OPINION NO. 72-074

Syllabus:

Hours for which a state employee is compensated for sick leave, but during which he does not actually work, should not be computed as "work hours" for the purpose of determining the eligibility of said employee for pay at the overtime rate prescribed by Section 143.11 or Section 3319.086, Revised Code. Opinion No. 70-110, Opinions of the Attorney General for 1970, approved and followed. Opinion No. 65-57, Opinions of the Attorney General for 1965, distinguished.

To: John T. Corrigan, Pros. Atty., Cuyahoga County, Cleveland, Ohio
By: William J. Brown, Attorney General, August 24, 1972

Your request for my opinion reads as follows:

> "Enclosed herewith please find copy of Attorney General Opinions 65-57 and 70-110. Each of these opinions concern themselves with the computation of a 40 hour standard work week when within that work week one takes sick leave. These opinions, on their face, seem to be in direct conflict one with the other.
>
> "I request an opinion as to whether or not they are in conflict and if so, which opinion should prevail."

In the Syllabus of Opinion No. 65-57, Opinions of the Attorney General for 1965, it was stated:

> "Days on which sick leave, under Section 143.29, Revised Code, was used are to be included in computing the forty-hour standard work week for nonteaching school employees under Section 3319.086, Revised Code."

Section 143.29, Revised Code, creates the right to sick leave for state, county, muncipal and certain board of education employees. The pertinent part of the statute reads as follows:

> "Each employee, whose salary or wage is paid in whole or in part by the state, each employee in the various offices of the county service and municipal service, and each employee of any board of education for whom sick leave is not provided by section 3319.141 of the Revised Code, shall be entitled for

each completed eighty hours of service to sick leave * * *."

The nonteaching school employee's standard workweek as to hours and overtime is defined in Section 3319.086 as follows:

> "In all school districts, forty hours shall be the standard work week for all non-teaching school employees. * * * Where such employees are required by their responsible administrative superiors to work in excess of forty hours in any seven day period * * * they shall be compensated for such time worked at not less than their regular rate of pay, or be granted compensatory time off. * * *"

However, Opinion No. 70-110, Opinions of the Attorney General for 1970, which discusses whether sick leave should be computed as "work hours" for state employees' overtime benefits, states in its Syllabus as follows:

> Hours for which a state employee is compensated, but during which he does not actually work because of sick leave, vacation leave, or the occurrence of a holiday, should not be computed as 'work hours' for the purpose of determining the eligibility of said employee for pay at the overtime rate prescribed by Section 143.11, Revised Code."

Section 143.11, Revised Code, fixes the standard workweek for state employees and provides for compensation for overtime:

> "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. When any employee is required by an authorized administrative authority to work more than forty hours in any calendar week, he shall be compensated for such time worked, * * *."

The conclusion of Opinion No. 65-57, supra, is that Section 3319.086 should be interpreted to mean that when a nonteaching employee is compensated by the use of sick leave, this time may be computed along with hours of actual service in determining an employee's eligibility for payment at the regular hourly rate. It must be remembered that that Opinion involved a question as to whether an employee could be paid at even the regular rate of pay for time accumulated in excess of forty hours in a regular seven day workweek. It did not involve a question as to whether or not the employee was to be paid at an overtime rate of one and one-half times his regular rate of pay. It held that he could receive pay for more than forty hours in a week in which he used some of his accumulated sick leave. While the language may seem inconsistent, the result obtained by my predecessor would be consistent with that of Opinion No. 70-110, supra.

Opinion No. 70-110 arrives at the same result by reading Section 143.11 to mean that only the time which an employee "actually works should be counted for purposes of computing overtime pay. The effect of Opinion No. 70-110, is to deny over-

time pay if an employee has not rendered more than forty hours of actual service during the week involved.

Opinion No. 2496, Opinions of the Attorney General for 1953, was the authority relied upon in Opinion No. 65-57, for the conclusion that it would be "anamalous" to grant sick leave credit for days when sick leave was taken, yet not overtime credit.

An examination of Opinion No. 2496, supra, shows that its purpose and effect is to allow an employee to acquire monthly sick leave credit while ill because said employee is still in service while so indisposed. Sick leave is accumulated without any minimum hourly work requirement for such accumulation. But overtime pay is earned when an employee is "required * * * to work in excess of forty hours in any seven day period." Hence, the plain words of the statutes require an employee to actually work for more than forty hours in the week to get overtime pay. Consequently, there is nothing "anamalous" about granting sick leave credit, but not overtime pay for days when sick leave was taken.

This is the conclusion reached in Opinion No. 70-110, that a state employee's "hours" should include only those hours actually worked when the issue is whether he should receive overtime pay computed at a rate of one and one-half time his regular rate of pay. This was found to be consistent with relevent federal authority. My predecessor stated in Opinion No. 70-110 as follows:

> "Section 207, Title 29, U.S.C.A., contains the overtime provision of the Fair Labor Standards Act and provides for compensation at one and one-half times the regular rate for employees who are employed for a workweek of longer than forty hours. The federal cases construing this section have uniformly held that an employee must actually work forty hours before he is eligible for compensation at one and one-half times the normal rate. For example, sick leave hours were held not to be included in the forty hour total in Marchant v. Sands, Taylor & Wood Co., D.C. Mass. 1948, 75 F. Supp. 783. Similarly, vacation time was held not to be properly computed in determining overtime eligibility in Sawyer v. Selvig Mfg. Co., D.C. Mass. 1947, 74 F. Supp. 319. It would appear that the same rule should apply to paid holidays."

There is no reason why a non teaching employee should have a different standard used for computing his overtime pay than is used for other state employees. Sections 143.11 and 3319.086 paraphrase each other as to the statutory definition of what constitutes a standard workweek. Neither Section contains any express language which could lead to a different result, nor has any Ohio court interpreted either Section to allow for a different effect.

In specific answer to your question it is my opinion, and you are so advised, that hours for which a state employee is compensated for sick leave, but during which he does not actually work, should not be computed as "work hours" for the purpose of determining the eligibility of said employee for pay at the overtime rate prescribed by Section 143.11 or Section 3319.086, Revised Code. Opinion No. 70-110, Opinions of the Attorney General for 1970,

approved and followed. Opinion No. 65-57, Opinions of the Attorney General for 1965, distinguished.