

Note from the Attorney General's Office:

1987 Op. Att'y Gen. No. 87-063 was questioned by
2008 Op. Att'y Gen. No. 2008-004.

1987 Op. Att'y Gen. No. 87-063 was modified in part by
2009 Op. Att'y Gen. No. 2009-009.

OPINION NO. 87-063**Syllabus:**

1. Employees of a court of common pleas are in the county service for purposes of R.C. 325.19.
2. R.C. 325.19 limits the power of an appointing authority to pay employees for unused vacation leave. Payment for unused vacation leave earned under R.C. 325.19 is authorized only upon the employee's separation from county service or in the case of an employee's death.

To: David E. Bowers, Allen County Prosecuting Attorney, Lima, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, August 20, 1987

I have before me your opinion request concerning vacation benefits for common pleas court employees. The vacation benefit policy you describe allows a common pleas court employee to apply for a cash payment as compensation in lieu of taking vacation leave for a period of up to forty hours per year. You question whether there are any statutory provisions which limit the implementation of such a policy for common pleas court employees.

In order to answer your question it is first necessary to examine the statutes governing the appointment and compensation of common pleas court employees. R.C. 2301.12 specifically authorizes a court of common pleas to appoint a court interpreter, a criminal bailiff or chief court constable, and, in certain instances, psychiatrists, psychologists, examiners, investigators, and an administrative assistant. The conditions under which such persons may be employed and the compensation

to which they are entitled are directed by statute. R.C. 2301.12. Further provision is made in R.C. 2701.07 for a court of common pleas, and certain other courts, to appoint one or more constables for the court. The compensation of such constables is prescribed by R.C. 2701.08. The compensation of employees hired under R.C. 2301.12 and 2701.07 is payable from the county treasury upon warrant of the county auditor.¹ R.C. 2301.12; P.C. 2701.08. The amount of such employees' compensation is fixed either by the court, R.C. 2301.12(A) and (B) (court interpreter and criminal bailiff), by the judges of the court sitting in joint session, R.C. 2301.12(C) (chief court constable); R.C. 2301.12(E) (administrative assistant), or by the appointing judges, R.C. 2301.12(D) (psychiatrists, psychologists, examiners, and investigators); R.C. 2701.08 (constables). Except in the case of an administrative assistant or court constable, the General Assembly has imposed certain limitations on the amount of compensation which may be prescribed. For example, the compensation of a court interpreter is "not to exceed twelve hundred dollars in any year, or such sum in each particular case as the court deems just." R.C. 2301.12(A). The compensation of the criminal bailiff is "not to exceed the amount allowed court constables in the same court." R.C. 2301.12(B). Similarly, the compensation of psychiatrists, psychologists, examiners, and investigators is not to exceed "in the aggregate such amount as is appropriated therefor by the board of county commissioners." R.C. 2301.12(D). Thus, the General Assembly has, by statute, imposed certain restrictions on the fixing of common pleas court employees' compensation.

In addition to its power to hire and fix the compensation of employees in the manner set forth above, a court of common pleas may, in accordance with R.C. 2301.27, establish a county department of probation. Pursuant to R.C. 2301.27:

Such department shall consist of a chief probation officer, and such number of other probation officers and employees, clerks, and stenographers, as are fixed from time to time by the court. The court shall make such appointments, fix the salaries of appointees, and supervise the work of appointees...All positions within such department of probation shall be in the classified service of the civil service of the county.

....
Probation officers shall, in addition to their respective salaries, receive their necessary and reasonable traveling and other expenses incurred in the performance of their duties. Such salaries and expenses shall be paid monthly from the county treasury in the manner provided for the payment of the compensation of other appointees of the court.
(Emphasis added.)

See generally State ex rel. Gordon v. Zangerle, 136 Ohio St. 371, 26 N.E.2d 190 (1940) (syllabus, paragraph four) (stating, in part, "it is not beyond the legislative power to clothe the

¹ Pursuant to R.C. 2301.12(A), where a court interpreter receives compensation other than a stipulated salary, he is entitled to payment, "at the conclusion of his services, upon the certificate of the judge of the court in which they were rendered."

judge or judges of the Court of Common Pleas with authority to create a probation department and appoint persons to positions therein as an adjunct to the judicial function"). A court of common pleas, therefore, acts as the appointing authority for employees of the county department of probation as well as for court employees.

