OPINION NO. 74-021

Syllabus:

1. The Chief of the Division of Mines, whose duties are prescribed by statute and require the independent exercise of governmental functions, is an officer of the State.

2. One who retires from the office of Chief of the Division of Mines is not entitled to be paid for unused sick leave which he had accumulated as an employee prior to his appointment as an officer (Opinion No. 73-104, Opinions of the Attorney General for 1973, approved and followed); he may, however, be paid for such vacation leave as he had accumulated, prior to becoming an officer, at his last rate of pay as an employee.

3. The Chief of the Division of Mines, being an officer of the State, is not entitled to step increases during his term in that office. Opinion No. 73-131, Opinions of the Attorney General for 1973, approved and followed.

To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General; March 8, 1974

Your request for my opinion states that the Chief of the Division of Mines in the Department of Industrial Relations recently retired at the conclusion of his six-year term. Prior to that term he had been employed by the state and had accrued, but not used, 720 hours of sick leave and 160 hours of vacation leave. Your letter, which encloses the research file of your office, continues as follows:

"* * * * * * * * *

"Although the research report points out a number of reasons why the Chief of the Division of Mines might be considered a public employee, there are other reasons why he should instead be treated as a public officer. For example, he takes an oath of office and serves a fixed term of six years. Many of his powers are established by Chapter 4151 R.C. and are fully independent of those of the Director of Industrial Relations, who is his nominal superior. Under Section 4151.04 R.C., he is not subject to removal in the same manner as are other state employees.

"The resolution of this person's civil service status may affect his right to receive the aforementioned sick leave and vacation benefits, and it may affect his right to salary increases granted by the General Assembly during this six-year term of service. For these reasons, I respectfully request your opinion on the following questions:

"'1. Is the Chief of the Division of Mines, appointed pursuant to Section 4151.04 R.C., an officer of the State of Ohio?

"'2. Is an officer of the state, upon retirement as such, eligible to receive cash payments for unused sick leave and vacation time which was accrued prior to his appointment as an officer?

"'3. Does Article II, Section 20, of the Ohio Constitution forbid in-term civil service step increases for a state officer even though the step increase schedule is enacted prior to the commencement of his term?'"

(1) The distinction between public officers and public employees has been the subject of numerous court decisions and opinions of this office. The general rule was stated by the

Supreme Court in State, ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 159-161 (1917), in the following language:

> "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.
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> "* * *It is no longer an open question in this state that 'to constitute a public office, * * *it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law.' State, ex rel. Attorney General, v. Jennings, 57 Ohio St., 415; State, ex rel. Armstrong, v. Halliday, Aud.,61 Ohio St., 171; Palmer v. Ziegler, 76 Ohio St., 210, and State, ex rel., v. Brennan, 49 Ohio St., 33.
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> "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 State, ex rel. Hogan, Atty. Genl., 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."

In Opinion No. 3548, Opinions of the Attorney General for 1963, one of my predecessors, after analyzing the case law, said:

> "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."

See also, State, ex rel. Herbert v. Ferguson, 142 Ohio St. 496, 501-503 (1944); Opinion No. 73-131, Opinions of the Attorney General for 1973; Opinion No. 73-104, Opinions of the Attorney General for 1973; Opinion No. 71-071, Opinions of the Attorney General for 1971; Opinion No. 65-150, Opinions of the Attorney General for 1965.

Whether the Chief of the Division of Mines is an "officer" or an "employee" depends on the language of several sections of Chapters 121. and 4151. of the Revised Code which are, in part, conflicting. The pertinent sections of Chapter 121. first appeared in the Administrative Code of 1921 (109 Ohio Laws, 105, 107, secs. 154-6, 154-7, 154-8), and they remain substantially the same.

R.C. 121.04, formerly G.C. 154-6, now reads in part as follows:

"Offices are created within the several departments as follows:

"* * * * * * * * *

"In the department of industrial relations:

Chiefs of divisions as follows:
Workshops and factories;
Bedding inspection;
Elevator inspection;
Boiler inspection;
Examiners of steam engineers;
Labor statistics;
Mines;
Minimum wage.

"* * * * * * * * *."

(Emphasis added.)

R.C. 121.06, formerly G.C. 154-7, reads as follows:

"The officers mentioned in sections 121.04 and 121.05 of the Revised Code shall be appointed by the director of the department in which their offices are respectively created, and shall hold office during the pleasure of such director."

And R.C. 121.07, formerly G.C. 154-8, provides in part as follows:

"The officers mentioned in sections 121.04 and 121.05 of the Revised Code shall be under the

direction, supervision, and control of the directors of their respective departments, and shall perform such duties as such directors prescribe.

