

Note from the Attorney General's Office:

1968 Op. Att'y Gen. No. 68-086 was overruled in part by
1981 Op. Att'y Gen. No. 81-001.

OPINION NO. 68-086**Syllabus:**

Pursuant to Section 325.19, Revised Code, as effective November 4, 1959 through October 30, 1965, a county employee could accumulate vacation leave earned but not used.

Where unused vacation leave was accrued from October 30, 1965 through February 8, 1967, with permission of a prior appointing authority in accordance with Section 325.19, Revised Code, it is a valid obligation of the present appointing authority and may be paid subsequent to the date that such employee was separated from the county service.

To: George J. Demis, Tuscarawas County Pros. Atty., New Philadelphia, Ohio
By: William B. Saxbe, Attorney General, June 5, 1968

I am in receipt of your letter which concerns a county employee whose service was terminated February 8, 1967. You first ask whether the employee in question is entitled to vacation pay for vacations earned since 1959 to the time of his separation and, if so, would this payment come out of the general fund of the county or from the fund of the department in which he worked at the time of his separation. Your second question asks whether the compensation for vacation earned would have to be approved by the present appointing authority or would the right of the employee be terminated if the present appointing authority is unwilling to consent to payment of said vacation pay.

In considering the questions you raise, I must point out the fact that the pertinent statutes with regard to both state and county employees are for the most part identical.

Section 325.19, Revised Code, effective November 4, 1959, in pertinent part provided:

"Each full-time employee in the several offices and departments of the county service, including full-time hourly-rate employees, after service of one year, shall be entitled during each year thereafter, to two calendar weeks, excluding legal holidays, of vacation leave with full pay. Employees having fifteen or more years of county service are entitled, during each year thereafter, to three calendar weeks, excluding legal holidays, of vacation leave with full pay. Two calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the first anniversary of employment and annually thereafter, and three calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the fifteenth anniversary of employment and annually thereafter. The annual leave during any one calendar year may be extended to include unused vacation leave of

previous years provided the total leave taken in any one year shall not exceed six weeks. An employee shall be entitled to compensation for the pro-rated portion of any earned but unused vacation leave to his credit at time of separation. (Emphasis added)

"* * * * *"

Section 121.161, Revised Code, effective November 4, 1959, in pertinent part provided:

"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 two calendar weeks, excluding legal holidays of vacation leave with full pay. Employees having fifteen or more years of service with the state are entitled, during each year thereafter, to three calendar weeks, excluding legal holidays, of vacation leave with full pay.

"Two calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the first anniversary of employment and annually thereafter, and three calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the fifteenth anniversary of employment and annually thereafter. Upon separation from state service, except for cause, an employee shall be entitled to compensation for the pro-rated portion of any earned but unused vacation leave to his credit at time of separation.

(Emphasis added)

"* * * * *"

Section 325.19, Revised Code, was amended effective October 30, 1965 and provided in pertinent part as follows:

"Each full-time employee in the several offices and departments of the county service, including full-time hourly-rate employees, after service of one year, shall be entitled during each year thereafter, to two calendar weeks, excluding legal holidays, of vacation leave with full pay. Employees having ten or more years of county service are entitled, during each year thereafter, to three calendar weeks of vacation leave with full pay. Employees having twenty-five or more years of county service are entitled, during each year thereafter to four calendar weeks of vacation leave with full pay. Such vacation leave shall accrue to the employee upon each successive annual recurrence of the anniversary date of his employment; provided, the anniversary date may be deferred because of periods of time which the employee is not in active pay status. Days specified as holidays in section 143.12 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 two years. An employee shall be entitled to compensation, at his current rate of pay, for the pro-rated 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 two years immediately preceding the last anniversary date of employment. (Emphasis added)

" * * * * * * * * "

Section 121.161, Revised Code, was amended effective July 22, 1965 and provided in part as follows:

"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 each 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. Days specified as holidays in section 143.12 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. Effective January 1, 1966, no vacation leave shall be carried over for more than two years.

"Upon separation from state service, except for cause, an employee shall be 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 permission of the appointing authority, for the two years immediately preceding the last anniversary date of employment."

(Emphasis added)

In Opinion No. 65-199, Opinions of the Attorney General for 1965, I stated in branch 1 of the syllabus:

"1. The amendment to Ohio Revised Code Section 325.19 which takes effect October 30, 1965, and states that no vacation shall be carried over for more than two years applies only to vacation earned after October 30, 1965."

In State ex rel. Sweeney v. Donahue, Case No. 8293, (affirmed 12 Ohio St. 2d 84) decided September 20, 1966 by the Court of Appeals of Franklin County, a state employee brought an action in mandamus against the Tax Commissioner to compel payment for his hours of unused vacation. The Court held under the law in effect from November 4, 1959, through relator's retirement in 1965 that he was clearly entitled to accumulate and be paid for unused vacation time. However, the Court denied recovery for any vacation leave acquired before the November 4, 1959 amendment.

On appeal, the Supreme Court held that:

"* * * in none of the versions of the vacation-leave statute having effect over the period from January 16, 1935, until November 4, 1959, does the right to vacation leave with pay survive the year in which it arises. The entire claim for compensation of the appellant is founded upon this right to vacation leave with pay, and if the right itself no longer exists then no valid claim may be founded upon it."

From the foregoing, it is clear that the former employee in question is entitled to compensation for vacation earned from November 4, 1959 to the date of his separation. Thus where such compensation is due a former employee, it is a valid obligation of the employing authority of the department wherein he was employed at the date of his separation.

Your second question concerns whether the compensation for vacation earned would have to be approved by the present appointing authority. Section 325.19, supra, which had effect over the period from November 4, 1959 until October 30, 1965 specifically gave an employee who was separated from the county service the absolute right to compensation for any unused vacation leave to his credit. During this period there was no provision in the statute that the accumulation of unused vacation leave was subject to the permission of the appointing authority.

From October 30, 1965 through February 8, 1967, the employee's separation date, Section 325.19, supra, gave an employee separated from the county service the right to compensation for any unused vacation leave accrued to his credit, with permission of the appointing authority. Thus where the unused vacation leave was accrued with permission of a prior appointing authority it is a valid obligation of the present appointing authority and may be paid subsequent to the date that such employee was separated from the county service.

Answering your specific questions, it is my opinion and you

are advised:

Pursuant to Section 325.19, Revised Code, as effective November 4, 1959 through October 30, 1965, a county employee could accumulate vacation leave earned but not used.

Where unused vacation leave was accrued from October 30, 1965 through February 8, 1967, with permission of a prior appointing authority in accordance with Section 325.19, Revised Code, it is a valid obligation of the present appointing authority and may be paid subsequent to the date that such employ was separated from the county service.