

Note from the Attorney General's Office:

1980 Op. Att'y Gen. No. 80-065 was overruled by
1990 Op. Att'y Gen. No. 90-014.

OPINION NO. 80-065**Syllabus:**

1. The Registrar of Motor Vehicles, deputy inspectors and the Deputy Auditor are not public officers and are, therefore, within the purview of R.C. 121.161, which governs vacation leave.
2. The Registrar of Motor Vehicles, deputy inspectors and the Deputy Auditor are "employees" as defined in R.C. 124.01 and are, therefore, within the purview of R.C. 124.38, which governs sick leave.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, October 15, 1980

I am in receipt of your letter requesting my opinion in response to the following two questions:

1. Is the Registrar of Motor Vehicles a "public officer", thereby exempting him from the provisions of Section 124.38 and 121.161 of the Revised Code?
2. Are Deputy Inspectors (R.C. 117.01) and/or the Deputy Auditor (R.C. 115.03) "public officers" thereby exempting them from the provisions of Section 124.38 and 121.161 of the Revised Code?

R.C. 124.38 provides in part:

Each employee, whose salary is paid in whole or in part by the state, each employee in the various offices of the county, municipal and civil service township, 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.

R.C. 121.161 reads, in pertinent part: "Each full-time state employee, including full-time hourly-rate employees, after service of one year with the state, or any political subdivision of the state, shall have earned and will be due upon the attainment of the first year of employment, and annually thereafter, eighty hours of vacation leave with full pay." R.C. 121.161 allows an increased number of vacation hours when the employee has served 8, 15, or 25 years with the state.

In 1963 Op. Att'y Gen. No. 3548, a prior Attorney General dealt with the question of whether state officers are "state employees" within the meaning of R.C. 121.161. In that opinion, my predecessor concluded that a state officer is not governed by R.C. 121.161 but, instead, may take a reasonable amount of vacation time at his own discretion. I concur in the reasoning of 1963 Op. No. 3548. The compensation of a state officer "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. Wilcox v. Woldman, 157 Ohio St. 264, 270, 105 N.E. 2d 44, 47 (1952). It is clear that a public officer could take a reasonable amount of vacation leave and still be entitled to full compensation. In addition, R.C. 121.161 states that only state employees are affected by its requirements. The term "employee" is not defined for purposes of R.C. Chapter 121; however, the difference between an officer and an employee has been discussed in a variety of court cases and Attorney General opinions. See, e.g., Scotfield v. Strain, 142 Ohio St. 290, 51 N.E. 2d 1012 (1943); State ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 115 N.E. 919 (1917); State ex rel. Attorney General v. Jennings, 57 Ohio St. 415, 49 N.E. 404 (1898); 1971 Op. Att'y Gen. No. 71-071; 1965 Op. Att'y Gen. No. 65-150. Given the fact that an "employee" has generally been considered as differing from an "officer," it is reasonable to assume that when the General Assembly made R.C. 121.161 applicable only to employees, it did not mean for that section to apply also to officers. I conclude, therefore, that a public officer is not governed by R.C. 121.161 and may take a reasonable amount of vacation time at his own discretion.

Conversations between my staff and your office have indicated that, in the past, the reasoning of 1963 Op. No. 3548 has also been applied to sick leave under R.C. 124.38 and 124.39. Under such reasoning, those individuals who were deemed to be public officers were permitted to take a reasonable amount of sick leave at their own discretion and were not allowed to accumulate sick leave or be paid for unused sick leave. This approach ignored the fact that R.C. Chapter 124, unlike R.C. Chapter 121, provides a definition of those persons governed by its provisions. R.C. 124.38 uses the term "employee." "Employee" is defined in R.C. 124.01 to mean "any person holding a position subject to appointment, removal, promotion or reduction by an appointing officer." This category may easily contain some individuals who are public officers for purposes of R.C. 121.161. For instance, the Chief of the Division of Mines has been found to be a public officer due to the nature of the duties performed by the officeholder. 1974 Op. Att'y Gen. No. 74-021. However, because the Chief of the Division of Mines is appointed under R.C. 4151.04, he would be an employee for purposes of R.C. 121.161. Only those individuals whose positions are not subject to appointment, reduction, promotion or approval by an appointing officer (for example, elected officials) are exempt from the requirements of R.C. 124.38.

