

**OPINION NO. 82-055****Syllabus:**

1. Pursuant to its authority to adopt a salary schedule for its employees, a county board of mental retardation and developmental disabilities may pay its employees in twenty-six biweekly installments, extended over a calendar year, even though such employees work only nine months during the year.
2. Full-time employees of a county board of mental retardation and developmental disabilities who work during only nine months of the year are not entitled to accrue sick leave benefits pursuant to R.C. 124.38 or vacation leave pursuant to R.C. 325.19 for the three months during which they are not scheduled to work, regardless of the number of installments in which the salary of such employees is paid. (1977 Op. Att'y Gen. No. 77-007, overruled.)
3. Pursuant to R.C. 145.03 a substitute teacher employed by a county board of mental retardation and developmental disabilities under a personal service contract that meets the requirements set out in 1 Ohio Admin. Code 145-5-15(C) does not become a member of the Public Employees Retirement System.

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**To: Arthur M. Elk, Ashland County Prosecuting Attorney, Ashland, Ohio**  
**By: William J. Brown, Attorney General, July 30, 1982**

I have before me your request for my opinion concerning the compensation of county board of mental retardation and developmental disabilities (169 board) employees. Your specific questions are as follows:

- a) May a county board of mental retardation pay seasonal employees, as classified by the Ohio Department of Administrative Services, over twenty-six bi-weekly pay periods between January and December of the calendar year, although their work period encompasses only nine months of this period?
- b) If such a pay apportionment is permissible, do these seasonal employees who do not work from June 8 through August 25 accrue sick leave and vacation benefits for that period?
- c) May a county board of mental retardation engage in a personal service contract for a period in excess of ninety (90) days with a person employed as a substitute teacher, without said teacher's membership in the public employees retirement system?

Your first question asks whether a county board of mental retardation and developmental disabilities may pay its employees in twenty-six biweekly installments over the calendar year even though the employees work only during nine months of the year. I note that county employees hired pursuant to R.C. 325.17 are paid "biweekly from the county treasury, upon the warrant of the auditor." This section does not, however, apply to employees of a county board of mental retardation and developmental disabilities, all of whom are hired pursuant to R.C. Chapter 5126. Because there are no other statutory provisions specifying the intervals at which such board's employees should be paid, it is necessary to examine the board's powers to determine whether it has the authority to pay its employees in the manner you propose.

Pursuant to R.C. 5126.05(J), a county board of mental retardation and developmental disabilities is required to adopt a salary schedule for its employees. Although the term salary schedule is not defined, I believe that the authority to adopt such a schedule would quite naturally imply the power to specify not only the amount but also the frequency of salary payments. See 1969 Op. Att'y Gen. No. 69-153 (since there are no statutes governing when the employees of certain county officers are to be paid, each officer is responsible for seeing that his employees are paid at reasonable intervals). It appears that the only limitation upon the board's authority to determine payroll periods is that any system it establishes must be reasonable. Jewett v. Valley Railway Co., 34 Ohio St. 601, 608 (1878) ("[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner"). I have no basis for determining that payment of the board's seasonal employees in the manner you suggest would be unreasonable. It is my opinion, therefore, that pursuant to its authority to adopt a salary schedule for its employees, a county board of mental retardation and developmental disabilities may pay its employees in twenty-six biweekly installments over the calendar year, even though the employees work during only nine months of the year.

Your second question asks whether payment of the board's seasonal employees in the manner you propose would entitle such employees to the accrual of vacation and sick leave benefits during the period in which they are not actually working. R.C. 124.38 establishes the sick leave benefits to which such employees are entitled by statute. Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). I note that in Ebert, the court stated that although the board's employees are entitled to the sick leave benefits set forth in R.C. 124.38, the board may, pursuant to its authority to compensate its employees, grant such employees a greater sick leave benefit than that established by statute. Because you have not indicated that the board has established a different policy for its employees, however, my discussion will be limited to the sick leave benefits set for board employees by statute.

The minimum benefit to which employees of a county board of mental retardation and developmental disabilities are entitled is four and six-tenths hours of pay "for each completed eighty hours of service." R.C. 124.38. Pursuant to the

statutory formula, the amount of sick leave to which an employee is entitled is based upon his "hours of service." R.C. 124.38, therefore, does not entitle seasonal employees of a county board of mental retardation and developmental disabilities to the accrual of sick leave benefits during the period in which such employees do not render services for the board. See 1980 Op. Att'y Gen. No. 80-037 (sick leave benefits can accrue only during the period for which a state university faculty member is under contract, regardless of the number of months in which the employee actually renders service or the number of installments in which such employee is compensated for services rendered).

