimited but, as is required of all public officers, must be exercised with sound and prudent judgment. Since such power is vested in the board, it necessarily follows, also, that, in dealing with an organization of its employees, it may agree with the organization on the manner of exercising the power.

Your second question deals with an allowance of time off on the day of the funeral of a member of an employee's family, without charging such time against sick leave.

Sick leave for all state, county and municipal employees and some employees of boards of education is established by Section 143.29, Revised Code, and allowance for funeral leave is expressly included as a charge against sick leave. In pertinent part, that language is as follows:

"Each employee, whose salary or wage is paid in whole or in part by the state, each employee in the various offices of the county service and municipal service, and each employee of any board of education for whom sick leave is not provided by section 3319.141 [3319.14.1] of the Revised Code, shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay. Employees may use sick leave, upon approval of the responsible administrative officer of the employing unit, for absence due to personal illness, injury, exposure to contagious disease which could be communicated to other employees, and to illness, injury, or death in the employee's immediate family. Unused sick leave shall be cumulative up to one hundred twenty work days, unless more than one hundred twenty days are approved by the responsible administrative officer of the employing unit.* * * This section shall be uniformly administered as to employees in each agency of the state government by the director of state personnel. No sick leave may be granted to a state employee upon or after his retirement or termination of employment."

The language makes clear that uniformity of application is required only as to employees in the state government. Comparable provision of the General Code was said by one of my predecessors to create a floor under sick leave allowance and was not intended to create a ceiling. Opinion No. 266, Opinions of the Attorney General for 1951, page 117. Subsequent Opinions of the Attorney General have tended to restrict the discretion of local governmental authorities but have not expressly grappled with the reasoning of the earlier one. See Opinion No. 1057, Opinions of the Attorney General for 1964 (discussing Section 143.29, supra, but allowing religious holiday pay under statutes pertaining to boards of education); Opinion No. 69-070, Opinions of the Attorney General for 1969 (disallowing paid time off to teachers for injuries caused by student assault); and Opinion No. 69-077, Opinions of the Attorney General for 1969 (disallowing pay for sick leave to one employee in excess of the amount theretofore earned). All of the three Opinions seem to follow a philosophy of Section 143.29, supra, somewhat different from that set out above, but the first two either held or suggested alternative means of compensation and the third apparently dealt with an individual case and did not deal with a general policy. (Compare Opinion No. 500, Opinions of the Attorney General for 1963.)

In the question present, the funeral leave is not chargeable to sick leave even though the sick leave provision of Section 143.29, supra, does provide for funeral leave. Thus, the question

is not strictly a matter of sick leave but is a different aspect of the authority of local government officers to prescribe working time and compensation, as discussed above with respect to holidays. The discussion of the first question, therefore, is equally applicable here.

In each case, holiday and funeral leave, the statutory provisions must be read as assuring employees of minimum fringe allowances, without being deemed to restrict the power of local officials to exercise prudent judgment. Because of the provisions applicable to municipalities, Article XVIII of the Ohio Constitution, I do not indicate that such conclusion is uniformly applicable to employees in the municipal service. See Opinion No. 266, supra, and Opinion No. 500, supra.

I must therefore conclude that the allowance of funeral leave not chargeable to sick leave, restricted to a short period of time, such as you describe, is a matter within the sound discretion of the board of trustees to establish.

Before concluding, it should be noted that the leading Opinions I rely on in answering both of your questions, i.e., Opinion No. 3480, supra, and Opinion No. 266, supra, were rendered by one Attorney General, now Chief Justice of The Supreme Court of Ohio, Opinions that in both instances reflect a penetrating analysis of the problems of local government officials.

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

1. A board of trustees of a county tuberculosis hospital may agree with an organization of its employees to provide them time off with pay on a day declared in the agreement to be a holiday, such as Good Friday, and

2. A board of trustees of a county tuberculosis hospital may agree with an organization of its employees to grant an employee time off, without charge against sick leave, on the day of the funeral of a member of such employee's family.