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1. VACATION LEAVE, PAID—STATE EMPLOYEES—MAY NOT BE ACCUMULATED AS A MATTER OF RIGHT—UNUSED LEAVE MAY BE CONSIDERED BY DIRECTOR OF DEPARTMENT IN GRANTING EXTENSIONS OF CURRENT LEAVE IN SPECIAL AND MERITORIOUS CASES—EMPLOYEES IN BUC ARE “STATE” EMPLOYEES—SECTION 121.161 RC.
2. NO PROVISION IN LAW FOR COMPENSATION OF STATE EMPLOYEES IN MONEY FOR UNUSED VACATION LEAVE—IN CASE OF DEATH MONEY PAYMENT WITH RESPECT TO UNUSED VACATION LEAVE TO WHICH EMPLOYEE ENTITLED IN YEAR OF DEATH SHALL BE MADE—PAYMENT TO SURVIVING SPOUSE, CHILDREN EIGHTEEN YEARS OF AGE OR OLDER, PARENTS OR TO ESTATE—SECTION 2113.04 RC.

## SYLLABUS:

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.

2. There is no provision in law for the compensation of state employees in money for unused vacation leave except that in the case of the death of any such employee a money payment with respect to unused vacation leave to which such employee was entitled in the year of his death shall be made, as provided in Section 121.161, Revised Code, to his surviving spouse, his children eighteen years of age or older, or his parents, as provided in Section 2113.04, Revised Code, or to his estate.

Columbus, Ohio, May 10, 1956

Hon. Carl W. Smith, Chairman, Civil Service Commission of Ohio  
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Mr. JFE, Employment Security Supervisor II, salary \$460.00 a month, Bureau of Unemployment Compensation, died on December 10, 1955. A payroll for ten days, from December 1, 1955, to December 10, 1955, was submitted PLUS 66½ days in the amount of \$986.77 for "unused vacation leave."

"In explanation the following letter was submitted under date February 14, 1956:

"Ohio State Civil Service Commission  
Ohio Departments Building, Columbus 15, Ohio

"Gentlemen:

"In line with a telephone request of February 13 made by your Chief Clerk, Mr. EW, we submit the data to substantiate the 66½ days' leave shown on the payroll for JFE, deceased. This payroll, we understand, is now in your hands.

"This statement is prepared to reflect Mr. E's unused vacation by years, with an unliquidated accrual at time of death of 66½ days.

1946—1½ days	
1947—12 days	..... 12/31/47 balance—13½ days
1948—12 days	..... 12/31/48 balance—25½ days
1949—12 days	..... 12/31/49 balance—37½ days

1950—12 days	.....	12/31/50 balance—49½ days
1951— 9 days	.....	12/31/51 balance—58½ days
1952— 8 days	.....	12/31/52 balance—60 days maximum. Lost 6½ days
1953—8½ days	.....	12/31/53 balance—60 days maximum. Lost 8½ days
1954—8¾ days	.....	12/31/54 balance—60 days maximum. Lost 8¾ days
1955—6½ days	.....	Not liquidated at date of death'

“Please advise us (1) whether vacation leave may be accumulated; (2) if so, whether vacation time may be compensated for in case the vacation leave is not taken.”

In Opinion No. 831, Opinions of the Attorney General for 1946, p. 230, it was held:

“1. Section 154-20, General Code, has no application employees of the Bureau of Unemployment Compensation.

“2. The Administrator of the Bureau of Unemployment Compensation has the legal power to define the working hours of the employees of the Bureau.”

The conclusion in that opinion was based on the language in former Section 154-20, General Code, relative to hours of service and vacation leave, which limited the provisions of that section to “all employees in the several departments of the state service \* \* \*.” By the enactment of Section 121.161, Revised Code, effective October 10, 1955, the statutory provision relative to paid vacation leave were extended to apply to “each full-time state employee.” The law upon which the 1946 opinion was based is thus clearly distinguishable from that applicable in the instant case, and the ruling therein cannot now be regarded as a proper statement of the law in the matter of paid vacations in the case of employees in this bureau.