Generally, an appointing authority's power to fix compensation includes the power to determine fringe benefits, such as vacation leave. Cataland v. Cahill, 13 Ohio App. 3d 113, 468 N.E.2d 388 (Franklin County 1984). Such power is, however, subject to any restrictions imposed by statute with regard to that benefit. Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). The framework for analyzing the extent to which an appointing authority may grant its employees various fringe benefits as part of their compensation is set forth in 1981 Op. Att'y Gen. No. 81-052, at 2-202, as follows:

Once the requisite authority to compensate has been established, any statutory provisions pertinent to the provision of the particular fringe benefit in issue by the public employer to its employees must be identified. If the particular fringe benefit is not the subject of any statutory provisions applicable to the public employer or its employees, the fringe benefit in question is a permissible exercise of the public employer's authority to compensate its employees. On the other hand, if the particular fringe benefit is the subject of any statutory provision applicable to the public employer or its employees, further consideration is required. If an applicable statute constitutes a minimum statutory entitlement to a particular benefit, the public employer may, pursuant to its power to compensate and in the absence of any statute constricting its action in the particular case, choose to provide such benefit in excess of the minimum statutory entitlement. If an applicable statute limits the general authority of the public employer to compensate its employees with the particular fringe benefit in question, it must, of course, be viewed as a restriction upon the employer's authority to grant the particular benefit.

R.C. 325.19(A) provides vacation leave benefits for "[e]ach full-time employee in the several offices and departments of the county service, including full-time hourly-rate employees." Pursuant to R.C. 325.19(B), "[a] board of county commissioners may, by resolution, grant vacation leave with full pay to part-time county employees."

"County service," as that term is used in R.C. 325.19, is not defined by statute. Because of the manner in which the judiciary is organized, some confusion has arisen as to whether a court of common pleas is a state or county entity. In Tymcio v. State, 52 Ohio App. 2d 298, 301-02, 369 N.E.2d 1063, 1065 (Franklin County 1977), the court concluded that, "[d]espite the fact that the court of common pleas of each county is a state court and an instrumentality of the state, we do not find that the state's waiver of immunity from liability by R.C. 2743.02(A) extends to the Common Pleas Court..." Distinguishing between a common pleas court itself and a judge

of such court, the Tymcio court stated: "Although, pursuant to Section 4(A), Article IV, Ohio Constitution, a judge is transitory in the sense that he may temporarily hold court in any county, a court of common pleas is not transitory but remains the court for the county" (emphasis added). 52 Ohio App. 2d at 301, 369 N.E.2d at 1065.

I am unaware of any judicial decisions or past opinions of the Attorney General addressing the precise question of whether common pleas court employees are considered to be in the county service. Recently, however, in 1987 Op. Att'y Gen. No. 87-021, I considered whether the service of a judge of a court of common pleas is to the state or to the county in which the court is located. The primary issue addressed in Op. No. 87-021 is whether a judge of a court of common pleas may be considered a county officer for purposes of R.C. 305.171, and thus receive group life insurance benefits procured by the county commissioners under that statute. As stated in Op. No. 87-021 (slip op. at 5): "the question of whether a common pleas judge may be classified as a state or county officer is not well settled and appears to depend upon the purpose for which such classification is being made." The dual character of a common pleas court judge's service is explained as follows in State ex rel. Justice v. Thomas, 35 Ohio App. 250, 256, 172 N.E. 397, 398-99 (Marion County 1930): "He is elected in the county in which he resides, and normally serves there, but is vested with state-wide jurisdiction. The state pays by far the greater part of his compensation; so that it is doubtful if he is, within the strict interpretation of the law, a county official." Op. No. 87-021, however, concludes that, for purposes of the procurement of life insurance by the board of county commissioners in accordance with R.C. 305.171, a judge of a court of common pleas may be considered a county officer, since, among other things, his service is primarily to the county and a portion of his compensation is paid by the county. See generally 1985 Op. Att'y Gen. No. 85-014 (common pleas court judge is a county officer for purposes of R.C. 309.09, concerning the representation of county officers by the county prosecutor).

