

Note from the Attorney General's Office:

1988 Op. Att'y Gen. No. 88-095 was overruled by
2007 Op. Att'y Gen. No. 2007-012.

OPINION NO. 88-095

Syllabus:

1. For purposes of computing vacation benefits under R.C. 325.19(A), a full-time county employee is entitled to prior service credit for time served as a county law librarian who was appointed and compensated pursuant to R.C. 3375.48.
2. A full-time county employee who served as a part-time county law librarian and who was compensated in yearly lump-sum payments is entitled to service credit for each biweekly pay period during which she actually worked as a county law librarian, regardless of the number of installments in which her compensation was paid. (1982 Op. Att'y Gen. No. 82-055, syllabus paragraph two, approved and followed.)

To: Daniel R. Gerschutz, Putnam County Prosecuting Attorney, Ottawa, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 27, 1988

I have before me your request for my opinion regarding how to characterize prior service as a county law librarian for purposes of determining the vacation benefits due to a county employee. Your letter states the following facts:

On January 1, 1966 through December 31, 1984, and to the present, the employee was the Putnam County Law Librarian. In December of each preceding year, the three trustees of the Putnam County Law Library Association appointed the employee for the next calendar year as the law librarian pursuant to Revised Code 3375.48. The Court of Common Pleas set her salary and it was generally the maximum allowed by statute. In recent years, that has been \$1,000.00 and in prior years it was \$500.00 per year.¹ These sums were paid by the county on the first of December of each year to the employee. No withholding, PERS, or other benefits were withheld or deducted from her check. On April 15, 1985, she became a full time employee of the Probate Court and has requested credit for prior years of service. The County Auditor believes that she was an independent contractor for the years January 1, 1966 through December 31, 1984, and should not be given credit for those years.

Additionally, the Public Employ[ees] Retirement System [PERS] has recently, through their process, given the employee 8.977 years of service credit for her years as County Law Librarian.²

¹ R.C. 3375.48 states that "[i]n counties, where there is not more than one judge of the court of common pleas, the compensation to be paid such librarian shall not exceed the sum of five hundred dollars per annum." There is no statutory limitation on the compensation of the law librarian in counties having more than one common pleas judge. 1955 Op. Att'y Gen. No. 5308, p. 280 (syllabus, paragraph one).

² A letter from the Public Employees Retirement System (PERS) attached to your request indicates that PERS charged the county for contributions due from 1966 through 1984, the period that your employee served as county law librarian. See R.C. 145.47; R.C. 145.48; R.C. 145.483 (establishing employer liability and the amount due when employer fails to withhold required payroll deductions and make the required employer contribution for PERS). I note further that PERS calculates the credit to be given for part-time service subsequent to 1934 by a specific formula set out at R.C. 145.01(T).

....
 It is clear that the employee rendered continuous service throughout the year, although no records were kept of her time. She was required to perform the functions of the law librarian and did so on a somewhat regular basis. The practice of the employee was to come to the library on approximately a weekly basis to supplement the volumes, discard the old books and perform the other functions of her position. (Footnotes added.)

You ask specifically whether years of service, as a county law librarian may be counted for purposes of computing vacation time due to the employee and, if so, how the number of years of credit should be computed.

Vacation benefits accruing to county employees on the basis of prior service are governed by R.C. 9.44 and R.C. 325.19(A). R.C. 325.19(A) states:

Each full-time employee in the several offices and departments of the county service, including full-time hourly-rate employees, *after service of one year with the county or any political subdivision of the state*, shall have earned and will be due upon the attainment of the first year of employment, and annually thereafter, eighty hours of vacation leave with full pay. One year of service shall be computed on the basis of twenty-six biweekly pay periods. A full-time county employee with eight or more years of *service with the county or any political subdivision of the state* shall have earned and is entitled to one hundred twenty hours of vacation leave with full pay. A full-time county employee with fifteen or more years of *service with the county or any political subdivision of the state* shall have earned and is entitled to one hundred sixty hours of vacation leave with full pay. (Emphasis added.)

R.C. 9.44(A) states:

Except as otherwise provided in this section,³ *a person employed*, other than as an elective officer, by the state or any political subdivision of the state, earning vacation credits currently, is entitled to have his *prior service with any of these employers counted as service with the state or any political subdivision of the state*, for the purpose of computing the amount of his vacation leave. (Emphasis and footnote added.)

I note initially that an employee of the Probate Court is considered a county employee for purposes of entitlement to vacation benefits under R.C. 325.19. See R.C. 2101.01 ("in the Revised Code, 'probate court' means the probate division of the court of common pleas"); 1987 Op. Att'y Gen. No. 87-063 (syllabus, paragraph one) ("[e]mployees of a court of common pleas are in the county service for purposes of R.C. 325.19"). Thus the employee in your question is a full-time county employee, currently entitled to receive vacation benefits. Since she was initially employed prior to July 5, 1987, she is now entitled to credit under R.C. 9.44 and R.C. 325.19(A) for any service with the state, county, or any other political subdivision of the state. See 1984 Op. Att'y Gen. No. 84-055, at 2-182 to 2-183 ("in addition to the prior service credit authorized by R.C. 325.19, R.C. 9.44 allows a county employee earning vacation credits currently to include prior service with the state").

