

Note from the Attorney General's Office:

2003 Op. Att'y Gen. No. 2003-021 was modified by
2009 Op. Att'y Gen. No. 2009-009.

OPINION NO. 2003-021**Syllabus:**

Pursuant to R.C. 9.44(C), a county employee employed on or after June 24, 1987, who previously retired in accordance with the provisions of a retirement plan offered by the State, may not count any of his prior service with the State, a political subdivision of the State, or regional council of government in determining the rate at which he accrues vacation leave under R.C. 325.19(A)(1), even where such service earned prior to his retirement was not used to determine his retirement eligibility and benefits. (1985 Op. Att'y Gen. No. 85-093, overruled due to statutory change; 1983 Op. Att'y Gen. No. 83-019, clarified.)

To: Jeffrey H. Manning, Lorain County Prosecuting Attorney, Elyria, Ohio
By: Jim Petro, Attorney General, July 8, 2003

Your predecessor has asked for an interpretation of R.C. 9.44, which grants county employees prior service credit for purposes of computing the amount of vacation leave to which they are entitled under R.C. 325.19.

By way of background, R.C. 325.19(A) grants full-time county employees vacation leave, basing the amount to which an employee is entitled on the number of years he has served with the county or other political subdivision of the state.¹ See 1994 Op. Att'y Gen. No. 94-009. See also 1992 Op. Att'y Gen. No. 92-066. One year of service is computed on the basis of twenty-six biweekly pay periods. R.C. 325.19(A)(1).

Although R.C. 325.19 bases the amount of vacation leave to which county employees are entitled on the number of years they have served with the county or another political

¹A full-time county employee earns and is entitled to use, after one year of service with the county or other political subdivision, eighty hours of vacation leave, and thereafter continues to earn eighty hours of vacation leave on an annual basis. With eight or more years of service with the county or other political subdivision, a full-time county employee earns and is entitled to use one hundred twenty hours of vacation leave annually. With fifteen or more years of service a full-time county employee earns one hundred sixty hours annually, and with twenty-five or more years of service, a full-time county employee earns two hundred hours of vacation leave annually. R.C. 325.19(A)(1). See R.C. 325.19(J)(1) (defining "full-time employee").

A full-time employee who works a standard workweek of less than forty hours, or who is in active pay status in a biweekly pay period for less than eighty hours or the number of hours considered as full-time by the employing agency, is entitled to fewer hours of vacation leave than provided in R.C. 325.19(A)(1), reduced in proportion to the actual number of hours worked or in active pay status. R.C. 325.19(A)(2),(3). See 1998 Op. Att'y Gen. No. 98-026. We also note that a board of county commissioners has the discretionary authority to grant vacation leave to part-time employees. R.C. 325.19(B). See also note 9, *infra*, and associated text.

subdivision,² R.C. 9.44 provides certain exceptions to the prior service provisions in R.C. 325.19, and reads in pertinent part:

(A) *Except as otherwise provided in this section, a person employed, other than as an elective officer, by the state or any political subdivision of the state, earning vacation credits currently, is entitled to have the employee's prior service with any of these employers counted as service with the state or any political subdivision of the state, for the purpose of computing the amount of the employee's vacation leave....*

....

(C) *An employee who has retired in accordance with the provisions of any retirement plan offered by the state and who is employed by the state or any political subdivision of the state on or after June 24, 1987, shall not have prior service with the state, any political subdivision of the state, or a regional council of government ... counted for the purpose of computing vacation leave. (Emphasis added.)*

The question posed is whether the restriction in R.C. 9.44(C), barring an employee who has retired from receiving credit for his prior service with the State, a political subdivision, or regional council of government applies to prior service that was not included in computing his eligibility for retirement and his retirement benefits. In the first example described in the request for an opinion, a county employee was previously employed as a city police officer and retired from the Ohio Police and Fire Pension Fund (OPFPF). The OPFPF is a "retirement plan offered by the state" for purposes of R.C. 9.44(C). See R.C. Chapter 742. Pursuant to R.C. 9.44(C), therefore, the county employee is not entitled to include his prior service as a city police officer in determining his vacation leave under R.C. 325.19. He wishes to know whether R.C. 9.44(C) also precludes him from receiving prior service credit for the time he served as a member of a local board of education³ (while still working as a police officer prior to his retirement) since his service as a board of education

²Pursuant to R.C. 325.19(A)(1), a county appointing authority may permit all or part of an employee's prior service with a regional council of government to be considered service with the county or a political subdivision for purposes of determining years of service thereunder.

