

Note from the Attorney General's Office:

1973 Op. Att'y Gen. No. 73-104 was overruled by
1981 Op. Att'y Gen. No. 81-049.

1973 Op. Att'y Gen. No. 73-104 was reinstated in part by
1990 Op. Att'y Gen. No. 90-014.

OPINION NO. 73-104

Syllabus:

1. A member of the Board of Review of the Bureau of Employment Services is a public officer and not an employee of the state within the meaning of R.C. 143.291.

2. When a public employee, who has accrued unused sick leave, accepts appointment to a public office from which he ultimately retires, he is not entitled to payment for any of the unused sick leave accrued as a public employee.

To: Robert Parrow, Acting Dir., Dept. of Finance, Columbus, Ohio
By: William J. Brown, Attorney General, October 17, 1973

I have before me your predecessor's request for an opinion which, in substance, states the facts and poses the questions as follows:

A member of the Board of Review of the Bureau of Employment Services is retiring from that position which he had held since his original appointment by the Governor on October 10, 1951. His salary at the time of retirement is \$9.02 per hour, or \$18,761.60 per annum. He has neither accrued, nor been charged with, sick leave or vacation leave while a member of the Board. Prior to his appointment he had served in the Bureau as a referee for the Board, a position in the classified service. His salary as a referee, at the time of his resignation to receive appointment as a member of the Board, was \$575.00 per month or \$6,900 per annum. He now claims 720 hours of sick leave which accrued to his credit while serving as an employee of the Bureau prior to becoming a member of the Board.

1. Is the member of the Board of Review of the Bureau of Employment Services an employee of the state at the time of his retirement within the meaning of R.C. 143.291 or is he an officer of the state?
2. Does the 720 hours of sick leave which the member of the Board claims as of October 10, 1951, still remain to his credit, or has it been lost under the provisions of R.C. 143.292?
3. If it be determined that the member of the Board is still an employee within the meaning of R.C. 143.291, should he be paid for one-fourth of his accrued sick leave at the rate of \$575.00

per month, or at the rate of his current \$0.02 per hour?

These questions require an interpretation of the two sections of the Revised Code which establish the sick leave rights of state employees.

R.C. 143.29, which deals with sick leave benefits accruing to state employees, reads as follows:

Each employee, whose salary or wage is paid in whole or in part by the state, * * * shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay. * * * Unused sick leave shall be cumulative up to one hundred twenty work days, unless more than one hundred twenty days are approved by the responsible administrative officer of the employing unit. The previously accumulated sick leave of an employee who has been separated from the public service may be placed to his credit upon his re-employment in the public service, provided that such re-employment takes place within ten years of the date on which the employee was last terminated from public service. An employee who transfers from one public agency to another shall be credited with the unused balance of his accumulated sick leave up to the maximum of the sick leave accumulation permitted in the public agency to which the employee transfers. * * *

R.C. 143.291, which provides for cash payment for leave credit, reads in part as follows:

A state employee paid directly by warrant of the state auditor may elect, at the time of retirement from active service with an agency of state government and with ten or more years of service with the state or any of its political subdivisions, to be paid in cash for one-fourth of the value of his accrued but unused sick leave credit. Such payment shall be based on the employee's rate of pay at the time of retirement. Payment for sick leave on this basis shall be considered to eliminate all sick leave credit accrued by the employee at that time. Such payment shall be made only once to any employee. The maximum payment which may be made under this section shall be for one-fourth of one hundred twenty days.

I do not think there can be any doubt that the Board member is, and will still be at the time of his retirement, a public officer, rather than a public employee. A public office is a charge or trust conferred by public authority for a public purpose, with independent and continuing duties involving in their performance the exercise of some portion of the sovereign power. State ex rel. Herbert v. Ferguson, 142 Ohio St. 496, 501-503 (1944); Opinion No. 71-071, Opinions of the Attorney General for 1971. Generally, authority and power relating to the public interest, conferred by statute, and vested in a board or individual by election or

by the appointing power of the state, creates a public office. State ex rel. Attorney General v. Mannon, 7 Ohio St. 546, 556-559 (1857).