* * * * * * * * *

On the other hand, R.C. 4151.04, which was not enacted until 1941 (119 Ohio Laws, 457, 461-462, G.C. 898-5), gives to the Governor the authority to appoint, and to remove, the Chief of the Division of Mines. The Section provides in part as follows:

"The division of mines shall be administered by the chief of the division of mines. Upon the expiration of the term of office of the chief, or in case of any vacancy in said office, the governor shall appoint a chief for a term of six years, in accordance with section 4151.05 of the Revised Code. The governor may remove the chief for inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office, giving to the chief a copy of the charges against him and affording him an opportunity to be publicly heard in person or by counsel in his own defense upon not less than ten days' notice. * * *"

The mere fact that the Chief of the Division of Mines is described in all the above Sections as an "officer" does not, in itself, establish that status. Opinion No. 56, Opinions of the Attorney General for 1963. On the other hand, the fact that he is, to some extent, under the general control of the Director of the Department of Industrial Relations, does not necessarily make him an "employee." State, ex rel. Milburn v. Pethel, 153 Ohio St. 1, 2-3 (1950). The decisive question is, as the Supreme Court said in the quotation from the Landis case, supra, whether his duties are prescribed by statute, and whether their performance requires the exercise of independent governmental functions. See State, ex rel. Giamarco v. Smith, 110 Ohio App. 65, 67-68 (1959). I am satisfied, upon consideration of the legislative history of the development of the position of Chief of the Division of Mines, that the General Assembly intended its occupant to be a state "officer."

The position first appeared in 1874 under the title of Mine Inspector when the General Assembly enacted R.S. 290 (71 Ohio Laws, 21). That Section provided for appointment by the Governor with the advice and consent of the Senate; for a specific term of four years; for removal by the Governor in case of neglect or malfeasance; for the taking of an oath of office and the giving of a bond; and that the Inspector should give full time to his office and see to it that the mine laws were properly enforced.

When the Industrial Commission was created in 1913, the office of Mine Inspector was abolished and its powers were transferred to the Commission. 103 Ohio Laws, 95. The position of Chief of the Division of Mines first appeared in the Administrative Code of 1921, the occupant to be appointed by, and to be subordinate to, the Director of the Department of Industrial Relations. 109 Ohio Laws, 95; G.C. 154-6 and 154-7. However, the duties of the position seems to have been mainly ministerial at that time, since the Industrial Commission retained the authority to enforce the mining laws. See, e.g., former G.C. 906, 907, 914. In a recodification of the mining laws in 1931, the General Assembly restored to the Chief of the Division of Mines most of the au-

thority originally exercised by the Mine Inspector from 1874 to 1913. 114 Ohio Laws, 603-677. But the Director of the Department of Industrial Relations was given general supervision over the mining laws through the Chief (114 Ohio Laws, 604-605, 609, G.C. 898-5 and 898-22), and he retained the authority to appoint the Chief. Finally, in the 1941 recodification, the authority to appoint, and to remove, the Chief of the Division of Mines was restored to the Governor. See R.C. 4151.04, formerly G.C. 898-5, supra. The general appointive power granted to the Director of the Department of Industrial Relations under R.S. 121.06, supra, has been clearly revoked by R.C. 4151.04 which is both specific and later in time. R.C. 1.51 and 1.52.

The permission or approval of the Chief of the Division of Mines before an individual may pursue a certain course of activity is necessary in many situations. See, R.C. Chapters 1509., 4151., 4153., 4155., 4157., 4161. In Opinion No. 784, page 448, Opinions of the Attorney General for 1949, one of my predecessors was also of the opinion that the Chief exercised a portion of the sovereignty of the state independently of any other officer. The Opinion says, at page 451:

> "From reading the mining laws I am greatly impressed with the wide field of responsibilities and authority placed upon the Chief, Division of Mines. The administration and enforcement seems to be placed entirely upon the Chief, Division of Mines. The mining laws are written in great detail and they seem to provide that the Chief, Division of Mines, can refuse to allow methods to be used which in his opinion are contrary to the interests of public health and safety."

Although R.C. 121.07 vests the general control and supervision of the Chief of the Division of Mines in the Director of Industrial Relations, the General Assembly has, by subsequent acts, granted the Chief independence in making many decisions relating to the public health and safety. In the light of this legislative history, I conclude that the Chief of the Division of Mines is an officer of the State.

(2) You also ask whether an officer of the State, upon retirement as such, is eligible to receive cash payments for unused sick leave and vacation time which had accrued to his credit prior to his appointment as an officer. I note, from the material in your research file, that the Chief of the Division of Mines did retire from that position, and that he was not credited with either sick leave or vacation time while he held the office.

