

**OPINION NO. 71-024****Syllabus:**

A board of education could, prior to the enactment of Section 3318.141, Revised Code, establish sick leave benefits by rule for full-time school employees in advance of the time they had been earned.

To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio  
By: William J. Brown, Attorney General, May 26, 1971

Your request for my opinion reads as follows:

"1. Prior to the enactment of Section 3319.141, Revised Code, effective September 16, 1970, could a board of education by rule establish sick leave benefits for full time school employees in advance of their earning the same at the rate established in Section 143.29, Revised Code?

"2. If your answer to the first is in the negative, may the Bureau in its examination make findings for recovery against all employees receiving sick leave payments in advance of their earning the same as prescribed under Section 143.29, Revised Code?"

Section 143.29, Revised Code, which provides generally for sick leave granted to state employees, was first enacted in 1947. In its original form it provided in pertinent part (122 Ohio Laws, 368):

"Each full-time employee, whose salary or wage is paid in whole or in part by the state of Ohio, shall be entitled for each completed month of service to sick leave of one and one-fourth (1 1/4) work days with pay. \*\*\*"

"Nothing in this act shall be construed to interfere with existing unused sick leave credit in any agency of government where attendance records have been maintained and credit has been given employees for unused sick leave."

Since questions immediately arose as to the coverage of the term "employee of the state", see Opinion No. 2419, Opinions of the Attorney General for 1947, the act was amended in 1949 to provide that all full-time county and municipal employees and those employed by boards of education were included. Section 486-170, General Code. Although the language of this amendment seems to embrace all employees of boards of education within the coverage of the general sick pay act, the legislative history of the treatment of sick pay for teachers and the latest amendment of the general act clearly indicate that teachers and other full-time

employees of the boards of education have enjoyed special treatment, at least up until the enactment of Section 3319.141, Revised Code, to which your letter refers.

In its latest amended form the general act, Section 143.29, supra, provides in pertinent part:

"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 of four and six-tenths hours with pay. \* \* \*"

(Emphasis indicates amendment)

The emphasized language shows that the General Assembly recognized that provision had already been made for sick leave to be credited to some board of education employees under a particular section of the Code, Section 3319.141, supra, rather than under the general coverage of Section 143.29, supra.

Furthermore, an examination of the history of Section 3319.141, supra, reveals that, prior to the enactment of the general statute in 1947, and for a long time thereafter, teachers and other full-time employees of the boards of education received special treatment in the matter of sick leave.

This treatment had its origin in 1904 when the General Assembly, in the course of reorganization of the statutes concerning the common schools, provided, in 97 Ohio Laws, 334, at page 361:

"\* \* \*[T]eachers shall be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity,\* \* \*"

Similar language was repeated in 107 Ohio Laws, 47 and in 109 Ohio Laws, 377. In 1943, however, in the course of another recodification of the school laws (120 Ohio Laws, 475), the

General Assembly, for the first time, specifically authorized sick pay for teachers, leaving the amount and the manner of such payments to be determined by regulations adopted by the various boards of education. This portion of the Act, which became Section 4842-7, General Code, provides in pertinent part, at page 540:

"\* \* \* Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity, and for time lost due to illness or otherwise to the extent authorized by regulations which each board of education shall adopt."

In 1945, prior to the original enactment of the general sick pay statute, 122 Ohio Laws, 368, supra, the General Assembly amended Section 4842-7, supra, to include a five-day minimum sick pay requirement. This amendment provides, in 121 Ohio Laws, 623:

"\* \* \* Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity, and for time lost due to illness or otherwise for not less than five days annually as authorized by regulations which each board of education shall adopt.

" \* \* \* \* \* \* \* \* \*"  
(Emphasis indicates amendment)

This same language still appears in Section 3319.08, Revised Code.

In 1949, two years after the enactment of the general sick pay statute (122 Ohio Laws, 368, supra), the General Assembly showed that it still regarded sick pay for school personnel as worthy of special treatment when it accorded to full-time employees of the boards of education the same treatment previously reserved for teachers alone. 123 Ohio Laws, 606; Section 4834-5a, General Code, now Section 3313.21, Revised Code. This statute provides:

"All full-time employees of a board of education, except those employed at hourly rates, must be paid

regular compensation for time lost, due to illness, or otherwise, for not less than five days annually as authorized by regulations which each board shall adopt."

It will be noted that the regulatory authority of the boards over sick leave, first granted in 1943, has been continued down to the present day. As far back as 1872, boards of education were given a general power to make rules and regulations for the government of the schools. 70 Ohio Laws, 195; 97 Ohio Laws, 356; Section 4834-5, General Code. The successor to these statutes, Section 3313.20, Revised Code, now provides in pertinent part:

"The board of education shall make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises.\* \* \*"

The Supreme Court has held that this line of statutory authority vests in the board a wide discretion to adopt such rules and regulations as it deems necessary for the conduct of the schools, Greco v. Roper, 145 Ohio St. 243, 249; provided, of course, that specific statutory limitations on the board's authority be not exceeded, Verberg v. Board of Education, 135 Ohio St. 246.

To summarize the foregoing, it may be stated that the General Assembly enacted sick pay legislation for teachers prior to the enactment of the general sick pay act and that it left the amount and the manner of payment to be regulated by the boards of education; that this authority of the boards was not done away with by the 1947 general sick pay act, since in 1949 the General Assembly broadened the special treatment of school personnel to include all full-time employees, and again left the treatment of school sick pay to regulation by the boards; that the boards have considerable discretion in exercise of their regulatory powers;

and that their power to regulate the amount and the manner of payment of sick leave to full-time school personnel remained in effect at least until the enactment of Section 3319.141, Revised Code, which became effective on September 16, 1970.

The statutes summarized above have been interpreted as giving the school boards the authority to advance sick leave before it has been earned. Drury, Ohio School Guide (3rd ed.), Text §628, states:

"\* \* \* If a teacher has not earned on the basis of completed service, such amount of sick leave credit as corresponds to the minimum sick leave credit authorized by a board, such teacher may use sick leave to the extent of the minimum amount of credit provided by a board, through its regulations."

And Spayde, Ohio School Law (7th ed.), Text §73.01, says:

"All new full-time employees of the board of education, except those employed on hourly rates, shall be credited with five days sick leave at the beginning of the school year (1965 Syllabi 23)."

This language is a direct quotation from a letter of the Deputy Auditor to an Examiner, dated April 5, 1965. In the light of the foregoing, it is my opinion that, prior to the enactment of Section 3319.141, supra, a board could by regulations provide that sick leave be paid in advance of the time it had been earned.

Opinion No. 1605, Opinions of the Attorney General for 1950, to which your letter refers, may not have given full consideration to the historical special treatment accorded by the General Assembly to sick pay for school personnel but, in any event, it is ambiguous and there is possible inconsistency between the Opinion and the syllabus. To the extent of any inconsistency herewith, such Opinion must be overruled.

In view of the conclusion as to your first question, it becomes

unnecessary to answer the second.

In specific answer to your question, it is my opinion and you are advised that a board of education could, prior to the enactment of Section 3319.141, Revised Code, establish sick leave benefits by rule for full-time school employees in advance of the time they had been earned.