Before addressing the specific positions listed in your letter, I believe it would be useful to set out the definition of a public officer. The following paragraphs from State ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 159, 115 N.E. 919, 919 (1917), are frequently quoted for their explanation of what constitutes a public office:

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him. But it has been held by this court that while an oath, bond and compensation are usually elements in determining whether a position is a public office they are not always necessary. . . . The chief and most-decisive

characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment. . . .

In all of these cases it is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state. But as stated by Spear, C.J., in The State, ex rel. Hogan, Atty. Gen., etc. v. Hunt, 84 Ohio St., at page 149, without a satisfactory definition of what is the "sovereignty of the country" the term "office" is not adequately defined. If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.

The definition of a public officer as an individual who independently exercises some portion of the sovereignty of the state has been accepted, and followed, in a number of Attorney General opinions. See, e.g., 1974 Op. Att'y Gen. No. 74-021; 1971 Op. Att'y Gen. No. 71-071; 1963 Op. Att'y Gen. No. 3548, p. 58.

The position of Registrar of Motor Vehicles is created by R.C. 4501.02. The duties of the Registrar of Motor Vehicles are set forth in R.C. 4501.02, which reads in pertinent part:

The registrar shall administer the laws of the state relative to the registration of and certificates of title for motor vehicles, and the licensing of motor vehicle dealers, motor vehicle leasing dealers, distributors, and salespersons, and of motor vehicle salvage dealers, salvage motor vehicle auctions, and salvage motor vehicle pools. He may, with the approval of the director of highway safety, adopt and promulgate such forms and rules as are necessary to carry out all laws he is required to administer. He may, with the approval of the director, appoint such number of assistants, deputies, clerks, stenographers, and other employees as are necessary to carry out such laws.

It is obvious that the only area in which the Registrar operates independently is in the administration of the laws of the state with regard to motor vehicles. In all other areas any action taken by the Registrar must first be approved by the Director of Highway Safety. I am reluctant to conclude that simple administration of the law is an exercise of the sovereignty of the state. This is particularly true in an area such as motor vehicle registration, in which the Revised Code states the procedures and requirements pertaining to registration with such particularity as to leave nothing to the discretion of the Registrar. The conclusion that the Registrar of Motor Vehicles is not a public officer is supported by 1927 Op. Att'y Gen. No. 121, p. 198, which concludes that the Commissioner of Motor Vehicles, whose powers were similar to those now vested in the Registrar of Motor Vehicles, was a member of the unclassified civil service rather than a public officer. It is, therefore, my opinion that the Registrar of Motor Vehicles is not a public officer and does fall within the purview of R.C. 121.161.

R.C. 115.03 authorizes the Auditor of State to appoint a Deputy Auditor. The Deputy Auditor has those powers and duties set forth in R.C. 115.03, which reads as follows:

During the absence or disability of the auditor of state, or when so directed by the auditor of state, the deputy auditor of state may perform all the duties of auditor of state. The deputy auditor of

state may serve on any board or commission of which the auditor of state is made a member by law. (Emphasis added.)

R.C. 3.06 governs deputies such as the Deputy Auditor, and states in pertinent part: "A deputy or clerk, appointed in pursuance of law, holds the appointment only during the pleasure of the officer appointing him. . . . The principal is answerable for the neglect or misconduct in office of his deputy or clerk." It is apparent from this section that the Deputy Auditor does not have a set term in office nor is he ultimately responsible for his own actions. The Deputy Auditor does not independently exercise the sovereignty of the state and, as a result, is not a public officer for purposes of R.C. 121.161.

This conclusion finds support in State ex rel. Morgan v. Board of Assessors, 15 Ohio N.P. (n.s.) 535 (1914), in which the court dealt with a position similar to that of the Deputy Auditor. In concluding that a Deputy Assessor was not a public officer for purposes of Ohio Const. art. XV, §4, the court stated at 537:

The performance by a deputy or an assistant of many or indeed all of the duties of his superior does not of itself constitute such assistant an officer; and this may be the case even though the duties of the assistant are prescribed by statute.

and at 539:

The provision that he shall have and perform, under such direction and supervision, all the powers and duties of the district assessor, is in effect only a provision which enables the district assessor to appoint deputies who shall assist him the discharge of the extensive and detailed labor of listing and valuing property. All ultimate matters, all acts of "sovereignty," must be performed by the district assessor, and for them he alone is responsible.