I recently held that a member of the Board of Review of the Bureau of Employment Services was an officer of the State, and that he was not entitled, upon retirement, to be paid for unused sick leave which he had accumulated as an employee prior to his appointment to the Board. Opinion No. 73-104, Opinions of the Attorney General for 1973. That opinion clearly covers the sick leave aspect of your question. In pertinent part it said:

> "The question remains whether the Board member has lost the 720 hours of sick leave which had accrued to his credit when he resigned as a referee in order to accept appointment as a member of the board.

"As noted previously, R.C. 143.29 provides in part:

"* * *The previously accumulated sick leave of an employee who has been separated from the public service may be placed to his credit upon his re-employment in the public service, provided that such re-employment takes place within ten years of the date on which the employee was last terminated from public service. * * * (Emphasis added.)

"And R.C. 143.291, also set forth above, provides in part:

"A state employee * * * may elect, at the time of retirement from active service * * * to be paid in cash for one-fourth of the value of his accrued but unused sick leave credit. Such payment shall be based on the employee's rate of pay at the time of retirement. * * * (Emphasis added.)

"The language of these two Sections seems clearly to indicate an intent on the part of the General Assembly to restrict the payment of accrued sick leave to retiring public employees. A public officer, of course, does not accrue sick leave since he has no need for it. He is paid his salary regardless of absence from his office. State, ex rel. Clinger v. White, supra; State, ex rel. Wilcox v. Wolman, supra. But under R.C. 143.29 a public employee, who leaves the public service, loses all accrued and unpaid sick pay unless he return to the public service within ten years. And under R.C. 143.291 he must be a public employee at time of retirement in order to receive a cash payment of unused sick leave, since the payment 'shall be based' on his salary as an employee at the time he retires. In the case you present, the officer did not return to public employment within ten years as required by R.C. 143.29. And he is retiring from public office, not from public employment as required by R.C. 143.291.

"It may be urged that this officer never was 'separated from the public service', in the language of R.C. 143.29 when his status changed from employee to officer, and that he is still entitled to his accrued and unused sick leave. I do not think that this a reasonable interpretation of the legislation. When R.C. 143.29 and 143.291 are read as a whole, the phrase 'public service' seems to refer only to those who have the status of public employees. When the member of the Board became an officer, he left the 'public service', as that term is used in these two Sections. He did not return to it within ten years, and he is retiring as an officer, not as an employee."

I conclude, therefore, that, since the individual involved here was separated from the state service as an employee when he became Chief of the Division of Mines, and since he retired as an officer of the State, he is not entitled to payment of any of the sick

leave he had accumulated as an employee. See also Opinion No. 3548, Opinions of the Attorney General for 1963, page 68, and Opinion No. 3425, Opinions of the Attorney General for 1962.

There is a difference, however, between the statutes governing an employee's right to accrued and unused sick leave, and the statute which governs his right to accrued and unused vacation leave. The right to payment of such unused sick leave becomes fixed upon the employee's retirement as an employee, and the individual here retired as an officer of the State. R.C. 143.29 and 143.291. The right to payment of unused vacation leave, on the other hand, becomes fixed upon the employee's separation from state service as an employee. In an opinion dealing with an earlier version of the controlling statute, R.C. 121.161, the then Attorney General said (Opinion No. 1575, Opinions of the Attorney General for 1960):

> "* * *Section 121.161, supra, specifically gives an employee who is separated from state service * * * 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."

See also, Opinion No. 20, Opinions of the Attorney General for 1963, and Opinion No. 40, Opinions of the Attorney General for 1963.

After several amendments R.C. 121.161 now reads in pertinent part as follows:

> "* * * * * * * * *
>
> "Upon separation from state service an employee shall be entitled to compensation at his current rate of pay for all lawfully accrued and unused vacation leave to his credit at the time of separation up to three years. * * *"

On January 30, 1967, however, when the individual concerned became Chief of the Division of Mines, the pertinent part of the Section read as follows (131 Ohio Laws, 17):

> "* * * * * * * * *
>
> "Upon separation from state service, * * * an employee shall be entitled to compensation, at his current rate of pay, for the pro-rated portion of any earned but unused vacation leave accrued to his credit at time of separation, and in addition shall be compensated for any unused vacation leave accrued to his credit, with permission of the appointing authority, for the two years immediately preceding the last anniversary date of employment.
>
> "* * * * * * * * *"

The Section also required at that time that vacation leave be used within the year it accrued; only in special and meritorious

cases could an appointing authority permit an employee to accumulate such leave up to two years.