³ As amended by Am. Sub. H.B. 178, 117th Gen. A. (1987) (eff. June 24, 1987), R.C. 9.44(B) sets out exceptions to the general rule stated in R.C. 9.44(A). These exceptions, however, are applicable only to persons employed "on or after July 5, 1987." As the individual you have described was hired prior to that date, I need not consider here the effect that the limitations to granting prior service credit under R.C. 9.44(B) have on the operation of R.C. 325.19(A).

I turn now to your first question and examine whether service as a county law librarian can qualify as such prior service. Although both R.C. 9.44 and R.C. 325.19 predicate initial eligibility for vacation benefits on status as an employee who is either working full-time or currently earning vacation, it is not necessary that a person have been either an employee or full-time worker during prior service for purposes of crediting that prior service and determining the amount of vacation due. *See, e.g.,* 1974 Op. Att'y Gen. No. 74-085 (service as a county officer constitutes prior service under R.C. 325.19); 1966 Op. Att'y Gen. No. 66-120, at 2-225 ("[i]f the Legislature had intended to limit the accrual of vacation benefits to periods of full-time service, they could easily have done so by inserting the word 'full-time' in front of the word 'service'"). Nor does R.C. Chapter 325 contain a general definition of the types of positions which constitute "service" for this purpose. In attempting to ascertain the intent of the General Assembly, it is sometimes helpful to compare the language of related statutes. *See, e.g., Lake Shore Electric Ry. Co. v. Public Utilities Commission*, 115 Ohio St. 311, 154 N.E. 239 (1926). R.C. 124.01(A) defines "civil service" for purposes of R.C. Chapter 124 as including "all offices and positions of trust or employment in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof." (Emphasis added.) Although service with subdivisions other than the state is included in the definition of civil service, not all benefits accruing to service with other subdivisions are found in R.C. Chapter 124. I note, in particular, that R.C. 325.19, which provides vacation benefits and holiday pay to county employees, is the counterpart at the county level to R.C. 124.13 which provides vacation benefits and holiday pay to state employees. Thus, while the definition of civil service in R.C. 124.01(A) is not directly applicable to R.C. 325.19 and R.C. 9.44, it is consistent with the overall statutory scheme to use R.C. 124.01(A) for guidance in interpreting these statutes and my predecessors have done so. *See, e.g.,* Op. No. 74-085, at 2-353 (county officers are in county service for purposes of R.C. 325.19 by virtue of their inclusion in the civil service pursuant to R.C. 124.01(A)). I conclude, therefore, that if the county law librarian was in the civil service as defined by R.C. 124.01(A), it follows that she was also "in the service of" the state, county, or a political subdivision and such time may be credited as prior service under R.C. 9.44 and R.C. 325.19.

R.C. 124.11 states:

The civil service of the state and the several counties, cities, civil service townships, city health districts, general health districts, and city school districts thereof shall be divided into the unclassified service and the classified service.

(A) The unclassified service shall comprise the following positions...

....

(7)...

(b) *The library staff of any library in the state supported wholly or in part at public expense.* (Emphasis added.)

The county law librarian is appointed and compensated pursuant to R.C. 3375.48, which states:

The judges of the court of common pleas of any county in which there is a law library association which furnishes to all of the members of the Ohio general assembly, the county officers and the judges of the several courts in the county admission to its library and the use of its books free of charge, upon the appointment by the board of trustees of such association of a person to act as librarian thereof...shall fix the compensation of such persons, which shall be paid from the county treasury.

Although the law library association which operates the library and appoints the librarian is a private entity,⁴ the operation of the law library itself has long

⁴ A county law library association may be formed as a private association or organized as a non-profit corporation pursuant to R.C. 1713.28. *See* 1986 Op. Att'y Gen. No. 86-102, at 2-565.

