OPINION NO. 65-180

Syllabus:

An employee becomes entitled to the increased vacation benefits granted under Section 121.161, Revised Code, as enacted by Amended House Bill No. 937 of the 106th General Assembly, upon the anniversary date of his employment notwithstanding the fact that such date may have occurred prior to the effective date of such Act.

To: Wayne Ward, Department of Personnel, Columbus, Ohio
By: William B. Saxbe, Attorney General, October 1, 1965

I have before me your request for my opinion which reads as follows:

> "Your opinion is hereby requested on the interpretation of Section 121.-161 of the Revised Code as enacted by amended H.B. 937 of the 106 General Assembly.
>
> "This bill provides liberalized vacation benefits for full time state employees, in that an employee with 10 or more years of service is entitled to 120 hours of vacation leave, and an employee with 25 or more years of service is entitled to 160 hours of vacation leave. The law further

provides, 'that such vacation leave shall accrue to the employee upon each successive annual recurrence of the anniversary date of his employment'.

"I have therefore notified appointing authorities in the state service that an employee will become eligible for the more liberal vacation benefits of his first anniversary following the effective date of this legislation. This statement has been challenged, on the grounds that an employee who has more than the specified years of service on the effective date of this law should be entitled to the increased benefits immediately, without waiting until the next anniversary date of his employment.

"Your opinion is requested as to which of these interpretations is correct."

Section 121.161, Revised Code, concerning which you make request, provides in part that:

"Each full-time state employee, including full-time hourly-rate employees, after service of one year with the state, is entitled, during each year thereafter, to eighty hours of vacation leave with full pay. A full-time employee with ten or more years of service with the state is entitled to one hundred twenty hours of vacation leave with full pay. A full-time employee with twenty-five or more years of service with the state is entitled to one hundred sixty hours of vacation leave with full pay. Such vacation leave shall accrue to the employee upon such successive annual recurrence of the anniversary date of his employment; provided, the anniversary date may be deferred because of periods of time during which the employee is not in active pay status.* * *"

In Informal Opinion No. 261, Opinions of the Attorney General for 1947, the then Attorney General was asked to construe Section 2394-4a, General Code, which became effective September 8, 1947. That section reads in part:

"Each employee in the several offices and departments of the county service shall be entitled during each

calendar year beginning January first, to two calendar weeks, excluding legal holidays, vacation leave with full pay. * * *"

In the body of said opinion the Attorney General stated at page 656:

"The two weeks vacation granted by the act to each employee of the several offices and departments of the county service during 'each calendar year beginning January first' is evidently intended to confer a definite right upon county employees which they did not possess prior to the enactment of this law. To hold that the words 'January first' mean January 1, 1947, would be, in my opinion, to give the act a retroactive effect and to grant a right predicated on past services.

"The Constitution, Article II, Section 28, forbids the legislature from passing a retroactive law. The courts in construing this constitutional provision have held that a law is retroactive within the prohibition of the constitution which grants a new right or takes away an existing right. Hamilton County v. Rosche, 50 O.S. 103. The right of the General Assembly to pass laws granting new remedies for existing rights is recognized. However, the principle is well established that in the construction of an act every presumption exists as to its having a prospective and not a retrospective or retroactive effect and if in any case it is to have a retroactive effect, the intention of the legislature in that respect must appear in express and unequivocal terms. 50 Am. Jur. 494; 37 O. Jur. 819; and cites cases.

"It is therefore my opinion that the act in question must be given a prospective construction and that the only calendar years beginning January 1 to which it may apply are those years which will begin with that date after the passage of the act,* * *"

While I am of opinion that the result reached in Opinion

No. 261, supra, is proper under the fact situation which prompted the request for that Opinion, I am not in agreement with the propositions of law upon which such conclusion is based.

In Informal Opinion No. 541, Opinions of the Attorney General for 1956, my predecessor in office stated at page 1917:

> "As to your question relative to giving 'retroactive' effect to Section 121.161, Revised Code, it should be borne in mind that we are here concerned with a privilege bestowed by statute and not with a vested right, for there can be no vested right in a statute which precludes its amendment or repeal. State ex rel. Bouse v. Cickelli, 165 Ohio St., 191."

Your attention is invited to Opinion No. 867, Opinions of the Attorney General for 1964, page 2-74; in that opinion I cited with approval the case Barbieri v. Morris, 315 S.W., 2d, 711. The Barbieri case, supra, provides an excellent discussion of retroactive or retrospective laws; the Court said at page 714:

> "'Retroactive' or 'retrospective' laws are generally defined, from a legal viewpoint, as those which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past. Lucas v. Murphy, 348 Mo. 1078, 156 S.W. 2d, 686, 690. But it has been held specifically that 'a statute is not retrospective because it merely relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its actions are drawn from a time antecedent to its passage, or because it fixed the status of a person for the purpose of its operation. State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W. 2d. 897, 900, 24 A.L.R. 2d, 340. It is said to be retroactive 'only when it is applied to rights acquired prior to its enactment.' 82 C. J.S. Statutes, Section 412. See also State ex rel. Ross to Use of Drainage Dist. No. 8 of Pemiscot County v. General American Life Ins. Co., 336 Mo. 829, 85 S.W. 2d, 68; 74; Dye v. School District No. 32 of Pulaski County, 355 Mo. 231, 195 S.W. 2d, 874, 879; 16 A C.J.S. Constitutional Law Section 414.
> * * *"

It is my opinion that the above quoted portion of Opinion No. 541, supra, correctly states the law with respect to the categorization of vacations granted to state employees by statute, and that a vacation is not a "right," as that term is used with reference to the rules governing the passage of retroactive or retrospective legislation. Therefore, I conclude that Section 28, Article II of the Constitution of the State of Ohio does not preclude the General Assembly from passing an Act which grants an employee a vacation upon the happening of an event which has already occured.

If the construction of Section 121.161, supra, suggested in your request is followed, it will produce an inequitable result in many instances. For example, an employee whose anniversary date falls on a day which is subsequent to the effective date of amended House Bill No. 937 of the 106th General Assembly may become entitled to a longer vacation period than one who has been employed by the State for a longer period, but whose anniversary date is prior to the effective date of such Act.

It is an established rule of statutory construction that where one construction of a statute would produce equitable results and another inequitable results, the former will be adopted if the language of the statute does not preclude such an interpretation. Ohio Mutual Insurance Co. v. Marietta Woolen Factory, 1 O. Dec. Rep 577. Since the language contained in Section 121.161, supra, does not preclude a construction contrary to that suggested in your request, I am of opinion that such Section should be construed so as to apply to those who reached their respective anniversary dates prior to the effective date of Amended House Bill No. 937 of the 106th General Assembly.

I might also point out that there is no danger that employees will claim that they are entitled to the increased benefits for years prior to the year of enactment, since it is further provided in Section 121.161, supra, that an employee must take his vacation leave in the year in which it accrues.

Therefore, it is my opinion and you are hereby advised that an employee becomes entitled to the increased vacation benefits granted under Section 121.161, supra, as enacted by Amended House Bill No. 937 of the 106th General Assembly, upon the anniversary date of his employment notwithstanding the fact that such date may have occurred prior to the effective date of such Act.