In comparison to its judge, an employee of a court of common pleas even more clearly renders his service to the county rather than to the state. Pursuant to R.C. 2301.12 and R.C. 2701.08, the compensation of common pleas court employees is payable from the county treasury, generally upon warrant of the county auditor. Further, such employees are appointed by the court which, as characterized in Tymcio v. State, is the court for the county in which it is located and render services only to the courts by which they are appointed. Thus, the service of common pleas court employees may be characterized as service directly to the county rather than to the state. See R.C. 2301.27 (making all positions within the county department of probation "in the classified service of the civil service of the county"); In re Etter, 2 Ohio App. 165 (Holmes County 1913) (characterizing the court of common pleas as the agent of the county in appointing the court's official stenographer); State ex rel. Justice v. Thomas, supra; 1985 Op. Att'y Gen. No. 85-093 (county probation department employees, appointed by the court of common pleas, are county employees for purposes of R.C. 325.19); 1983 Op. Att'y Gen. No. 83-074 (juvenile court employee is a county employee for purposes of R.C. 325.19); 1981 Op. Att'y Gen. No. 81-001 (deputy clerk of probate court

is a county employee for purposes of R.C. 325.19).² For purposes of R.C. 325.19, I conclude, therefore, that employees of a court of common pleas are in the county service.

Having concluded that common pleas court employees are considered to be in the county service, and thus entitled to vacation benefits as county employees pursuant to R.C. 325.19, it is next necessary to examine that statute to determine whether it constricts an appointing authority's power to adopt the type of payment policy described in your request. Concerning the use of vacation leave and payment for unused vacation leave, R.C. 325.19 states in part:

(C) Days specified as holidays in section 124.19 of the Revised Code shall not be charged to an employee's vacation leave. Vacation leave shall be taken by the employee during the year in which it accrued and prior to the next recurrence of the anniversary date of his employment; provided, the appointing authority may, in special and meritorious cases, permit such employee to accumulate and carry over his vacation leave to the following year. No vacation leave shall be carried over for more than three years. An employee is entitled to compensation, at his current rate of pay, for the prorated portion of any earned but unused vacation leave for the current year to his credit at time of separation, and in addition shall be compensated for any unused vacation leave accrued to his credit, with the permission of the appointing authority, for the three years immediately preceding the last anniversary date of employment.

....
(E) In the case of the death of a county employee, the unused vacation leave and unpaid overtime to the credit of any such employee, shall be paid in accordance with section 2113.04 of the Revised Code, or to his estate.

Thus, R.C. 325.19(C) states that vacation leave "shall" be taken by the employee during the year in which it accrued, but the appointing authority may allow the carryover of unused vacation leave to the following year in special and meritorious cases. Further, no vacation leave may be carried over for more than three years. Payment for unused vacation leave is permitted only when an employee separates, R.C. 325.19(C), or, pursuant to R.C. 325.19(E), in the case of the death of a county employee. Upon examination of R.C. 325.19 as a whole, it becomes apparent that the General Assembly, having specifically provided for the situations in which payment for

² Pursuant to R.C. 325.17, the county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer, and county recorder are authorized to appoint necessary deputies, assistants and other employees and to fix their compensation. Further, "[s]uch compensation shall not exceed, in the aggregate, for each office, the amount fixed by the board of county commissioners for such office. When so fixed, the compensation of each such [employee] shall be paid biweekly from the county treasury, upon the warrant of the auditor." R.C. 325.17.

unused vacation leave may be made, intended the provisions concerning the uses of vacation leave and payment for such unused leave as limitations on the power of county appointing authorities to fix their employees' compensation.

The court in Cataland v. Cahill, 13 Ohio App. 3d at 114, 468 N.E.2d at 390 determined that: "Sick leave and vacation leave prescribed by statute are minimums only and, where the appointing authority is authorized to establish compensation of employees, either sick-leave or vacation-leave benefits in addition to the minimums prescribed by statute may be granted as part of compensation." The court's discussion, however, addressed the statutory provisions concerning only the number of hours of vacation leave to which a county employee is entitled. See generally R.C. 325.19(A) and (B); 1965 Op. Att'y Gen. No. 65-222 at 2-487 (R.C. 325.19 "is not a limitation on the amount of vacation allowance a county employee may receive. Rather, [it] is a guarantee that county employees will receive at least the vacation allowance specified therein"). The possible constricting effect upon an appointing authority of other portions of R.C. 325.19 was not addressed.

In a recent opinion I had occasion to consider a similar issue with regard to the permissible uses of sick leave benefits provided for by R.C. 124.38 and concluded that:

2. Although R.C. 124.38 constitutes a minimum entitlement to hours of paid sick leave for, among others, the county employees compensated in accordance with R.C. 325.17, which may be increased in amount by an appointing authority pursuant to R.C. 325.17 for employees within the appointing authority's office, R.C. 124.38 does not provide authority for either a board of county commissioners or the county elected officials mentioned in R.C. 325.27 to allow sick leave to be used for any purpose other than those stated in R.C. 124.38.
3. There is no authority for a board of county commissioners to institute a countywide policy to increase hours of paid sick leave or to increase the permissible uses for sick leave beyond those set forth in R.C. 124.38. The authority to increase hours of paid sick leave is vested in an appointing authority pursuant to the power to fix compensation for employees within his office, but such authority is limited in that the increased hours of paid sick leave may only be used for the purposes stated in R.C. 124.38. (Emphasis added.)

