

3006.

COUNTY COMMISSIONERS—AUTHORITY TO GRANT EMPLOYEES
LEAVES OF ABSENCE, DISCUSSED.

SYLLABUS:

County commissioners may lawfully allow their employes a reasonable leave of absence during their term of employment with full pay, whether such employes are paid on a weekly or monthly basis, or upon a per diem basis, providing the contracts of employment with such employes so provide, either expressly or by necessary reasonable implication.

COLUMBUS, OHIO, December 10, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your request for my opinion in answer to the following question:

“May employes of the county commissioners listed as electricians, painters, plumbers, charmen and charwomen, etc., who are employed at a per diem rate, be given vacations on full pay, when no services whatever are rendered for the days charged for during vacation?”

Section 2410, General Code, applying to boards of county commissioners, reads as follows:

“The board may employ a superintendent, and such watchman, janitors and other employes as it deems necessary for the care and custody of the court house, jail, and other county buildings, and of bridges, and other property under its jurisdiction and control.”

Then follow Sections 2411 and 2412, General Code, authorizing county commissioners to appoint engineers and legal counsel under certain circumstances. Section 2413, General Code, reads as follows:

“The board of county commissioners shall fix the compensation of all persons appointed or employed under the provisions of the preceding sections, which, with their reasonable expenses shall be paid from the county treasury upon the allowance of the board. No provisions of law requiring a certificate that the money therefor is in the treasury shall apply to the appointment or employment of such persons.”

It will be observed from the provisions of the foregoing statutes that no limitations or restrictions are placed upon the county commissioners with respect to the terms of the contract of employment when employes named in Section 2410, supra, are hired. The entire matter of the terms of the contract of employment and the fixing of the employe's compensation is left to the discretion of the county commissioners, and I know of no specific provision of law qualifying or limiting the discretion of the commissioners thus reposed, except as the same may be done by authority of the laws relating to civil service.

It is well settled that the unqualified and unlimited discretion vested in a public officer will not be interfered with so long as the action taken is not unlawful, arbitrary, unreasonable or of such a character as to constitute an abuse of discretion.

This rule is well stated by Judge Matthias in the case of *The State ex rel. Maxwell, Prosecuting Attorney, vs. Schneider, et al.*, 103 O. S. 492, at page 498, where, in speaking of the discretion vested in county boards of education by virtue of the provisions of Section 4736, General Code, authorizing such boards to create new school districts, he said as follows:

"The action of a public officer, or of a board, within the limits of the jurisdiction conferred by law, is not only presumed to be valid but it is also presumed to be in good faith and in the exercise of sound judgment. Before a court will take cognizance of a claim that the action of such officer or board is unlawful, arbitrary, unreasonable, or of such character as to constitute an abuse of discretion, facts must be set forth which would warrant such conclusion. In the answer some facts with reference to distance, condition of roads, etc., are averred, but no facts are alleged which if admitted to be true would warrant the court in substituting its judgment for that of the county board of education in a matter as to which the statute has conferred upon that board authority so full and complete. Facts showing fraud, collusion, or such abuse of discretion as would call for the restraining action of the court, are not presented."

That being the case, there is nothing to prevent county commissioners when employing the class of employes enumerated in your inquiry from providing as a part of the contract of employment that they may have a vacation with pay. The compensation paid them during the vacation period would be considered a part of their regular compensation and supplemental to the pay they are to receive for their services at other times and as part payment for those services. If such a contract were made in express terms, or if the right to a vacation with pay may be impliedly included within the terms of the contract by reason of a custom existing to grant such vacations, or by reason of rules that may have been adopted by the commissioners applicable to the subject, it does not in my opinion amount to an abuse of discretion on the part of the commissioners and is lawful.

The Legislature has in Section 154-20, General Code, provided for vacations for employes in the several departments of state government having charge of the administrative functions of the state. No such statutory direction is made with reference to other public employes than those provided for by the administrative code. That, however, does not prevent the granting of vacations to other public employes if it be within the discretionary power of the employer to do so and not prohibited by other provisions of law. Neither does the authority granted in said Section 154-20 extend to the granting of leaves of absence with full pay to other public employes than those named in the statute, but it is a clear and positive expression of legislative determination that the granting of leaves of absence with full pay to public employes is not in and of itself contrary to public policy or an unlawful diversion of public funds.

There are no provisions of law nor any rules of the State Civil Service Commission which may be read into a contract of employment made by county commissioners with the classes of employes named in your inquiry which would purport to limit or control the discretion of the county commissioners with respect to the matters here under consideration. Neither does the fact that a contract is made with an employe to pay him on a per diem basis rather than a weekly, monthly or yearly basis preclude the making of a contract of employment with such an employe providing that he be allowed a certain number of days' leave of absence during his term of employment without disallowance of those days in computing the amount of his compensation. The making of such a contract would not in my opinion amount to an abuse of discretion on the part of the county commissioners or an unwarranted expenditure of public money.

It is provided in Section 154-19, General Code, that each department of government provided for by the so-called administrative code, is empowered to employ, subject to the civil service laws in force at the time the employment is made, all necessary employes, and if the rate of compensation is not otherwise fixed by law, to fix their compensation. These departments are not limited to the fixing of compensation on a weekly, monthly or yearly basis and may provide for compensation on a per diem basis. Yet in the next section of the Code noted above, it is provided that:

"Each employe in the several departments shall be entitled during each calendar year to fourteen days' leave of absence with full pay."

Instances may be conceived where to grant vacations to employes employed on a per diem basis would be an abuse of discretion, but the same observation might be made in cases where the employe was employed on a weekly or monthly basis. Contracts providing for leaves of absence with full pay should be reasonable and may not either provide or be construed so as to make the granting of the leave of absence an abuse of discretion.

I am therefore of the opinion, in specific answer to your question, that county commissioners may lawfully allow their employes a reasonable leave of absence during their term of employment with full pay whether such employes are paid on a weekly or monthly basis or upon a per diem basis, providing the contracts of employment with such employes so provides either expressly or by necessary reasonable implication.

Respectfully,

EDWARD C. TURNER,

Attorney General.

3007.

EXEMPTION FROM TAXATION—PERSONAL PROPERTY—ESTATES
ACCUMULATED BY GUARDIANS FROM GRATUITIES OF FEDERAL
GOVERNMENT EXEMPT UNDER CERTAIN CONDITIONS.

SYLLABUS:

Estates that have been built up by guardians out of money received as payments under the World War Veterans' Act of 1924, are exempt from taxation under the provisions of Section 22 of said Act, (38 U.S.C.A. Section 454), as long as said funds are in their original form in the hands of the beneficiary or on deposit to the credit of his estate.

COLUMBUS, OHIO, December 10, 1928.

The Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads:

"The Tax Commission of Ohio is desirous of having an opinion from your office relative to the question raised in the enclosed letter."

The letter which you enclosed is addressed to your Commission by Mr. A. M. Barlow, Regional Attorney for the United States Veterans Bureau at Cleveland, Ohio, and reads as follows: