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RETIREMENT FUND PAYMENTS SHOULD NOT BE DEDUCTED FROM EARNED BUT UNUSED VACATION LEAVE COMPENSATION OF A EMPLOYEE SEPARATED FROM PUBLIC EMPLOYMENT—§§325.19, 145.47, 145.48, 145.01, R.C.

SYLLABUS:

Where under Section 325.19, Revised Code, a county employee who is separated from employment is paid compensation for any earned but unused vacation leave to his credit, the employer should not deduct from said compensation for the public employees retirement system under authority of Section 145.47, Revised Code, nor, in view of such payment of compensation, make any payments to that system as required by Section 145.48, Revised Code.

Columbus, Ohio, November 26, 1962

Hon. John S. Ballard, Prosecuting Attorney
Summit County, Akron, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Your opinion is requested concerning whether or not public employees retirement deductions should be made pursuant to Sections 145.47 and 145.48 in the following circumstances:

“A county employee with extended service and accumulated vacation resigned and made a claim for a considerable amount of earned but unused vacation leave. On applying the statute of limi-

tations, the county offered to settle for a total of 18 weeks, being 3 weeks per year for 6 years, which was accepted by the employee.

“While this was treated as a claim against the county a subsequent compromise accompanied by a release to the county of further claims, we do not know if this settlement is subject to deduction for public employees retirement system pursuant to Section 145.01, Revised Code, especially Paragraph Y thereof. The employee’s termination was effective September 30, 1962, although he was relieved from duties June 30, 1962, for medical attention, and the agreement for settlement of his vacation claim was concluded October 18, 1962.”

As to earned but unused vacation leave at time of separation, Section 325.19, Revised Code, reads, in part, 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, shall be entitled during each year thereafter, to two calendar weeks, excluding legal holidays, of vacation leave with full pay. Employees having fifteen or more years of county service are entitled, during each year thereafter, to three calendar weeks, excluding legal holidays, of vacation leave with full pay. Two calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the first anniversary of employment and annually thereafter, and three calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the fifteenth anniversary of employment and annually thereafter. The annual leave during any one calendar year may be extended to include unused vacation leave of previous years provided the total leave taken in any one year shall not exceed six weeks. An employee shall be entitled to compensation for the pro-rated portion of any earned but unused vacation leave to his credit at time of separation.

“* * * * * * * * *”

Under Section 325.19, *supra*, a county employee is entitled to compensation for any earned but unused vacation leave to his credit at the time of separation. Opinion No. 2021, Opinions of the Attorney General for 1961, issued on February 24, 1961; Opinion No. 3081, Opinions of the Attorney General for 1962, issued on June 21, 1962.

Thus, when the employee here in question was separated, he should have been paid compensation for any earned but unused vacation leave to his credit. From the facts as given, he was separated on September 30, 1962; and here I assume that he was on sick leave for the period of June 30 to September 30. Also, while the amount actually paid was in the

manner of a settlement, I believe that it must be considered to have been a payment for earned but unused vacation leave at the time of separation.

Section 145.47, Revised Code, reads, in part, as follows:

“Beginning January 1, 1960, each public employee who is a member of the public employees retirement system shall contribute seven per cent of his earnable salary or compensation to the employees’ savings fund. The head of each state department, institution, board, and commission, and the fiscal officer of each local authority subject to sections 145.01 to 145.57, inclusive, of the Revised Code, shall deduct from the compensation of each member on every payroll of such member for each payroll period subsequent to January 1, 1960, or if the employee becomes a member subsequent to that date then on the date upon which such employee became a member, an amount equal to seven per cent of such member’s earnable salary or compensation. * * *

“* * * * * * * * *”

Section 145.48, Revised Code, reads, in part, as follows:

“Each employer described in division (D) of section 145.01, and in section 145.011 of the Revised Code shall pay to the employers’ accumulation fund an amount which shall be a certain per cent of the earnable compensation of all members to be known as the ‘employer contribution.’ * * *

“* * * * * * * * *”

Accordingly, during the time that the person here concerned was a public employee, the county was required to deduct from the compensation on each of said person’s payrolls an amount equal to seven per cent of his earnable salary or compensation, and during that time the county was required to pay into the employers accumulation fund the amount provided under Section 145.48, *supra*.

While under a broad interpretation, the payment of compensation for accumulated vacation leave might be construed as a payroll, or part of a payroll, I do not believe that such payment should be considered a payroll within the purview of Section 145.47, *supra*. Ordinarily a payroll consists of compensation for unused vacation leave is, however, more in the nature of a bonus to an employee, paid because he did not take time off during his employment.

I also believe that the reason for the deductions must be considered in arriving at a conclusion in this question.

Chapter 145., Revised Code, provides for a public employees retirement system with retirement allowances and survivor benefits for members. The allowances and benefits under the system vary according to the length of time that the persons concerned are contributing members of the system.

It will be noted that under Section 325.19, *supra*, the employee is separated from county employment and is given compensation for accumulated vacation leave—he is not given vacation time with pay, during which time he would remain a county employee, and then separated. Thus, the employee who is separated is not given service credit under the public employees retirement system for the number of days involved in the accumulated vacation leave; such service credit stops on the day that he is separated.

Division (Y) of Section 145.01, Revised Code, to which you refer, reads as follows:

“ ‘Public service terminates’ means the later of the following dates: (1) the last day for which an employee is compensated for services performed for an employer or (2) the last day for which an employee is compensated by an employer although no services have been performed. Subdivision (2) hereof shall include but not be limited to compensation relating to vacation, sick, or terminal leave.”

Under either “(1)” or “(2)” of division (Y), *supra*, the public service of the employee here in question terminated on September 30, 1962. Up until that date, he was carried as an employee on sick leave, and no compensation was paid for any days after that date, either for service rendered or not rendered.

In view of the fact that service credit is not given for the number of days of accumulated vacation leave, it would appear to follow that no contributions should be required from the amount of compensation allowed to an employee for accumulated vacation leave, and no payments to the system should be required of the employer; and I so conclude.

Accordingly, it is my opinion and you are advised that where under Section 325.19, Revised Code, a county employee who is separated from employment is paid compensation for any earned but unused vacation leave to his credit, the employer should not deduct from said compensation for the public employees retirement system under authority of Section

145.47, Revised Code, nor, in view of such payment of compensation, make any payments to that system as required by Section 145.48, Revised Code.

Respectfully,

MARK McELROY

Attorney General