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SYLLABUS:

1. Under Section 121.161, Revised Code, as effective November 4, 1959, a state employee may accumulate vacation leave earned but not used during his state service and upon separation from state service, except for cause, such an employee should be compensated for any earned but unused vacation leave to his credit at the time of separation. Opinion No. 1575, Opinions of the Attorney General for 1960, page 531, approved.

2. A state officer, such as the director of finance, appointed pursuant to Section 121.03, Revised Code, is not a state employee within the purview of Section 121.161, Revised Code, and not subject to the vacation provisions of that statute; and where such an officer terminates his state service as an officer, he is not entitled to compensation for earned but unused vacation leave, regardless of what vacation he may or may not have taken during his service as an officer.

3. A person who served as a state employee during the period January 2, 1954 to January 12, 1959, and served as a state officer from January 12, 1959 to December, 1962, is not, upon leaving his state office in 1962, entitled to compensation for any vacation earned but not taken during the period January 2, 1954 to January 12, 1959, as only those state employees separated from state service on or after November 4, 1959, are entitled to such compensation, and such person was separated as an employee on January 12, 1959, at which time there was no provision in the law allowing compensation for earned but unused vacation leave.

4. The payment of compensation for earned but unused vacation leave to a state employee under Section 121.161, Revised Code, should be at the employee's current rate of pay.

Columbus, Ohio, January 14, 1963

Hon. James A. Rhodes
Auditor
State House
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"We are in receipt of a Payroll Disbursements Journal, from the Department of Finance, which includes the name of James H. Maloon, Director of Finance, as entitled to a regular one-half month's pay, less 24 hours, at the rate of $7.21 per hour, plus 432 hours at the same rate, representing accumulated, but unused vacation leave, the amount of the claim being $3,566.68. This unused vacation time has been accumulated during the period from 1954, through 1958, while Mr. Maloon was an enmployee of the Department of Taxation, and from 1959, through 1962, while Mr. Maloon has been Finance Director.

"Mr. Kenneth F. Weimer, Chief of Personnel and Fiscal Affairs of the Department of Taxation, in a letter, dated November 9, 1962, indicates 21 days of unused vacation leave was accumulated while Mr. Maloon was an employee of the Department of Taxation. It should be noted here that Mr. Maloon's salary then was not the same as his present salary. Mr. Rex S. Riggs, Chief Officer of Fiscal and Personnel Affairs, Department of Finance, in a letter, dated December 13, 1962, has indicated that Mr. Maloon during his tenure as Director of Finance, has accumulated 33 days of unused vacation leave.

"Under these circumstances, your opinion is requested with respect to the following questions:

'1. May an appointive state official, in this case, the Director of Finance, accumulate unused vacation leave, and be paid for it in addition to his salary, which is set by law at $15,000.00 per annum?

'2. If your answer to Question No. 1, is in the negative, may Mr. Maloon be paid at this time for vacation leave accumulated, but unused, during the period 1954 through 1958, four years after terminating his employment in the Department of Taxation?

'3. If your answer to Question No. 2, is in the affirmative, what rate of pay should be used to deter-

mine the amount due Mr. Maloon.' "

Section 121.161, Revised Code, reads 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 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 empolyee 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.

"In special and meritorius cases where to so limit the annual leave during any one calendar year would work peculiar hardship, it may, in the discretion of the director of the department, be extended.

"Employees working on an hourly basis shall be entitled to eight hours of holiday pay for New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas Day of each year, if they are regular employees with at least six month's full-time state service immediately prior to the month when such holiday occurs, except that interruption of service due to illness or injury caused or induced by the actual performance of official duties and not by an employee's negligence shall not affect such employee's right to holiday pay.

"In the case of the death of a state employee, the unused vacation leave and unpaid overtime to the credit of any such employee, shall be paid in accordance with section 2113.04 of the Revised Code, or to his estate."

In my Opinion No. 1575, Opinions of the Attorney General for 1960, page 531, the first paragraph of the syllabus reads, in part, as follows:

"Pursuant to Section 121.161, Revised Code, as effective November 4, 1959, a state employee may accumulate vacation leave earned but not used during his state service, * * *."