In addition, at 539, the court noted that the District Assessor could "withhold from the deputy the opportunity of engaging in the exercise of any of the duties for which he was appointed." I believe that this is also true in the case of the Deputy Auditor. In the ordinary course of events, the Deputy Auditor carries out his duties at the direction of the Auditor. "This being so, what becomes of the 'sovereignty' of the deputy, of his 'independent' right to exercise certain public duties, free from the 'direction and control' of a superior?" State ex rel. Morgan at 539.

I am aware that, in the absence or during the disability of the Auditor, the Deputy Auditor would be exercising discretion independently. However, since it is not certain that such an absence or disability will ever occur, the existence of this possibility cannot negate the fact that, under ordinary circumstances, the Deputy Auditor will serve at the direction of the Auditor, and that he will always serve at the pleasure of the Auditor. I conclude, therefore, that the Deputy Auditor is not a public officer and is entitled to vacation leave only in accordance with R.C. 121.161.

The office of deputy inspector is created by R.C. 117.01, which reads in pertinent part: "By virtue of his office the auditor of state shall be chief inspector and supervisor of public offices, and may appoint not more than three deputy inspectors and supervisors and a clerk." As members of the Bureau of Inspection and Supervision, the deputy inspectors examine public offices, departments, agencies and school districts, R.C. 117.09, as well as the Ohio National Guard, R.C. 117.04. Their specific powers are set forth in R.C. 117.03, which reads in pertinent part:

[E]ach deputy inspector. . . may issue subpoena and compulsory process, direct service thereof by a sheriff or constable, compel the attendance of witnesses and the production of books and papers before him, administer oaths, and punish for disobedience of subpoena, refusal to be sworn, refusal to answer as a witness or refusal to produce books and papers.

The deputy inspectors are not required by statute to furnish bond. However, the Auditor has the authority to request the payment of a bond pursuant to R.C. 3.06 to protect himself in the event that the actions of the deputy lead to liability on the part of the Auditor.

The deputy inspectors by statute do not serve a set term in office and they are, therefore, lacking one of the primary indicia of a public office. However, as was noted in State ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 115 N.E. 919 (1917), the most important element of a public office is not term of office but, rather, that the individual independently exercise some part of the sovereignty of the state. The Ohio Revised Code does not expressly state whether the deputy inspectors are authorized to independently exercise the sovereignty of the state. It is my understanding, however, that even as the deputy inspectors serve at the pleasure of the Auditor, R.C. 3.06, they also operate at the direction and under the supervision of the Auditor and his Deputy Auditor. In addition, R.C. 3.06, discussed in connection with the Deputy Auditor, also applies to deputy inspectors. As a result, the deputy inspectors do not possess one of the most important characteristics of a public officer: independence.

Because the deputy inspectors do not independently exercise the sovereignty of the state and do not have a set term of office, I conclude that they are not public officers and must, therefore, comply with R.C. 121.161.

The three positions mentioned in your letter are all appointive posts. The Registrar of Motor Vehicles is appointed by and serves at the pleasure of the Director of Highway Safety. R.C. 4501.02. The Deputy Auditor and deputy inspectors are appointed by the Auditor of State. R.C. 115.03; R.C. 117.01. These individuals are, therefore, employees within the meaning of R.C. 124.01 and must take sick leave in accordance with R.C. 124.38.

It is my opinion, and you are, therefore, advised, that:

1. The Registrar of Motor Vehicles, deputy inspectors and the Deputy Auditor are not public officers and are, therefore, within the purview of R.C. 121.161, which governs vacation leave.
2. The Registrar of Motor Vehicles, deputy inspectors and the Deputy Auditor are "employees" as defined in R.C. 124.01 and are, therefore, within the purview of R.C. 124.38, which governs sick leave.