Where an individual has been appointed or elected in a manner prescribed by law, has a designation or title given him by law, and exercises functions of government concerning the public, assigned to him by law, he must be regarded as a public officer. State v. Frennan, 40 Ohio St. 33, 37-38 (1892). Furthermore, a public officer is entitled to receive only such compensation as is expressly provided for by statute and the laws relating to compensation are strictly construed. State ex rel. Lois v. Ferguson, 149 Ohio St. 555, 558-559 (1948). It is a well established principle that a salary pertaining to an office is an incident of the office itself, and that the incumbent does not lose any right to his salary by reason of occasional absences. State, ex rel. Clinger v. White, 143 Ohio St. 175, 179 (1944); State, ex rel. "Ilco" v. Foldman, 157 Ohio St. 264, 271 (1952). On the other hand, the fact that a position is held at the will or pleasure of another, is held to distinguish a mere employment from a public office. State ex rel. Jennings, 57 Ohio St. 415, 425 (1898). Those who are subject to the direction and control of another do not fall within the class of public officers, and one who performs no duties except such as are charged upon his superior holds an employment, not an office. State ex rel. Allen v. Mason, 61 Ohio St. 62, 72 (1899).

Under the circumstances presented by your predecessor's request, the individual involved was quite clearly an employee while a referee, and an officer while serving as a member of the Board. R.C. 4141.06 provides for the creation of the Board of Review of the Bureau of Employment Services, defines the power and duties of a member of the Board, and also provides for the appointment of referees by the members of the Board. The Section reads in part as follows:

There is hereby created an unemployment compensation board of review consisting of three full-time members appointed by the governor, * * *for terms of six years * * * each member shall be paid a salary fixed pursuant to section 143.09 of the Revised Code.
* * *

The board, subject to sections 143.01 to 143.48, inclusive, of the Revised Code * * *shall appoint such referees as are necessary. Such referees shall be classified by the department of state personnel. * * *

The Section further provides that the function of the Board is to hear and decide appeals arising from compensation claims presented to the Bureau, and that the function of the referee is to assist the Board in such hearings.

The conclusions of my predecessors, in the two Opinions to which the request letter refers, are consistent with the foregoing Opinion No. 3548, Opinions of the Attorney General for 1962: Opinion No. 65-145. Opinions of the Attorney General for 1965.

The question remains whether the Board member has lost the 720 hours of sick leave which had accrued to his credit when he resigned as a referee in order to accept appointment as a member of the Board.

As noted previously, R.C. 143.20 provides in part

* * *The previously accumulated sick leave of an employee who has been separated from the public service may be placed to his credit upon his re-employment in the public service, provided that such re-employment takes place within ten years of the date on which the employee was last terminated from public service. * * * (Emphasis added.)

And R.C. 143.291, also set forth above, provides in part:

A state employee * * * may elect, at the time of retirement from active service * * * to be paid in cash for one-fourth of the value of his accrued but unused sick leave credit. Such payment shall be based on the employee's rate of pay at the time of retirement. * * * (Emphasis added.)

The language of these two sections seems clearly to indicate an intent on the part of the General Assembly to restrict the payment of accrued sick leave to retiring public employees. A public officer, of course, does not accrue sick leave since he has no need for it. He is paid his salary regardless of absence from his office. State, ex rel. Clinger v. White, supra; State, ex rel. Wilcox v. Tolman, supra. But under R.C. 143.20 a public employee, who leaves the public service, loses all accrued and unpaid sick pay unless he returns to the public service within ten years. And under R.C. 143.291 he must be a public employee at time of retirement in order to receive a cash payment of unused sick leave, since the payment "shall be based" on his salary as an employee at the time he retires. In the case you present, the officer did not return to public employment within ten years as required by R.C. 143.20. And he is retiring from public office, not from public employment as required by R.C. 143.291.

It may be urged that this officer never was "separated from the public service", in the language of R.C. 143.20, when his status changed from employee to officer, and that he is still entitled to his accrued and unused sick leave. I do not think that this is a reasonable interpretation of the legislation. When R.C. 143.20 and 143.291 are read as a whole, the phrase "public service" seems to refer only to those who have the status of public employees. When the member of the Board became an officer, he left the "public service", as that term is used in these two sections. He did not return to it within ten years, and he is retiring as an officer, not as an employee.

In view of the answer to your first and second questions, there is no need to reply to the third.

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

1. A member of the Board of Review of the Bureau of Employment Services is a public officer and not an employee of the state within the meaning of R.C. 143.291.

2. When a public employee, who has accrued unused sick leave, accepts appointment to a public office from which he ultimately retires, he is not entitled to payment for any of the unused sick leave accrued as a public employee.