1987 Op. Att'y Gen. No. 87-029 (syllabus, paragraphs two and three). The basis upon which I concluded that the statutorily defined uses of sick leave, as set forth in R.C. 124.38, constitute a limitation upon an appointing authority's power to prescribe sick leave benefits as a component of compensation is that the uses stated in R.C. 124.38 define the sick leave benefit. Similarly, I find that the General Assembly has, through the enactment of R.C. 325.19, established a vacation leave scheme for county employees. Although an appointing authority may grant vacation leave to employees beyond the minimum number of vacation leave hours to which an employee is entitled under the statute, R.C. 325.19 limits, among other things, the instances in which an employee may receive payment for such unused leave.

R.C. 325.19(C) directs that: "Vacation leave shall be taken by the employee during the year in which it accrued and prior to the next recurrence of the anniversary date of his employment," except in special and meritorious cases. (Emphasis added.) With the exception established in the statute, the General Assembly has made the use of vacation leave within the year it accrues mandatory. See generally Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("[i]n statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage").

Since R.C. 325.19(C) and (E) expressly provide for just two instances where an employee may receive cash payment for unused vacation leave, I must conclude that the General Assembly specifically intended to limit payment only to those two instances. See generally State v. Amman, 78 Ohio App. 10, 12-13, 68 N.E.2d 816, 818 (Hamilton County 1946) ("under proper conditions and with important limitations, the express mention of a person, thing or consequence in a statute is tantamount to an express exclusion of all others"). I conclude, therefore, that R.C. 325.19 does not allow for the adoption of a vacation leave policy in which an employee may elect to receive a cash payment in lieu of taking as leave up to forty hours of vacation per year.

Since the vacation leave payment policy about which you ask is for the benefit of common pleas court employees, it is necessary to determine whether R.C. 325.19 limits the authority of a court of common pleas, in the same manner as nonjudicial appointing authorities, to dictate the terms of its employees' compensation without regard to limitations imposed by statute. Concerning the power and authority of common pleas court judges generally, one of my predecessors stated: "Such judges when acting in a judicial capacity have some inherent power, but when acting in an administrative capacity they are pure creatures of the statute, having such power as is expressly delegated by the General Assembly together with such implied power as is necessary to carry into effect the power expressly delegated." 1938 Op. Att'y Gen. No. 2308, vol. II, p. 821, 824.

The power of a court of common pleas, when acting as an appointing authority, was addressed in the case of In re Etter, supra. At issue in that case was whether the court had the power to fix the term of the court stenographer. The court in Etter noted that G.C. 1546³ (now R.C. 2301.18) authorizes a common pleas court to appoint a stenographer. Concerning a

³ G.C. 1546, as enacted in 1913 Ohio Laws 542 (H.B. 318, approved May 6, 1913) stated in part:

When in its opinion the business requires it, the court of common pleas of a county may appoint a stenographic reporter as official stenographer of such court, who shall hold the appointment for a term not exceeding three years from the date thereof, and until a successor is appointed and qualified, unless removed by the court, after a good cause shown, for neglect of duty, misconduct in office, or incompetency.

common pleas court's authority with regard to such an appointment, the court in Etter stated:

the statute fixes the duration of the term and not the court. The legislature did not see fit to give to the court the power to fix and determine the length of the term. It simply designated the court of common pleas as the appointing power, as the agent of the county, in making a contract with a stenographic reporter as the official stenographer of such court. (Emphasis added.)

2 Ohio App. at 168-69. Thus, the court in Etter found that a court of common pleas, although possessing the power of appointment under G.C. 1546, was limited in fixing the term of such an appointee to that term directed by statute. See State ex rel. Justice v. Thomas, supra, (express authorization for a common pleas court judge to appoint a court constable and criminal bailiff is contained in G.C. 1541 (R.C. 2301.12), 1692 (R.C. 2701.07), and 1693 (R.C. 2701.08)); 1984 Op. Att'y Gen. No. 84-008 at 2-22 through 2-23 ("[t]he authority of a court of common pleas to appoint deputy sheriffs is very limited...[P]ursuant to R.C. 2301.12(B) and (C), a court of common pleas may appoint either a criminal bailiff or a chief court constable and upon such appointment the appointee automatically becomes a deputy sheriff...Absent these provisions, however, I am aware of no general authority for a court of common pleas to appoint deputy sheriffs to perform security duties on behalf of the court").