I conclude, therefore, that, when on January 30, 1967, the Chief was separated from service as an employee by becoming a State officer, his right to accrued and unused vacation leave became fixed under R.C. 121.161 as it read at that date. He is entitled to compensation, at his then current rate of pay, for the prorated portion of unused vacation pay accrued during his last year as an employee, plus such unused vacation leave as he had been permitted to accumulate during the previous two years. I take it, from your letter and from the material in the research file, that this amounts to 160 hours.

The language of Opinion No. 72-013, Opinions of the Attorney General for 1972, which held that a 1967 amendment to R.C. 121.161 resulted in the cancellation, after July 1, 1968, of all vacation leave in excess of the accrual of two years, is not controlling here. The present Section, as set forth above, now permits an accrual up to three years. Furthermore, that Opinion was based in part on the fact that employees who had an accrual in excess of two years had an opportunity to use up the excess prior to the cutoff date of July 1, 1968. The Chief of the Division of Mines had no such opportunity since he was already a State officer when the 1967 amendment became effective.

(3) You ask finally whether Article II, Section 20, of the Constitution of the State of Ohio forbids in-term civil service step increases for a State officer, even though the step increase schedule is enacted prior to the commencement of his term.

Article II, Section 20, of the Constitution provides as follows:

> "The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

It has frequently been held that this Section prohibits the enactment of any legislative increase in the salary of an officer during the term which he is then serving. See, e.g., State, ex rel. Wallace v. Celina, 29 Ohio St. 2d 109 (1972); State, ex rel. Edgecomb v. Rosen, 29 Ohio St. 2d 114 (1972); Opinion No. 72-059, Opinions of the Attorney General for 1972. However, the Section does not prohibit an officer from receiving, during his term, automatic periodic raises embodied in a statute which became effective prior to the beginning of such term. State, ex rel. Mack v. Guckenberger, 139 Ohio St. 273 (1942); State, ex rel. Edgecomb v. Rosen, supra; Opinion No. 5199, Opinions of the Attorney General for 1955.

On January 30, 1967, when the individual involved became Chief of the Division of Mines, R.C. 143.09 (now R.C. 124.14) provided as assignment of all positions and offices in the State civil service pay ranges, and R.C. 143.10 (now R.C. 124.15) established a table of rates and provided for automatic step increases. 131 Ohio Laws, 92-126. The Chief of the Division of Mines was described in R.C. 143.09 as (131 Ohio Laws, 108):

"7022 Director, Mine Safety"

However, in 1969 the General Assembly made extensive revisions in R.C. 143.09, among which was the following (133 Ohio Laws, 834):

"7022 Director, Mine Safety (S)"

The significance of the symbol (S) is explained in R.C. 124.15(J) as follows:

> "* * *An officer * * *serving in a classification designated by a letter (S) in division (A) of Section 143.09 of the Revised Code shall be paid at the rate established for step one of the range and shall not receive step advancements. * * * (Emphasis added.)

In a recent opinion in response to a very similar question, Opinion No. 73-131, Opinions of the Attorney General for 1973, I made the following comment as to the significance of the statutory symbol (S):

> "This was a clear recognition by the General Assembly that the members of the Board, being state officers, could not receive a raise in pay during their terms. Furthermore, in establishing the new pay rates by amendment of R.C. 143.10(A), Am. Sub. S.B. 31 speaks only of 'employees.' The conclusion must be that the General Assembly did not intend the members of the Board to receive the raise. A statute must, of course, be so interpreted as to save it from constitutional infirmities wherever possible. Wilson v. Kennedy, 151 Ohio St. 485, 492 (1949); State, ex rel. Mack v. Guckenberger, 139 Ohio St. 273, 277 (1942)."

I note that R.C. 124.15(A), formerly R.C. 143.10(A), has always spoken, at least since 1965, in terms of "employees" only. 131 Ohio Laws, 123.

I conclude, therefore, that the Chief of the Division of Mines was not entitled to step increased during his term in that office. It appears to me from an examination of the material in the research file that he has never actually received step increases, and that he retired at step one.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. The Chief of the Division of Mines, whose duties are prescribed by statute and require the independent exercise of governmental functions, is an officer of the State.

2. One who retires from the office of Chief of the Division of Mines is not entitled to be paid for unused sick leave which he had accumulated as an employee prior to his appointment as an officer (Opinion No. 73-104, Opinions of the Attorney General for 1973, approved and followed); he may, however, be paid for such vacation leave as he had accumulated, prior to becoming an officer, at his last rate of pay as an employee.

3. The Chief of the Division of Mines, being an officer of the State, is not entitled to step increases during his term in that office. Opinion No. 73-131, Opinions of the Attorney General for 1973, approved and followed.