For the sake of brevity, I will not herein restate the reasoning of Opinion No. 1575, *supra,* but suffice it to say that I am of the opinion that a state employee may accumulate vacation leave earned but not used during his state service and, upon separation from state service, except for cause, such an employee should be compensated for any earned but unused vacation leave to his credit at the time of separation.

The first question to consider in this opinion is whether an appointive state official, such as the director of finance, is a "state employee" within the purview of Section 121.161, *supra,* so as to be entitled to compensation for earned but unused vacation leave upon separation from state service.

While, loosely speaking, all persons who are compensated by the state for services rendered might be considered to be employed by the state, there are definite distinctions between a public office and a public employment. The requisite elements of public office are: (1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the incumbent must be by virtue of his election or appointment to the office; (3) in the exercise of the duties so imposed, he can not be subject to the direction and control of a superior officer. *State, ex rel., Morgan v. Board of Assessors,* 15 N.P. (N.S.) 535, 24 O.D. 271 (1914); *State, ex rel., Attorney General v. Jennings,* 57 Ohio St., 415 (1898); 44 Ohio Jurisprudence 2d, 483, Section 2 and 903, Section 17; 67 Corpus Juris Secundum, 97, Section 2. An incumbent of such an office is, of course, a public officer; a person holding a position lacking one or more of the above-noted elements, is on the other hand, only an employee.

Without reviewing the specific duties of the director of finance, I feel it safe to say that as the head of the department of finance he does exercise certain independent duties, relative to state finances and purchasing, a part of the sovereignty of the state. See Chapter 125. and Section 131.17, Revised Code. Also, such exercise is by virtue of his appointment to the office by the governor. Section 121.03, Revised Code. Further, in the exercise of such duties, the director of finance is not subject to the direction and control of a superior officer; and in this regard, the opinion of Marshall, C. J., in

State, ex rel., v. Baker, 112 Ohio St., 356, states at page 368:

> "State officials in the executive departments are not in any sense deputies of the Governor, but, on the contrary, possess powers and are charged with duties and have independent discretion and judgment entirely beyond his control, except in those instances where it is otherwise provided."

Accordingly, I am of the opinion that the director of finance is a public officer rather than a public employee, and the same can be said for the other state officials appointed pursuant to Section 121.03, Revised Code.

While the director of finance is a state officer, it remains to be considered whether in enacting Section 121.161, *supra,* the legislature intended that all persons employed by the state, whether officer or employee, be considered as state employees for the purposes of the section.

I have been unable to find any statutory definition of the words "state employee" as used in said Section 121.161. I note that for the purposes of the public employees retirement system law, Chapter 145., Revised Code, the term "public employee" includes any person holding an office, not elective, under the state. Section 145.01, Revised Code. For the purposes of the state civil service law, Chapter 143., Revised Code, the word "employee" signifies any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer. Section 143.01, Revised Code. I do not, however, believe that a state officer is an employee within this latter definition as I construe the reference to "appointing officer" to mean the appointing officer of a particular office, department, commission, board, or institution, and not to include the governor as an appointing authority with reference to the appointment of directors of departments. In any event, however, whether the director of finance is a state employee for the purposes of Chapter 143. or 145., *supra,* is important only in construing those particular chapters of the law and does not appear to be relevant in the instant matter.

I note that, as other directors of state departments, the annual salary of the director of finance is fixed by Section 141.03, Revised Code, such salary in his case being $15,000. (The director is also

entitled to his actual and necessary expenses incurred in the performance of his official duties. Section 121.12, Revised Code.) I further note that, as an officer, the director is entitled to this salary regardless of whether he performs the duties of the office—the salary is an incident of the office and not of the exercise of the functions of the office. In this point, it is stated in 43 American Jurisprudence 161, Section 379:

> "* * * Such compensation as may be attached to the office, although not generally fixed on a quantum meruit basis, must necessarily be a reward for the performance of official duites, and it is the purpose of the law that the incumbent of an office shall devote his personal attention to the duties of the office to which he is appointed or elected. But this does not mean that he shall lose his title to the office or his right to the emoluments of salary connected with it because he may be absent or away from the office for a short, occasional, or even a protracted, period of time and does not during such period of time personally give his time and attention to the duties of the office. This is true whether he is absent from office through illness or upon purely personal business, and even though during his absence the duties of the office devolve upon another officer who by law is entitled to compensation for performing them. * * *"

Also, with regard to allowable compensation for employees and public officers, the opinion by Zimmerman, J., in the case of *The State, ex rel., Wilcox v. Woldman, Dir.*, 157 Ohio St., 264, states at page 270:

> "But no matter whether public employment is treated as *ex contractu* or *ex lege,* most of the cases declare that a public employee, even though he holds his position under civil service, is subject to the rule than earnings either actual or which he had the opportunity to receive during the period of wrongful exclusion from public employment should be allowed as an offset against the amount of compensation claimed on account of such wrongful exclusion. See *Stockton v. Department of Employment,* 25 Cal. (2nd), 264, 153 P. (2d), 741; *Corfman v. McDevitt et al., Civil Service Comm.,* 111 Col., 437, 142 P. (2d), 383, 150 A.L.R., 97; *Kelly v. Chicago Park Dist.,* 409 Ill., 91, 98 N.E. (2d), 738; *Spurck v. Civil Service Board,* 231 Minn., 183, 42 N.W. (2d) 720; annotation, 150 A.L.R., 113 *et seq;* 10 American Jurisprudence (1951 Cumulative Supplement, 101, Section 17).

> "It is appropriate to remark here that unlike a public employee, a public officer is not amenable to the offset rule. His right to compensation is attached to the office itself, is an incident of the title to the office and not of the exercise of the functions of the office, and a failure to perform the duties of the office does not prevent him from claiming and receiving full compensation. *State, ex rel., Clinger, Pros. Att., v. White et al., Bd. of Commrs.,* 143 Ohio St., 175, 179, 54 N.E. (2d), 308, 310. * * *"

For further authority on the proposition that the compensation of a public officer is not dependent upon the performance of the duties of the office by such officer unless his failure to so perform amounts to an abandonment of his office, see 44 Ohio Jurisprudence 2d, 638, Section 141 and 67 Corpus Juris Secundum 321, Section 83.

In a recent opinion, Opinion No. 3239, issued on August 30, 1962, I had occasion to consider a question closely related to that here concerned. In that instance, a person serving as auditor of a county had died, and the question arose whether his estate was entitled to receive compensation for vacation time earned but unused during said person's tenure as auditor. The statute providing for vacation leave for county employees, Section 325.19, Revised Code, is almost identical in language to Section 121.161, *supra,* pertaining to state employees, and reads, in 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 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.
>
> "* * * * * * * * *
>
> "In the case of the death of a county employee, the unused vacation leave and unpaid overtime to the credit of any such employee, shall be paid in accordance with section 2113.04 of the Revised Code, or to his estate."

After discussing the difference between a public officer and a public employee, and after referring to the words of Zimmerman J., in the case of *State, ex rel., Wilcox v. Woldman, supra,* I said:

> "The attributes which mark the distinction between public officers and public employees, particularly those relating to hours of work and compensation, compel me to the conclusion that the word 'employee' as used in Section 325.19, *supra*, is not intended to include within its meaning persons who are elected public officers of the county. Such persons are not entitled to (or limited to) any particular period of time for vacation leave."

The syllabus of said Opinion No. 3239 reads as follows:

> "A public officer, such as a county auditor, is not an employee as such word is used in Section 325.19, Revised Code, and, upon the death of such officer, no amount may be paid for earned but unused vacation leave under Section 2113.04, Revised Code, to his estate."

I do not believe that anyone would claim that an elected state officer such as the governor or the attorney general is a state employee within the purview of Section 121.161, *supra*, and the reasoning of Opinion No. 3239, *supra*, would appear to clearly apply as to such elected officers.