Past Attorneys General have consistently found the powers of courts of common pleas with regard to the employment of court personnel to be limited to those granted by statute. See, e.g., 1957 Op. Att'y Gen. No. 188, p. 54, 55 ("the number of criminal bailiffs [a common pleas court] judge may appoint and the salary he may fix for them are governed by the statutory provisions specifically applicable to such appointments"); 1951 Op. Att'y Gen. No. 913, p. 723 (G.C. 1692 (now R.C. 2701.07) limits a court of common pleas in its appointment of one or more constables in that such appointments may be made only "[w]hen, in the opinion of the court, the business thereof so requires," G.C. 1692); 1942 Op. Att'y Gen. No. 5183, p. 379 (syllabus) (G.C. 1546 and 1547 (current versions at R.C. 2301.18 and 2301.19), "which provide for the appointment of shorthand reporters for courts of common pleas, authorize the appointment of only one official shorthand reporter in counties having one common pleas judge and, consequently, the appointment of additional shorthand reporters in such counties on either full or part-time basis is unauthorized by law"); 1938 Op. No. 2308 (the manner of appointment of court constables for courts of common pleas is directed by statute); 1921 Op. Att'y Gen. No. 2017, vol. I, p. 329, 332 ("when services are rendered to the court by a court stenographer, the only compensation which may be paid from the public treasury for such services is the salary provided in [G.C. 1550], except in those cases in which transcripts have been properly made for use in the particular case in which the record was taken"); 1916 Op. Att'y Gen. No. 1613, vol. I, p. 908 (syllabus) ("[a] judge of the court of common pleas in a county where only one judge holds court cannot legally appoint a court constable to attend the assignment of cases, and fix an additional compensation for so doing"); 1915 Op. Att'y Gen. No. 203, vol. I, p. 382 (syllabus) ("[t]he compensation of court constables is limited by the maximum fixed by [G.C. 1693 (now

at R.C. 2701.08]], and may not be taxed as costs, nor is the same subject to allowance by county commissioners").⁴ I conclude, therefore, that the portions of R.C. 325.19 limiting the use of and payment for unused vacation benefits limit the power of common pleas courts to fix their employees' compensation.

Based on the foregoing, it is my opinion, and you are hereby advised, that:

1. Employees of a court of common pleas are in the county service for purposes of R.C. 325.19.
2. R.C. 325.19 limits the power of an appointing authority to pay employees for unused vacation leave. Payment for unused vacation leave earned under R.C. 325.19 is authorized only upon the employee's separation from county service or in the case of an employee's death.

⁴ With respect to the inherent powers of courts of common pleas, there is a line of cases which supports the proposition that the funding necessary, in part, to compensate court employees, as part of the orderly and efficient administration of justice by the courts, is not subject to statutory restrictions. See, e.g., State ex rel. Britt v. Board of County Commissioners, 18 Ohio St. 3d 1, 2, 480 N.E.2d 77, 78 (1985) ("[a] court of common pleas possesses inherent authority to require funding for its services at a level that is both reasonable and necessary to the administration of the judicial process...In turn, the board of county commissioners must provide the requested funds, unless the commissioners can establish that the court abused its discretion in submitting a budget which is unreasonable and unnecessary" (citations omitted)); State ex rel. Rudes v. Rofkar, 15 Ohio St. 3d 69, 472 N.E.2d 354 (1984); In re Furnishings & Equipment, 66 Ohio St. 2d 427, 423 N.E.2d 86 (1981); State ex rel. Foster v. Wittenberg, 16 Ohio St. 2d 89, 242 N.E.2d 884 (1968).

I note that, in the case of State ex rel. Johnston v. Taulbee, 66 Ohio St. 2d 417, 421, 423 N.E.2d 80, 83 (1981), the court stated: "R.C. 2151.10 as it now reads, by its granting to a legislative body, to wit: the county commissioners, the 'power of the purse' over judicial administration, unconstitutionally restricts and impedes the judiciary in complete contradiction of our rudimentary democratic principles." The court thus found R.C. 2151.10 to be unconstitutional as an impermissible legislative encroachment upon the inherent powers of the judiciary. I am, however, unaware of any cases which have declared unconstitutional the statutes which direct the number and types of employees a court of common pleas may appoint or which limit the amount of compensation a court may grant its employees.