It may properly be observed at this point also that employees of the bureau must be considered “state employee(s),” and so fully amenable to the general statutory provisions relative to compensation and paid leaves of absence, without regard to the circumstances that funds for personal service in the bureau are the subject of federal grants to the state at periodic intervals. This is true for the reason that such funds, when received by the state, become state funds and can thereafter be disbursed only as provided by state law. See Opinion No. 1455, Opinions of the Attorney General for 1952, p. 370.

The statute presently applicable to vacation leave of state employees, and to payment with respect to "unused vacation" in case of the death of any such employee, is Section 121.161, Revised Code. This section 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, 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."

The precise question here raised is the meaning of the expression "unused vacation leave to the credit of any such employee."

In the first paragraph in this section provision is made for stated periods 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.

In reaching this conclusion I do not mean to suggest such employees may not, in any circumstances, be given any special consideration in those cases where for good cause there has been a failure currently to use vacation leave. It will be noted in this connection that Section 121.161, Revised Code, provides in part:

“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.”

Under this provision I entertain no doubt of the authority of the director of the department concerned to take into consideration the extent to which an employee has failed to exercise the vacation privilege in prior years, and currently to extend the period of paid vacation in such amount as he deems reasonable. Such extension is, however, in the ordinary case, a matter of discretion on the part of the director concerned, and cannot be claimed as a matter of right by the employee. Nor is there any authority, on the part of the director, to “compensate” such employee for such unused vacation in any way other than by such current extension of leave; and certainly no authority to “compensate” therefor by a payment in money over and above his fixed salary.

In the special situation here involved, where the administrator had promulgated a personnel policy, under the statutes in existence prior to October 10, 1955, as interpreted in the 1946 opinion, *supra*, permitting accumulation of leave in amounts not in excess of sixty days, it could be argued with some force that leave so accumulated prior to that date could be claimed by the employees concerned as a matter of right. The resolution of this question is not necessary, however, in the case at hand although it may be observed in passing that even if such claim of right were recognized it would merely permit the claimant to *use* such leave in subsequent years, rather than to be paid therefor in money at the termination of employment, whether by death or otherwise. This is true for the reason that the “death benefit” set out in the statute effective on October 10, 1955, cannot be given any retroactive effect. By this enactment the bureau employees first became subject to the provisions of Section 121.161, Revised Code, and the death benefit provision therein could thus apply to them only with respect to unused vacation leave which had been placed “to the (their) credit” under the provisions of that section, i.e., prospectively from the date of enactment.

As to the leave "accumulated" under the bureau's personnel policy prior to October 10, 1955, I am informed that no provision was made therein for any such payment upon an employee's death or separation from the service for other cause. Any "rights" with respect thereto which survived the statutory change of October 10, 1955, would not, therefore, include such death or separation payment.

In this situation it will be seen that the expression "unused vacation leave to the credit of any such employee" as used in Section 121.161, Revised Code, can have reference only to the unused portion of the leave to which the deceased employee was "entitled," as a matter of statutory right, "during" the year in which death occurred. Thus the maximum "unused" leave which may at any time be deemed "to the credit" of a deceased employee at the date of death is two, or three, calendar weeks, depending upon the extent of his prior service with the state.

A further word may be in order relative to your question on whether leave may be "accumulated." It will be seen that Section 121.161, supra, provides that state employees, after one year of service, are "entitled" to stated amounts of paid leave "during" each year thereafter. Since no period "during" such year is specified within which such leave must be taken, it must be concluded that it can be taken at any time in such year. Thus there is no necessity under the statute that leave be "accumulated" at a particular rate per month "during" the year in which the employee is "entitled" to it. In short, following such initial year of service, it is legally possible for an employee to use his paid leave immediately, without "earning" or "accumulating" it during the then current year.

Accordingly, in specific answer to your inquiry, it is my opinion that :

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.

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vacation leave to which such employee was entitled in the year of his death shall be made, as provided in Section 121.161, Revised Code, to surviving spouse, his children eighteen years of age or older, or his parents, as provided in Section 2113.04, Revised Code, or to his estate.

Respectfully,

C. WILLIAM O'NEILL

Attorney General