OPINION NO. 70-110

Syllabus:

Hours for which a state employee is compensated, but during which he does not actually work because of sick leave, vacation leave, or the occurrence of a holiday, should not be computed as "work hours" for the purpose of determining the eligibility of said employee for pay at the overtime rate prescribed by Section 143.11, Revised Code.

To: Lloyd Goggin, Vice Pres. for Finance and Business Affairs, Miami University, Oxford, Ohio
By: Paul W. Brown, Attorney General, August 27, 1970

Your request for my opinion regarding Section 143.11, Revised Code, presents, in substance, the following question: Are hours for which a state employee is compensated, but during which he does not actually work because of sick leave, vacation leave, or the occurrence of a holiday, to be computed as "work hours" for the purpose of determining the eligibility of said employee for pay at the overtime rate prescribed by Section 143.-11, Revised Code?

Section 143.11, supra, provides in pertinent part:

> "Forty hours shall be the standard work week for all employees whose salary or wage is paid in whole or in part by the state. When an employee who is paid at an hourly rate of less than four dollars and forty cents is required by an authorized administrative authority to work more than forty hours in any seven day period, he shall be compensated for such time worked, except as otherwise provided in this section, at one and one-half times his regular rate of pay."

The first sentence of Section 143.11, supra, establishes a standard work week of forty hours for all state employees. The second sentence refers only to those employees who are paid at an hourly rate of less than four dollars and forty cents and provides that said employees shall be compensated at the prescribed rate when required to work hours is excess of those scheduled in accordance with the forty hour standard.

As your letter suggests, the term "hours", as employed in the first line of the statute, is subject to two possible interpretations. "Hours" might be read to mean hours which an employee actually works; in which case an employee, in order to qualify for the overtime benefit, must have already rendered forty hours of actual service. However, "hours" might also be interpreted to mean hours for which an employee is compensated; in which case sick leave, vacation leave, or paid holiday time would be computed along with hours of actual service in determining an employee's eligibility for overtime pay.

The term "hours", as it is used in this section, is not defined by statute, nor does research reveal a judicial interpretation as to its operative effect; but an examination of the relevant federal authority indicates that Section 143.11, supra, should be interpreted to mean that an employee must actually render forty hours of service before he qualifies for the overtime benefit.

In Maryland v. Wirtz, 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968), the United States Supreme Court held that the minimum wage and maximum hours amendments to the Fair Labor Standards Act extended coverage to employees of schools and hospitals including those operated by states or their subdivisions upon a finding that such institutions were engaged in interstate commerce. Section 207, Title 29, U.S.C.A., contains the overtime provision of the Fair Labor Standards Act and provides for compensation at one and one-half times the regular rate for employees who are employed for a workweek of longer than forty hours. The federal cases construing this section have uniformly held that an employee must actually work forty hours before he is eligible for compensation at one and one-half times the normal rate. For example, sick leave hours were held not to be included in the forty hour total in Marchant v. Sands, Taylor & Wood Co., D.C. Mass. 1948, 75 F. Supp. 783. Similarly, vacation time was held not to be properly computed in determining overtime eligibility in Sawyer v. Selvig Mfg. Co., D.C. Mass. 1947, 74 F. Supp. 319. It would appear that the same rule should apply to paid holidays.

Although the Maryland v. Wirtz, supra, decision is only applicable to employees of institutions which may be engaged in interstate commerce, it would seem that in the interest of consistency in administering the Fair Labor Standards Act and Section 143.11, supra, both should be given the same construction. An administrative authority will thereby avoid the necessity of determining what is interstate commerce and what is not, and the individual state employees will receive equitable treatment.

Therefore, it is my opinion and you are hereby advised that hours for which a state employee is compensated, but during which he does not actually work because of sick leave, vacation leave, or the occurrence of a holiday, should not be computed as "work hours" for the purpose of determining the eligibility of said employee for pay at the overtime rate prescribed by Section 143.11, Revised Code.