³Apart from the issue raised under R.C. 9.44(C), a county employee is entitled to include his prior service as an elected official for purposes of determining his vacation leave under R.C. 9.44(A) and R.C. 325.19, despite the fact that elected office holders, including members of boards of education, do not accrue vacation leave. See 1994 Op. Att'y Gen. No. 94-008; 1984 Op. Att'y Gen. No. 84-055; 1980 Op. Att'y Gen. No. 80057. See also *State ex rel. North Olmsted Fire Fighters Ass'n v. City of North Olmsted*, 64 Ohio St. 3d 530, 597 N.E.2d 136 (1992) (rejecting the argument that, because a city employee did not accumulate vacation leave while with the National Guard, he could not receive service credit under R.C. 9.44 for his time with the Guard in computing his city vacation leave). Cf. *Bayus v. City of Campbell*, No. 92 C.A. 22, 1993 Ohio App. LEXIS 4679, at *3 (Mahoning County Sept. 27, 1993) (holding that a city employee was entitled, when computing his vacation leave, to credit for his service as an elected part-time city council member, stating that the employee "is not seeking vacation time accrued during his time as a part-time elected official; he is trying to recoup vacation time earned during his years as a full-time employee but based on 'years of service'").

member was not used in computing his eligibility for retirement from the city police department.⁴

In the second instance, a county employee is also retired from a city police department and a member of the OPFPF. During the time he was employed by the city, he also worked part-time as an assistant county prosecuting attorney. He resigned from the prosecutor's office prior to his retirement from the police department, but has now been rehired as an assistant prosecuting attorney. As with the first employee, his service as an assistant prosecutor prior to his retirement from the city police department was not included in computing his retirement, and the issue is whether he is now entitled to include that prior county service for purposes of computing his vacation leave under R.C. 325.19.⁵ We assume that both employees were most recently employed by the county on or after June 24, 1987, for purposes of analyzing R.C. 9.44(C).⁶

⁴The eligibility of an OPFPF member to retire, as well as the benefits to which he is entitled upon retirement, are based on the member's years of "active service." R.C. 742.37(C). *See also* R.C. 742.39 (disability benefits); 2 Ohio Admin. Code 742-5-01(B) (the term "years of active service" means years of full-time service). Under certain circumstances, a member of OPFPF may purchase or transfer service credit that he earned as a member of another public retirement system, for use in computing his retirement eligibility and benefits under OPFPF. However, a member may receive credit only for "service credit earned for full-time service as a member of the non-uniform system." R.C. 742.21(C)(1),(D); 2 Ohio Admin. Code 742-5-07 (Supp. 2002-2003). Furthermore, pursuant to R.C. 742.21(G) and rule 742-5-07(F), credit may not be purchased or transferred for employment served concurrently with any employment for which the member has already received OPFPF service credit. *See also* [2002-2003 Monthly Record] Ohio Admin. Code 742-5-11 at 1080.

The law does not require that a member of a board of education be a member of any retirement plan offered by the State, although he may elect to become a member of the School Employees Retirement System (SERS). R.C. 3309.012. Even if the employee in question had joined SERS, however, he would not have been entitled to purchase his SERS service credit for purposes of computing his retirement eligibility and benefits as a member of OPFPF since his SERS service credit would not have been earned for full-time service. *See* R.C. 3313.15 (a board of education must hold a regular meeting at least once every two months). Also, his service as a board of education member ran concurrently with his employment with the city police department for which he received OPFPF service credit.

⁵All county employees, including part-time employees, are required to be members of the Ohio Public Employees Retirement System (OPERS). R.C. 145.01(A),(B). Determinations of retirement eligibility and benefits are based on years of "total service credit," which equates for purposes of those determinations to calendar months of continuing service. R.C. 145.01(H)(1),(T); R.C. 145.32; R.C. 145.33. A month of continuing service is computed based on salary earned. R.C. 145.01(T)(1). Again, however, in this instance, the employee worked part-time as an assistant county prosecutor while working as a city police officer, and was not entitled as a member of OPFPF to purchase credit earned for other than full-time service as a member of OPERS, or for service running concurrently with his OPFPF-covered employment.

⁶We also assume that each employee is a full-time county employee, and earns vacation leave in accordance with R.C. 325.19(A)(1), rather than pursuant to any policy adopted by his appointing authority that grants vacation benefits in excess of the minimum entitlements established by R.C. 325.19, *see* 1999 Op. Att'y Gen. No. 99-039; 1998 Op. Att'y Gen. No.

In order to analyze the issue raised, we begin with the principle of statutory construction that requires the interpreter “to give effect to the words used, not to delete words used or to insert words not used.” *Columbus-Suburban Coach Lines, Inc. v. Public Utilities Comm’n*, 20 Ohio St. 2d 125, 127, 254 N.E.2d 8 (1969). *Accord Cleveland Electric Illuminating Co. v. City of Cleveland*, 37 Ohio St. 3d 50, 524 N.E.2d 441 (1988); *State ex rel. Celebrezze v. Board of County Commissioners*, 32 Ohio St. 3d 24, 512 N.E.2d 332 (1987). *See also Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948) (syllabus, paragraph five) (“[t]he court must look to the statute itself to determine legislative intent, and if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged”). R.C. 9.44(C) states simply that an employee who has retired under a plan offered by the State shall not have his prior service with the State, any political subdivision of the State, or a regional council of government counted for the purpose of computing vacation leave. It is broadly worded and includes no exemption for prior service that was not used to determine retirement.