You have also asked whether payment of the board's seasonal employees in twenty-six biweekly payments during the year entitles such employees to accrue vacation benefits for that period of the year during which they are not scheduled to work. Again, because you have not indicated whether the board has adopted a different vacation policy from that set forth in R.C. 325.19, I shall limit my analysis of your question to a discussion of vacation benefits to which a board employee is entitled by statute.

Employees of a county board of mental retardation and developmental disabilities are entitled to vacation benefits as set forth in R.C. 325.19, which reads, in part, as follows:

(A) 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 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. . . . 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. . . .

. . . .

(G) As used in this section:

(1) "Full-time employee" means 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.

(2) "Part-time employee" means an employee whose regular hours of service for a county total less than forty hours per week, or who renders any other standard of service accepted as part-time by an office, department, or agency of county service, and whose hours of county service total at least five hundred twenty hours annually.

It is my understanding that the employees in the questions you pose actually work less than forty hours per week, but are considered by the board to be full-time employees. They are, therefore, entitled to the vacation benefits set forth in R.C. 325.19(A).<sup>1</sup> This section entitles a county employee who works full time to vacation

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<sup>1</sup>In 1977 Op. Att'y Gen. No. 77-007, I concluded that where an appointing authority has established a standard workweek of less than forty hours per week, R.C. 325.19 requires that "the number of hours of vacation leave accrued biweekly be adjusted proportionately to reflect differences in employees' standard work weeks." Op. No. 77-007 at 2-26. Since issuance of that opinion, however, R.C. 325.19 was amended (Am. H.B. 333, 113th Gen. A. (1980) (eff. May 13, 1980)) to define a full-time employee as including any employee who works a standard workweek, although less than forty hours per week, which is considered by the appointing authority to be full-time service. Thus, the legislature has addressed the problem of adjusting vacation benefits based on differences in standard workweeks, and has stated that all county employees who are considered to be full time by their appointing authorities are entitled to vacation leave benefits pursuant to the scheme set forth in R.C. 325.19(A). Based on this amendment to R.C. 325.19, I must overrule Op. No. 77-007.

leave in an amount based on the employee's years in service. R.C. 325.19(A) states that a year of service "shall be computed on the basis of twenty-six biweekly pay periods." In light of this language, you ask whether the board's payment of its employees in twenty-six biweekly installments entitles the employees to accrue a full year of service for purposes of R.C. 325.19, although such employees are scheduled to work for only nine months of the year.

In order to determine how R.C. 325.19(A) applies to the employees in the question you pose, it is necessary to keep in mind the obvious intent of the legislature that service time be the determining factor in computing the amount of vacation leave to which an employee is entitled under R.C. 325.19. Additionally, I note that pursuant to R.C. 1.47(C) it is presumed that, in enacting a statute, the legislature intended a just and reasonable result. Since vacation benefits accrue on the basis of time in service, I believe that it would be unreasonable to interpret R.C. 325.19 as entitling a seasonal employee to a full year's worth of vacation benefits merely because such employee's salary payments extend over an entire year. Rather, the twenty-six biweekly pay periods referred to in R.C. 325.19 must be interpreted as meaning those biweekly periods in which an employee actually works or is scheduled to work. It is, therefore, my opinion that under R.C. 325.19 a full-time seasonal employee whose salary payments extend over an entire year is entitled to service credit, and thus vacation benefits, for only those months during which he is scheduled to work, regardless of the number of installments in which such employee is paid.

You also ask whether a county board of mental retardation and developmental disabilities may hire a substitute teacher pursuant to a personal service contract for a period in excess of ninety days without said teacher's membership in the Public Employees Retirement System (hereinafter PERS). R.C. 145.03 sets forth the basic requirement for membership in PERS as follows:

A public employees retirement system is hereby created for the employees of the state and of the several local authorities mentioned in section 145.01 of the Revised Code. Membership in the system is compulsory upon being employed except that a student whose employment will not exceed fifteen hundred hours in any calendar year or any new employee, not a member at the time of his employment, whose employment will not exceed twenty hours per week, may choose to be exempt from compulsory membership by signing a written application for exemption within the first month after being employed.

A temporary or emergency employee whose employment will not exceed three calendar months may be exempted from compulsory membership by signing a written application for exemption within the first month after being employed. . . .