As to the director of finance, he is a state officer rather than a state employee, and I have found no indication that Section 121.161, *supra*, is intended to apply to state officers. Further, as a state officer, the director of finance is entitled to his fixed salary regardless of whether or not he performs the duties of his office, and it would appear that the director may thus take whatever time he may deem proper as vacation without being governed by the statute pertaining to state employees, and that he is not entitled to compensation over his fixed salary and reimbursement for necessary expenses as allowed by law.

I might note that I am aware of the provision of Section 121.12, Revised Code, stating that each appointed state officer shall devote his entire time to the duties of his office. I do not believe, however, that this provision relegates state officers to the forty-hour week required of state employees by Section 143.11, Revised Code. Nor do I believe that this would entitle state officers to compensation or compensatory time off for service in excess of forty hours as is granted to employees by that section. As I stated in my Informal Opinion No. 22, issued on April 16, 1959:

> "It would thus seem clear that as to state employees

> the term 'full-time' means forty hours of service each week, this being the normal period of service of such *employment*. It does not appear, however, that there is any similar statutory provision to state *officers*.
>
> "* * * * * * * * *
>
> "* * * In the case of officers whose duties are of a more routine nature, requiring emergency action only in the most extraordinary situations, it would seem that service is given on a 'full-time' or 'entire time' basis by service to such extent as is necessary to discharge efficiently all the duties of the office. * * *
>
> "* * * * * * * * *"

I thus conclude that the provision of Section 121.12, *supra*, as to "entire time" requires only that the director of finance devote the time which is necessary to discharge efficiently all of the duties of the office.

In the case of *State, ex rel., v. Ferguson*, 149 Ohio St., 555, dealing with the expenses allowed to appointed state officers (members of the board of liquor control), the second paragraph of the syllabus reads:

> "Statutes relating to compensation and allowances of public officers are to be strictly construed, and such officers are entitled to no more than that clearly given thereby."

Further, where there is a doubt as to the expenditure of public money, the doubt should be resolved in favor of the public and against the grant of power. *State, ex rel., v. Pierce*, 96 Ohio St., 44.

Also of prime consideration is the possible effect of a holding that state officers are governed by Section 121.161, *supra*, as to vacation. There are many state offices in which the duties require only part-time attendance—certainly, the vacation statute could not possibly be applied to incumbents of such offices. Also, were I to hold that a state officer is governed by the vacation statute, I would also have to hold that state officers are employees required to work a forty-hour week (Section 143.11, *supra*) and entitled to compensation or compensatory time off for time worked in excess of forty hours. I am reluctant to conclude that the legislature ever intended that state officers should be governed by those statutes.

In view of the foregoing, therefore, I am constrained to con-

clude that a state officer such as the director of finance is not a state employee within the purview of Section 121.161, Revised Code, and I thus answer your first question in the negative.

Your second question is concerned with the period from 1954 through 1958 during which Mr. Maloon served as an employee of the department of taxation. From later information furnished by you, I understand that the period in question extends from January 2, 1954 to January 12, 1959. During 1954 and until October 11, 1955, the pertinent statutory provision as to vacation for state employees read as follows:

> "Each state employee after service of one year is entitled during each year thereafter, to two calendar weeks, excluding legal holidays, vacation leave with full pay. Employees having fifteen or more years of service are entitled to three calendar weeks of such leave." (Section 121.16, Revised Code; 125, Ohio Laws, 677.)

Effective October 11, 1955, the above provision was taken from Section 121.16, Revised Code, and a new provision was inserted in the newly enacted Section 121.161, Revised Code, reading:

> "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, vacation leave with pay. Employees having fifteen or more years of service with the state are entitled to three calendar weeks of such leave." (126, Ohio Laws, 424.)

This latter provision remained the same until Section 121.161, *supra,* was amended, effective November 5, 1959, to read as set forth at the outset of this opinion.

