

OPINION NO. 71-078

Syllabus:

The health commissioner of a city health district cannot cumulate and receive compensation for earned but unused vacation time, in the absence of a specific municipal civil service regulation to that effect.

To: John J. Malik, Jr., Belmont County Pros. Atty., St. Clairsville, Ohio
By: William J. Brown, Attorney General, November 18, 1971

Your request for my opinion reads as follows:

"Mr. E. L. Scheehle is commissioner of the Martins Ferry City Health District, having been so employed on June 30, 1938. From June 30, 1959, to June 30, 1965, Mr. Scheehle informs me that he did not use 16 weeks of vacation to which he was entitled. He is now seeking to be paid for the unused vacation.

"Employees of the Martins Ferry City Health District receive their normal salary during their vacation period. Mr. Scheehle received his regular annual salary during the periods that he did not use vacation time due him.

"The rules and regulations of the City Health District are silent as to whether or not Mr. Scheehle is entitled to be paid for the unused vacation time. Codified Ordinance 149.01 of the City of Martins Ferry says, 'All full-time employees of the City shall receive vacations, with pay, in accordance with the following tables. Thereafter vacations are awarded depending upon the length of service in the City. City ordinances do not shed any light on the question.

"My questions are as follows:

"1. Is Mr. Scheehle entitled to be paid for the unused vacation time?

"2. If the answer to question No. 1 is yes, is he entitled to be paid according to the salary

schedule in effect at the time he did not use vacation time, or is he entitled to be paid under his present salary schedule?"

In order to answer your request, it must first be determined which legislative or administrative agency controls the employees of the Martins Ferry City Health District. In State, ex rel. Mowrer v. Underwood, 137 Ohio St. 1 (1940), it was held that the city health districts, established by Section 3709.01, Revised Code, are separate political subdivisions, independent of the cities in which they are located. It was stated in that case, at pages 4 and 5, as follows:

"In dividing the state into health districts, the General Assembly, in the same act, also repealed the then existing statutes which authorized municipalities to establish and appoint boards of health as part of their local governments. [Hughes Act, 108 Ohio Laws, 236 et seq. (1919), as amended by the Griswold Act, 108 Ohio Laws, 1085 et seq. (1919).] This, in our opinion, evidences a legislative intent to withdraw from municipalities the powers of local health administration previously granted to them, and to create in each city a health district which is to be a separate political subdivision of the state, independent of the city with which it is coterminus [sic], and to delegate to it all the health powers thus withdrawn from municipalities. * * *

This type of legislative action withdrawing power previously granted to cities, did not contravene constitutional provisions for city home-rule. Board of Health v. State, 40 Ohio App. (1931). In accordance with the Underwood decision, supra, David Davies v. Sensenbrenner, 79 Ohio L. Abs. 33 (1957), appeal dismissed, 168 Ohio St. 356, held city health districts to be agencies of the state government and governed by state laws. 26 O. Jur. 2d Section 12, indicates further that a board of health of a city health district is not subject to the jurisdiction of the municipality. It states:

"The board of health of a city health district constitutes a governmental agency separate and distinct from such municipality and is not in any way subject to the jurisdiction of the municipality with which the district is co-extensive, except that appointments of members of the board are made by the municipal authorities."

However, although the city health district derives its jurisdiction and powers entirely from the state, the General Assembly has preserved certain ties between the district and the municipality with which it coexists. Thus, the controlling body of the district, the board of health, is appointed by the mayor and con-

firmed by the city council. Section 3709.05, Revised Code. The duties and salaries of the employees of the district are determined by the board of health. Section 3709.16, Revised Code. And, of critical importance for present purposes, the civil service rights of the employees of the city health district are determined by the municipal civil service commission. Section 143.30, Revised Code, provides, in pertinent part, as follows:

"The mayor or other chief appointing authority of each city in the state shall appoint three persons * * * who shall constitute the municipal civil service commission of such city and of the city school district and city health district in which such city is located. * * * Such municipal civil service commission shall prescribe * * * rules * * * for the classification of * * * all the positions in the city health district; * * * Said municipal civil service commission shall exercise all other powers and perform all other duties with respect to the * * * city health district, * * *.

"All persons who are employed by a city school district, city health district, or city health department when a municipal civil service commission having jurisdiction over them is appointed, * * * shall continue to hold their positions until removed in accordance with the civil service laws.

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(Emphasis added.)

See Scotfield v. Strain, 142 Ohio St. 290 (1943), holding that the commissioner of a city health district can only be removed in accordance with the civil service laws of the city.

It follows from the foregoing that the right of a city health commissioner to be paid for unused vacation time depends upon the civil service regulations of the municipality. His rights are to be distinguished from those state employees who come under the jurisdiction of the state civil service commission, and who are specifically given the right to be paid for unused vacation time up to two years at time of separation. Section 121.161, Revised Code. One of my predecessors has held that this Section does not apply to a city health commissioner. Opinion No. 1302, Opinions of the Attorney General for 1960.

You state that the regulations of the city health district and the municipal ordinances are silent on the question of compensation for unused vacation time. Where no provision exists for such compensation, the consensus seems to be that there is no right to be paid for unused vacation time. 56 C.J.S. Section 97 provides as follows:

"Generally, and in the absence of a special agreement as to additional compensation, or of evidence showing an intent to pay it, or of a uniform and notorious custom sufficient to warrant the presumption that the contract was made with reference thereto, an employee cannot recover extra compensation for extra work performed within the scope of his employment even if the extra work is done at the request of the employer. The rule applies to overtime, work on Sundays or holidays, and to work during the vacation period. The presumption is either that the employee volunteers such services or that the salary or other compensation provided for in the contract is intended by the parties to compensate him also for the extra work."

Likewise, 53 Am. Jur. 2d Section 76 states as follows:

"Since the right to pay in lieu of vacation time not taken is basically a right to be paid for overtime, one is not, absent an express or implied agreement, entitled to double compensation for working during a vacation to which he was entitled under full pay. On the other hand, an express agreement to pay salary in lieu of vacation time not taken is clearly enforceable."

Apparently there have been no exceptions in applying this policy to public employees. E. McQuillin, *Municipal Corporations* (3rd ed. 1970), 12.135, states that "[t]he time allowed for vacations may not be cumulated unless the law expressly so provides, * * *."

In specific answer to your question, therefore, it is my opinion, and you are so advised, that the health commissioner of a city health district cannot cumulate and receive compensation for earned but unused vacation time, in the absence of a specific municipal civil service regulation to that effect.