It has been suggested that R.C. 9.44(C) precludes credit only for the time served with the subdivision from which the employee retires. There is, however, no such qualifier in R.C. 9.44(C). If we were to interpret R.C. 9.44(C) as inapplicable to service with a subdivision other than the one from which an employee retired, or to prior service that was not used in determining an employee’s retirement eligibility and benefits, we would, in effect, be inserting words not used in R.C. 9.44(C) in violation of basic canons of statutory construction. *Cf. Bayus v. City of Campbell*, No. 92 C.A. 22, 1993 Ohio App. LEXIS 4679, at *3-4 (Mahoning County Sept. 27, 1993) (interpreting an ordinance similar to R.C. 325.19, providing vacation leave for full-time city employees based on “years of service,” and holding that, “[i]n applying the rules of statutory construction, we find no manifest expression that council had any intent to exclude years as a part-time elected official from years of service [w]ithout some language in the ordinance referring to prior full-time years of service, the plain meaning of the ordinance suggests that appellant [employee] should be credited for his ... years as a part-time councilman”). Thus, we interpret R.C. 9.44(C) as barring the use of any service credit earned by an employee prior to retirement, regardless of whether it was used to determine the employee’s eligibility for retirement and the benefits thereof.⁷

98-026, or a collective bargaining agreement, as discussed more fully below. We also assume that the provisions of R.C. 325.19(A)(2) and (3), and (F) are inapplicable. *See* notes 1, *supra*, and 9, *infra*.

⁷Division (C) of R.C. 9.44 was enacted in 1987-1988 Ohio Laws, Part II, 2564 (Am. Sub. H.B. 178, eff. June 24, 1987). Prior to that time, R.C. 9.44 was silent as to the effect that retirement might have on an employee’s prior service credit. Accordingly, 1985 Op. Att’y Gen. No. 85-093 concluded that a county employee was entitled to vacation credit for prior service as a municipal police officer even though such prior service was followed by retirement. In light of the passage of Am. Sub. H.B. 178, we overrule 1985 Op. Att’y Gen. No. 85-093 with respect to persons hired by the State or a political subdivision on or after June 24, 1987.

As part of its analysis, 1985 Op. Att’y Gen. No. 85-093 approved and followed 1983 Op. Att’y Gen. No. 83-019, which concluded that a county employee’s service with the county need not have been continuous in order to be counted in determining the employee’s vacation leave under R.C. 325.19(A). The facts considered in the 1983 opinion involved an employee whose break in county service was due to employment in the private sector rather than retirement, and we do not mean, by overruling 1985 Op. Att’y Gen. No. 85-093, to imply that the conclusion in 1983 Op. Att’y Gen. No. 83-019 is no longer sound. We affirm

The conclusion that a county employee may not, pursuant to R.C. 9.44, receive service credit for a second position, held concurrently with a position from which he previously retired, is consistent with the manner in which county employees accrue service credit for purposes of determining their vacation leave. As mentioned above, county employees are entitled to vacation leave based on years of service and, in turn, one year of service is computed on the basis of twenty-six biweekly pay periods. An employee need not have worked full-time during a biweekly pay period in order to receive full service credit for that period. See 1987 Op. Att'y Gen. No. 87-055. See also *State ex rel. North Olmsted Fire Fighters Ass'n v. City of North Olmsted*, 64 Ohio St. 3d 530, 597 N.E.2d 136 (1992); *Bayus v. City of Campbell*; 1994 Op. Att'y Gen. No. 94-008; 1989 Op. Att'y Gen. No. 89-088 at 2-419 (“[t]he fact that an employee was not entitled to accrue vacation leave during a particular period does not, however, mean that work performed during that period may not be counted as service credit if the employee subsequently holds employment which provides an entitlement to vacation benefits”); 1988 Op. Att'y Gen. No. 88-095. An employee is entitled to receive full service credit (a full biweekly pay period) even though he worked only part-time or intermittently during that pay period; conversely, if an employee works in two positions covered by R.C. 9.44 during the same biweekly pay period, he is entitled only to the service credit he would receive if he held a single position (one biweekly pay period).