A public employee, as defined in division (A) of section 145.01 of the Revised Code, who is employed by a private temporary help service and performs services under the direction of an employer, as defined in division (D) of section 145.01 of the Revised Code, or who is employed on a contractual basis by such an employer, or who is employed under a personal service contract, does not become a member of the public employees retirement system. (Emphasis added.)

A county board of mental retardation and developmental disabilities is considered an employer for purposes of R.C. Chapter 145, and its employees must, therefore, become members of PERS unless they are specifically exempted. See 1980 Op. Att'y Gen. No. 80-063 (a 169 board, as an employer for purposes of R.C. Chapter 145, must bear financial responsibility for delinquent contributions owed PERS arising out of employment with the board).

R.C. 145.03 sets forth three categories of public employees who may apply for exemption from membership in PERS: students whose employment will not exceed

fifteen hundred hours per calendar year, new employees who are not members at the time of their employment and whose employment will not exceed twenty hours per week, and temporary or emergency employees whose employment will not exceed three calendar months. R.C. 145.03 also establishes three categories of employees who do not become members of PERS upon employment in the public service: a public employee who is employed by a private temporary help service and performs services under the direction of an employer as defined in R.C. 145.01, a public employee who is employed on a contractual basis, see 1 Ohio Admin. Code 145-5-15(B),<sup>2</sup> or a public employee who is employed under a personal service contract.

Your question concerns a substitute teacher hired by the board pursuant to a personal service contract for a period in excess of ninety days. As an employee under a personal service contract, such teacher comes within the last exclusion set forth in R.C. 145.03. I note that there is no statutory definition of what constitutes a personal service contract. PERS has, however, adopted 1 Ohio Admin. Code 145-5-15(C), which interprets the meaning of the phrase "employed under a personal service contract" as used in R.C. 145.03 in the following manner:

(C) "Employed under a personal service contract" means that an individual so employed would:

(1) Not appear on a public payroll.

(2) Not be eligible for sick leave, vacation, hospitalization, or other fringe benefits extended to "regular" employees.

(3) Be a party to a formal bilateral written contract delineating the rights, obligations, benefits, and responsibilities of both parties.

(D) There are two categories of persons employed under a personal service contract:

(1) The contract was entered into before August 20, 1976, when Am. Sub. H.B. No. 268 became effective. These could be contractual employees whose duties and working relationship substantially correspond with an existing public payroll slot for that agency. In this situation, PERS deductions should be made unless the employment is temporary or emergency in nature.

(2) The contract was entered into after August 20, 1976.

Under the law as it was before the August 20 amendments, membership in and contribution to PERS were required; therefore contributions should continue for category (1), above.

If there is a break in public service for the contractual employee; and if he enters into a personal service contract after August 20, 1976, then no PERS deductions should be made under the new contract.

Section 145.03, as amended effective August 20, 1976, bars persons under personal service contracts; therefore no contributions can be accepted for persons whose contract was originated or renewed on, or after August 20, 1976 (category (2) above).

I note that there is one other exemption category which may apply to the substitute teachers about which you ask. Although you have not stated the number of hours these employees will work per week, if such persons are new employees who are not members of PERS at the time they begin employment with the board, and if they will not work over twenty hours per week, such employees may apply for exemption from membership in PERS. R.C. 145.03.

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<sup>2</sup>This category of employees excluded from membership in PERS encompasses individuals paid by an organization or firm which has a contract with a public employer as defined in R.C. 145.01(D). Your concern, however, appears to be with employees hired directly by the board pursuant to a personal service contract. Such employees, not being paid by a contract firm or organization, do not fall within this particular category.

It is, therefore, my opinion, and you are advised, that:

1. Pursuant to its authority to adopt a salary schedule for its employees, a county board of mental retardation and developmental disabilities may pay its employees in twenty-six biweekly installments, extended over a calendar year, even though such employees work only nine months during the year.
2. Full-time employees of a county board of mental retardation and developmental disabilities who work during only nine months of the year are not entitled to accrue sick leave benefits pursuant to R.C. 124.38 or vacation leave pursuant to R.C. 325.19 for the three months during which they are not scheduled to work, regardless of the number of installments in which the salary of such employees is paid. (1977 Op. Att'y Gen. No. 77-007, overruled.)
3. Pursuant to R.C. 145.03 a substitute teacher employed by a county board of mental retardation and developmental disabilities under a personal service contract that meets the requirements set out in 1 Ohio Admin. Code. 145-5-15(C) does not become a member of the Public Employees Retirement System.