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STATE EMPLOYEE MAY ACCUMULATE VACATION LEAVE  
EARNED—UNUSED VACATION LEAVE—§§121.161, 2113.04, R.C.

SYLLABUS:

1. 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, and in case of the death of a state employee the monetary value of all such unused vacation leave, if not exceeding \$300.00, should be paid in accordance with Section 2113.04, Revised Code, and if exceeding \$300.00, to his estate.

2. Where a state employee was separated from the state service without being paid the compensation due him under Section 121.161, Revised Code, as effective November 4, 1959, for accumulated vacation leave to his credit at the time of separation, the employing authority may, if funds are available for the purpose, make such payment subsequent to the time of separation.

Columbus, Ohio, July 25, 1960

Hon. James T. Welch, Director, Department of Personnel  
Ohio Departments Building, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Your opinion is respectfully requested on the following two questions:

“(1) May payment made under the provisions of 2113.04 of the Revised Code to the survivor of a public employee include payment for any amount of earned but unused vacation leave to

which the employee himself would have been entitled, under 121.161 of the Revised Code, as amended in 1959, upon separation from the service; or is such payment limited to the equivalent of one year's vacation?

“(2) If a state employee is separated from the service, not for cause, after service of more than one year, but the appointing authority fails, presumably through oversight, to make payment for earned but unused vacation leave, as provided under 121.161 of the Revised Code, may a payroll be prepared subsequent to his termination for such vacation payment?”

Section 121.161, Revised Code, so far as here pertinent, reads:

“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 services, 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 meritorious 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.

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“In 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.” (Emphasis added)

Under this section of law a person with one year's service is entitled to two calendar weeks of leave with pay each year and a person with fifteen years service is entitled to three calendar weeks of leave with pay each year. When an employee is separated from the state service he is entitled to compensation for the pro-rated portion of *any* earned, but unused vacation leave to his credit at the time of separation.

Your first question asks whether compensation on separation (caused by death in this case) is for all "earned but unused vacation leave" accumulated by the employee during his entire state service or whether such compensation is limited to the equivalent of one year's vacation.

In Opinion No. 6580, Opinions of the Attorney General for 1956, page 385, the first paragraph of the syllabus reads:

"1. The paid vacation leave for state employees for which provision is made in Section 121.161, Revised Code, may not be accumulated as a matter of right, but any such unused leave may be considered by the director of the department concerned in granting extensions of current leave in special and meritorious cases as provided in this section. Employees in the bureau of unemployment compensation are 'state' employees within the meaning of this section."

Section 121.161, Revised Code, as interpreted in the 1956 opinion, then read:

"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 full pay. Employees having fifteen or more years of service with the state are entitled to three calendar weeks of such leave.

"In special and meritorious 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.

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

Referring to the section as it then read, it is stated at page 388 of that opinion:

"In the first paragraph in this section provision is made for stated period of 'vacation leave with full pay.' This term is so plain in meaning as to permit no interpretation otherwise than

as providing for (1) an actual absence from work, and (2) full pay for such period of actual absence. It certainly contains no implication of any provision for an extra money payment to an employee in the event he should fail to avail himself of this vacation privilege.

“Moreover, it will be noted that each such employee ‘is entitled, *during each year,*’ to this privilege. This quite plainly implies that he is not so entitled to the privilege at any time other than during each year following the initial year of service. Hence, it must be concluded that there is no authority in this section for an accumulation of leave over a period of years in the case of employees who fail ‘during each year’ to avail themselves of the privilege of absence with full pay.”

Since the issuance of Opinion No. 6580, *supra*, in 1956, Section 121.161, Revised Code, was amended to read as set forth at the outset of this opinion (Amended Substitute House Bill No. 208 of the 103rd General Assembly, effective November 4, 1959.) These amendments have definitely changed the effect of the section.

Where the section previously did not contain a provision for an extra money payment to an employee in the event he should fail to take his vacation, it presently specifically provides that an employee upon separation, is entitled to compensation for *any* earned, but unused vacation leave. The section further states that “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*. Thus, under the present law, there is specific authority for an accumulation of leave over a period of years in the case of employees who fail “during each year” to avail themselves of the privilege of leave with full pay.

Section 2113.04, Revised Code, referred to in your letter and in Section 121.161, *supra*, reads in part:

“Any employer, including the state or a political subdivision, at any time not less than thirty days after the death of his or its employee, may pay all wages or personal earnings due to such deceased employee to: (A) the surviving spouse (B) any one or more of the children eighteen years of age or older or (C) the father or mother of the deceased employee, preference being given in the order named, without requiring letters testamentary or letters of administration to be issued upon the estate of such

deceased employee, *where such wages or personal earnings do not exceed three hundred dollars*. The payment of such wages or personal earnings is a full discharge and release to the employer from any claim for such wages or personal earnings. \* \* \*"  
(Emphasis added)

It will be noted that the distribution under this section is made only where the amount involved does not exceed three hundred dollars. Where the amount involved is in excess of that amount it is to be paid to the estate of the employee (Section 121.161, *supra*).

Answering your first question, therefore, under the provisions of Section 121.161, Revised Code, a state employee may accumulate vacation leave earned, but not used during his state service, and in case of the death of a state employee the monetary value of all such unused vacation leave, if not exceeding \$300.00, should be paid in accordance with Section 2113.04, Revised Code, and if exceeding \$300.00, to his estate.

Coming to your second question, Section 121.161, *supra*, specifically gives an employee who is separated from state service (not for cause) the right to compensation for the prorated portion of any earned, but unused vacation leave to his credit at time of separation. Thus, where such compensation is due a former employee, it is a valid obligation of the employing authority and, providing that funds are available for that purpose, may be paid subsequent to the date that such employee was separated from the state service.

Regarding funds being available, I might note that funds available under the presently existing appropriation act, Amended Substitute House Bill No. 831 of the 103rd General Assembly, may be used to pay accumulated vacation leave of an employee who was separated from the state service on or after November 4, 1959. As this act is effective only until July 1, 1961, however, any such payments made after that date must be based on further appropriations of funds by the legislature.

Answering your specific questions, it is my opinion and you are advised:

1. 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, and in case of the death of a state employee the monetary value of all such unused vacation leave, if not

exceeding \$300.00, should be paid in accordance with Section 2113.04, Revised Code, and if exceeding \$300.00, to his estate.

2. Where a state employee was separated from the state service without being paid the compensation due him under Section 121.161, Revised Code, as effective November 4, 1959, for accumulated vacation leave to his credit at the time of separation, the employing authority may, if funds are available for that purpose, make such payment subsequent to the time of separation.

Respectfully,

MARK McELROY

Attorney General