

OPINION NO. 75-078**Syllabus:**

1. When county employees are required to work in excess of forty hours in one work week, R.C. 4111.03 requires that such employees be paid at a rate of one and one-half times their regular rate for such extra time worked. However, county officers defined in R.C. 325.27 may, pursuant to their authority under R.C. 325.17 to fix compensation, establish a standard work week of less than forty hours for those employed in their respective offices and may pay an overtime rate for time worked in excess of that fixed standard.

2. A county officer's determination under R.C. 325.17 of a standard work week for purposes of overtime pay must be part of a

uniform plan which applies equally to persons performing substantially the same jobs within that office.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, October 31, 1975

I am in receipt of the request from your office for my opinion on the following questions:

"1. Can work weeks of varying lengths be established among the several offices of county government, thereby causing certain employees to become eligible for overtime earlier in the week than their counterparts in other county offices?"

"2. Can work weeks of varying lengths be established among the various departments of one county office, thereby causing certain employees to become eligible for overtime earlier in the week than their counterparts in other departments within the office?"

R.C. 124.18 provides that "forty hours shall be the standard work week for all employees whose salary or wage is paid in whole or in part by the state." Although there is no similar statute applicable to the counties, counties as well as the state and other political subdivisions, are subject to R.C. 4111.03. That section reads:

"An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one work week, in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the 'Federal Fair Labor Standards Act of 1938,' 52 Stat. 1060, 29 U.S.C.A. 207, 213, as amended, except that employers not covered by said act on January 1, 1973, shall not be required to pay the rate required by this section until July 1, 1974.

"Any employee employed in agriculture shall not be covered by the overtime provision of this section."

Counties then are required to pay employees one and one-half times the normal wage rate for hours worked in excess of forty hours in one work week. Your questions, however, require a determination as to whether R.C. 4111.03 operates to preclude the establishment of a standard work week of less than forty hours for purposes of overtime pay.

While I find no authority interpreting R.C. 4111.03 with respect to this specific issue, it should be noted that by its own language this section is patterned after the Federal Fair Labor Standards Act, *supra*. It follows that reference may be made to the federal act in construing R.C. 4111.03.

It is well settled that 29 U.S.C.A. 207(a)(1) establishes forty hours as the maximum number of hours that an employee may

be required to work without being paid overtime. Bay Ridge Operating Co. v. Aaron, 223 U.S. 446 (1948); Tenn. Coal Iron and R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942). Furthermore it has been held that the purpose of Section 207, supra, is not only to require extra pay for overtime work, but also to discourage employers from requiring their employees to work in excess of forty hours per week. Bay Ridge Operating Co. v. Aaron, supra; Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419 (1945); Hodgson v. Elm-Hill Meats of Ky., Inc., 327 F. Supp. 1009 (D.C. Ky. 1971, affd. 463 F.2d 1186).

The foregoing suggests that Section 207, supra, does not preclude shorter standard work weeks, but merely establishes the maximum work week that may be used without paying one and one-half times the regular rate as overtime pay. This view is bolstered by reference to 29 U.S.C.A. 207(e) which reads in pertinent part:

"(e) As used in this section the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include--

"(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;"

(Emphasis added.)

Applying this construction to R.C. 4111.03 it is then necessary in answering your questions to determine wherein the authority lies to establish a standard work week for county employees.

R.C. 325.17 provides for the compensation of county employees as follows:

"The officers mentioned in section 325.27 of the Revised Code may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices, fix the compensation of such employces and discharge them, and shall file certificates of such action with the county auditor. Such compensation shall not exceed, in the aggregate, for each office, the amount fixed by the board of county commissioners for such office. . . ."

(Emphasis added.)

R.C. 325.27 reads:

"All the fees, costs, percentages, penalties, allowances, and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer, or county recorder, shall be received and collected for the sole use of the

treasury of the county in which such officers are elected, and shall be held, accounted for, and paid over as public moneys belonging to such county in the manner provided by sections 325.30 and 325.31 of the Revised Code."