Thus, even if the employees in question had terminated their respective city positions other than by retirement, and were not precluded by division (C) from including their city service in computing their vacation leave as county employees, they would have received no additional service credit for the positions they held with the board of education or county prosecutor's office during the same pay periods that they were working for the city police departments. In computing their vacation leave as county employees, they would have received credit for one biweekly pay period for each pay period they had served with the city police departments, but would have received no additional credit for the second positions they held during the same pay period. If, having retired from their positions with the city police departments, they were allowed additional credit for a second position held during the same biweekly pay period, they would be more favorably positioned than if they had not previously retired, in contravention of the apparent purpose of R.C. 9.44(C).⁸

The employee who previously worked as an assistant prosecutor and resumed that position after retiring from the police department argues that, if his employment with the prosecutor's office had been continuous, he would have retained the county service credit even after retiring from the police department. In that instance, however, R.C. 9.44 would have been inapplicable since there would have been no separation or break in service, and thus no “prior” service subject to the limitations of R.C. 9.44. Only R.C. 325.19 would have been applicable in that instance, and it does not exclude service credit earned prior to retirement.

that a county employee's service with the county need not have been continuous in order to be included in the computation of his vacation leave, so long as the employee has not retired under a plan offered by the state.

⁸We do not mean to imply, however, that a county employee who previously served in two positions consecutively rather than concurrently, and retired from one of the positions, could receive credit in computing his vacation leave for his service in the second position if it was not counted towards his retirement. Such facts are not before us, but it appears that the broad language of R.C. 9.44(C) would not permit such a result.

The reasons for the distinctions made among employees under R.C. 9.44 and R.C. 325.19 are not always readily apparent. *See* 1995-1996 Ohio Laws, Part V, 8516 (Am. Sub. S.B. 99, eff. Oct. 25, 1995); 1989-1990 Ohio Laws, Part IV, 5670 (Am. H.B. 552, eff. July 14, 1989); 1987-1988 Ohio Laws, Part II, 2564 (Am. Sub. H.B. 178, eff. June 24, 1987); 2000 Op. Att’y Gen. No. 2000-001 at 2-5 (“[t]he various amendments to R.C. 9.44 since its enactment in 1970 have ... resulted in county employees being entitled, on an inconsistent basis, to receive credit for prior service with the state for purposes of calculating their vacation leave benefits”). *See also* 1987 Op. Att’y Gen. No. 87-055 (a full-time county employee who previously worked as a part-time employee for twenty years receives the same amount of vacation leave as an employee who worked full-time for twenty-years). However, as noted in 1989 Op. Att’y Gen. No. 89-096 at 2-466, with regard to 1987-1988 Ohio Laws, Part II, 2564 (Am. Sub. H.B. 178, eff. June 24, 1987), “the right to transfer service credit was provided by statute as a matter of policy and was subject to legislative change.” The remedy for any perceived inequity in the application of R.C. 9.44 lies with the General Assembly. *See also* 1998 Op. Att’y Gen. No. 98-026.

We note, however, that R.C. 9.44(C) does not bar a county appointing authority from adopting for its employees a policy for crediting prior service that is more generous than the provisions of R.C. 9.44. 1992 Op. Att’y Gen. No. 92-066; 1990 Op. Att’y Gen. No. 90-104. *See also State ex rel. Clark v. Greater Cleveland Regional Transit Authority*, 48 Ohio St. 3d 19, 548 N.E.2d 940 (1990); *Cataland v. Cahill*, 13 Ohio App. 3d 113, 468 N.E.2d 388 (Franklin County 1984). Also, recognition of prior service credit in determining vacation leave is an appropriate subject for collective bargaining, and if included in a collective bargaining agreement, supercedes R.C. 9.44.⁹ *See State ex rel. Clark v. Greater Cleveland Regional Transit Authority*. *See also State ex rel. International Union of Operating Engineers v. Simmons*, 58 Ohio St. 3d 247, 569 N.E.2d 886 (1991); *Bemmerlin v. City of Eastlake*, No. 95-L-034, 1996 Ohio App. LEXIS 3003 (Lake County July 5, 1996).

In conclusion, it is my opinion and you are advised that, pursuant to R.C. 9.44(C), a county employee employed on or after June 24, 1987, who previously retired in accordance with the provisions of a retirement plan offered by the State, may not count any of his prior service with the State, a political subdivision of the State, or regional council of government in determining the rate at which he accrues vacation leave under R.C. 325.19(A)(1), even where such service earned prior to his retirement was not used to determine his retirement eligibility and benefits. (1985 Op. Att’y Gen. No. 85-093, overruled due to statutory change; 1983 Op. Att’y Gen. No. 83-019, clarified.)

⁹A county appointing authority that has both bargaining unit and non-bargaining unit employees, may, upon notification to the board of county commissioners, establish alternative schedules of vacation leave for the non-bargaining unit employees. R.C. 325.19(F); 1999 Op. Att’y Gen. No. 99-039. However, the alternative schedules may not be inconsistent with the provisions of a collective bargaining agreement covering the bargaining unit employees of the appointing authority. *Id.*