Under the law existing immediately prior to November 4, 1959, state employees could not accumulate vacation leave earned but not used in past years, and could not be paid for any such unused leave on separation from the state service. Opinion No. 6580, Opinions of the Attorney General for 1956, page 388. The language of Section 121.161, *supra,* that leave "will have been earned" and "will be due" was not added until November 4, 1959 (128, Ohio Laws, 627). Prior to that time, the law provided that employees were "entitled" to certain periods of leave after certain periods of service. But to be "entitled" to leave, an employee had to "earn"

that leave even though the law did not then use that language. Thus, where prior to November 4, 1959, an employee was entitled to leave but did not take such leave, such leave was actually "earned but unused vacation leave." Accordingly, since Section 121.161, *supra,* states that compensation shall be paid for *any* earned but unused vacation leave at the time of separation, and that "the unused vacation leave" shall be paid in case of death, I am of the opinion that where, on and after November 4, 1959, an *employee* is separated from the state service, except for cause, he is entitled at the time of separation to compensation for any vacation leave to which he was entitled but did not use, either before or after November 4, 1959. (See Opinion No. 3081, issued on June 21, 1962, construing the similar language of Section 325.19, Revised Code, dealing with county employees.)

As to the instant question, however, when Mr. Maloon left his employment with the department of taxation and became a state officer, he was no longer within the purview of the vacation statute and, in fact, was then separated from state service as a state employee (See Opinion No. 3425, issued on November 14, 1962, construing the similar language of Section 325.19, Revised Code, pertaining to county employees); but this occurred prior to November 4, 1959, and Mr. Maloon was thus not entitled to compensation for unused vacation leave at that time. Further, the fact that Section 121.161, *supra,* was later amended to allow for compensation for unused vacation leave, does not mean that Mr. Maloon is now entitled to compensation for vacation leave earned but unused during the period from January 2, 1954 to January 12, 1959; only those employees separated from state service (within the purview of the vacation statute) on or after November 4, 1959, are entitled to the benefits of that amendment, and Mr. Maloon was separated as an emlpoyee *before* that date (January 12, 1959). I thus answer your second question in the negative.

My answers to the first two questions are dispositive of your third question; however, since in the future many state employees will no doubt be entitled to compensation under Section 121.161, *supra,* upon separation, a discussion of the question of "rate of pay" appears advisable at this time.

In my Opinion No. 2021, issued on February 24, 1961, I held in the syllabus as follows:

> "Pursuant to Section 325.19, Revised Code, a county employee may accumulate vacation leave earned, but not used during his county service, and the payment of such earned but unused vacation leave to an employee upon separation should be at his current rate of pay."

As mentioned earlier, Section 325.19, Revised Code, dealing with county employees, contains language similar to Section 121.161, Revised Code, dealing with state employees, and I believe that the conclusion of Opinion No. 2021 may be applied to said Section 121.161. Where the law allows compensation for vacation earned but not used, the result is that the employee receives the vacation not previously taken, at the time of separation. That is, he is given a certain number of days' pay which is the equivalent of giving him a vacation with pay; and such a vacation could only be given at the current rate of pay.

In summary, therefore, it is my opinion and you are advised:

1. Under Section 121.161, Revised Code, as effective November 4, 1959, a state employee may accumulate vacation leave earned but not used during his state service and upon separation from state service, except for cause, such an employee should be compensated for any earned but unused vacation leave to his credit at the time of separation. Opinion No. 1575, Opinions of the Attorney General for 1960, page 531, approved.

2. A state officer, such as the director of finance, appointed pursuant to Section 121.03, Revised Code, is not a state employee within the purview of Section 121.161, Revised Code, and not subject to the vacation provision of that statute; and where such an officer terminates his state service as an officer, he is not entitled to compensation for earned but unused vacation leave, regardless of what vacation he may or may not have taken during his service as an officer.

3. A person who served as a state employee during the period January 2, 1954 to January 12, 1959, and served as a state officer from January 12, 1959 to December, 1962, is not, upon leaving his state office in 1962, entitled to compensation for any vacation

earned but not taken during the period January 2, 1954 to January 12, 1959, as only those state employees separated from state service on or after November 4, 1959, are entitled to such compensation, and such person was separated as an employee on January 12, 1959, at which time there was no provision in the law allowing compensation for earned but unused vacation leave.

4. The payment of compensation for earned but unused vacation leave to a state employee under Section 121.161, Revised Code, should be at the empoyee's current rate of pay.

Respectfully,

MARK MCELROY

Attorney General