Pursuant to these sections the county commissioners are given authority to limit the aggregate amount which may be expended for compensation of the various personnel in the county offices. However, the authority to appoint and hire and to fix the compensation of the employees is vested in the county officers enumerated in R.C. 325.27. Commissioners v. Rafferty, 19 Ohio N.P. (n.s.) 97, 101 (1916); 1927 Op. Att'y Gen. No. 1339, p. 2432; 1926 Op Att'y Gen. No. 3929, p. 253. See also 1975 Op. Att'y Gen. No. 75-017 in which I had occasion to discuss the nature of county employment with respect to the campaign reporting requirements of R.C. 3517.10(C):

"Which employees, then, are under the direct supervision and control of a county commissioner for the purpose of R.C. 3517.10(C)? Those persons employed or appointed by the Board of County Commissioners itself, pursuant to R.C. 305.13 to 305.16, certainly are. Such persons are appointed or employed directly by the Board and their compensation is also fixed by the Board pursuant to R.C. 305.17. However, those persons who are employed by other elected county officers and whose salary is fixed by an appointing authority other than the Board, are not under the 'direct supervision and control' of a commissioner for the purposes of R.C. 3517.10(C). The only control which the Board has over such persons in the indirect power to fix the aggregate sums which the various appointing authorities may spend. The Board has no direct control of those county departments headed by a separately elected county official. Accordingly, the purposes of R.C. 3517.10(C) would not be served by extending its coverage to employees of county departments headed by separately elected public officials."

Therefore, while the county commissioners may determine the aggregate sums which may be spent by county officers, R.C. 325.17 authorizes certain county officers to appoint and employ and to fix the compensation of employees in their respective offices. Such authority provides the basis for the payment of overtime for hours worked in excess of a standard work week established by the county officer.

With respect to the establishment of a standard work week I would refer you to 1971 Op. Att'y Gen. No. 71-092 in which I considered the authority of the board of trustees of a county tuberculosis hospital to provide its employees time off with pay declared by agreement with the employees to be a holiday. In holding that the trustees had such authority I noted that "considerable latitude is afforded the officers of the county service to prescribe and adjust working time and pay allowance for time not worked."

Similarly in 1964 Op. Att'y Gen. No. 1405 my predecessor determined that a county officer's authority under R.C. 325.17

to fix compensation includes the authority to pay additional compensation for time worked in excess of a standard work week established by the employer.

It appears clear then that in the absence of a statutory provision establishing a standard work week for all county employees, there is no requirement of uniformity among the various county offices. County officers defined in R.C. 325.27 may, pursuant to their authority under R.C. 325.17 to fix compensation, establish a standard work week and may pay an overtime rate for time worked in excess of that fixed as standard.

Your second question is whether a county officer can establish a different standard work week for personnel in different departments of his office. As discussed above, the authority of county officers to determine a standard work week is incident to the power under R.C. 325.17 to fix compensation. In Op. No. 1405, supra, my predecessor stated at p. 360:

"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 of compensatory time off is a part of a uniform plan."

(Emphasis added.)

This language has been cited with approval in 1969 Op. Att'y Gen. No. 69-134 and Op. No. 71-042, supra. However, it may be noted that there is no statutory requirement of uniformity within a county office. It appears, therefore, that the above reference to a "uniform plan" relates to the guarantee of equal protection by Article I, Section 2, Constitution of Ohio, and to the requirement in Article II, Section 26, Constitution of Ohio, that all laws of a general nature shall have a uniform application throughout the state. While designed primarily to insure uniformity among different geographical areas, Article II, Section 26, supra, has further been held to require that any variation in the application of such a statute be based on a reasonable classification. Village of Beachwood v. Board of Elections of Cuyahoga County et al., 167 Ohio St. 369, 372 (1958); City of Cleveland v. Davis, 95 Ohio St. 52 (1916); State, ex rel. Yapple v. Cramer, Treasurer of State, 85 Ohio St. 349, 404 (1912).

Similarly the rationality or reasonableness of a classification with respect to a legitimate purpose has been applied as the test in cases arising under Article I, Section 2, supra. Painesville v. Bd. of County Commrs., 17 Ohio St. 2d 35, 37 (1969); State v. Buckley, 16 Ohio St. 2d 128, 134 (1968); Porter v. Oberlin, 1 Ohio St. 2d 143, 151 (1965); 1975 Op. Att'y Gen. No. 75-001.

Such appears to be the effect of Article I, Section 2, supra, and Article II, Section 26, supra, on the payment of wages under R.C. 325.17. Thus, the requirement of uniformity would preclude different standard work weeks for persons performing substantially the same duties in different departments of a county office where there is no reasonable basis for distinction between the jobs, and where such work weeks are to be used to determine eligibility for overtime pay.

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

1. When county employees are required to work in excess of forty hours in one work week, R.C. 4111.03 requires that such employees be paid at a rate of one and one-half times their regular rate for such extra time worked. However, county officers defined in R.C. 325.27 may, pursuant to their authority under R.C. 325.17 to fix compensation, establish a standard work week of less than forty hours for those employed in their respective offices and may pay an overtime rate for time worked in excess of that fixed standard.

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