been recognized as a public function which constitutionally may be supported by public funds. See *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 150-151, 128 N.E.2d 59, 65 (1955) (stating "that the appropriation of public money to a private corporation to be expended for a public purpose is a valid act of the legislative body" and, in support, citing *State ex rel. Pugh v. Sayre*, 90 Ohio St. 215, 107 N.E. 512 (1914), which ordered the county treasurer to pay funds to the privately incorporated law library association for maintenance of the county law library). For support of the law library, the General Assembly has mandated that certain court fines, penalties, and forfeitures be paid to the law library association. See R.C. 3375.50-3375.53; R.C. 733.40; R.C. 4513.35; R.C. 5503.04. See also *State ex rel. Akron Law Library Ass'n v. Weil*, 16 Ohio App. 2d 151, 242 N.E.2d 664 (Summit County 1968) (reviewing and following the body of case law which holds that distribution of funds to county law libraries pursuant to the above statutes is mandatory). The county commissioners are also required to provide suitable rooms, heat, light, and bookcases at county expense. See R.C. 3375.49. See also *State ex rel. Mahoning Law Library Ass'n v. Bd. of Comm'rs*, 53 Ohio St. 2d 56, 372 N.E.2d 349 (1978) (holding board of county commissioners in contempt for failure to comply with order in mandamus to provide more space for a county law library). The county law librarian's salary is similarly required by statute to be paid by the county. R.C. 3375.48. Clearly, a county law library is "supported wholly or in part at public expense."

By its terms, R.C. 124.11(A)(7)(b) applies to "any library supported wholly or in part at public expense." (Emphasis added.) I find no indication that the General Assembly intended to exclude law libraries from the scope of R.C. 124.11(A)(7)(b). The word "any" in contexts similar to that of R.C. 124.11(A)(7)(b) has been construed to mean "every" or "all". See *Wachendorf v. Shaver*, 149 Ohio St. 231, 239-240, 78 N.E.2d 370, 375 (1948) (interpreting the phrase "inhabitants of any territory" in G.C. 3526); *Motor Cargo, Inc. v. Board of Township Trustees*, 52 Ohio Op. 257, 259, 117 N.E.2d 224 (C.P. Summit County 1953) (interpreting the phrase "any public utility" in R.C. 519.21). See generally, *Wachendorf, supra* at 237, 78 N.E.2d at 374, ("general words are to have a general operation, where the manifest intention of the Legislature affords no ground for qualifying or restraining them. Under this rule, where the statute is expressed in general language, it is to be applied to *all* cases coming within its terms") (emphasis added). In addition, I note that the General Assembly has included county law libraries in R.C. Chapter 3375 which governs other types of publicly funded libraries. See, e.g., R.C. 3375.01-3375.05 (state library); R.C. 3375.06-3375.08 (county free public libraries); R.C. 3375.12-3375.13 (municipal free public libraries); R.C. 3375.14-3375.18 (school libraries). I conclude that a county law library is included in the phrase "any library" and that a county law librarian is a member of the unclassified civil service pursuant to R.C. 124.11(A)(7)(b). Therefore, service as a county law librarian qualifies for prior service credit pursuant to R.C. 9.44 and R.C. 325.19.

It has been suggested that, in the instant case, the librarian served as an independent contractor, rather than as a civil servant, and I address this issue as a final matter. As a general rule:

in the absence of proof that a public employer was motivated by political considerations or a desire to set up a spoils system, the public employer "may lawfully contract to have an independent contractor perform services which might also be performed by civil service employees," *State, ex rel. Sigall, v. Aetna* (1976), 45 Ohio St. 2d 308, at 315 [74 O.O.2d 471], so long as such practice is not violative of either the affected employees' collective bargaining agreement or R.C. Chapter 4117.

Local 4501, Communications Workers of America v. Ohio State University, 24 Ohio St. 3d 191, 196 494 N.E.2d 1082, 1087 (1986). An independent contractor and the contractor's employees are not members of the civil service. See, e.g., 1979 Op. Att'y Gen. No. 79-036; 1976 Op. Att'y Gen. No. 76-040 (syllabus, paragraph one). There is, however, no indication that an independent contractor relationship existed in the instant case. You have indicated as a factual matter that there was no express contract regarding the county law librarian. She was paid pursuant to a certificate of appointment and compensation, a practice consistent with public employment procedures. See R.C. 325.17 ("[county] officers...may appoint and

employ...employees for their respective offices, fix the compensation...and shall file certificates of such action with the county auditor"). The determination by the Public Employees Retirement System (PERS) that the individual should have been a PERS member during her librarian service, *see* note 2, *supra*, although not controlling, also strongly negates the existence of an independent contract. Even though R.C. 145.01(A) specifically includes persons holding non-elective positions with the county law library within the definition of "public employee," R.C. 145.03 provides that "[a] public employee, as defined in division (A) of section 145.01 of the Revised Code...who is employed on a contractual basis by such an employer,⁵ or who is employed under a personal service contract, *does not become a member of the public employees retirement system.*" (Emphasis and footnote added.)

It should further be noted that a county is a creature of statute and has only those powers which are expressly granted by statute, or which may be necessarily implied therefrom. *See State ex rel. Shriver v. Board of Commissioners*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). The use in R.C. 3325.48 of the terms "appointment" and "fix the compensation of" is characteristic of positions in public service. *Compare* R.C. 124.01(F) (defining "employee" for purposes of civil service law as "any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer") with R.C. 307.13 ("board of county commissioners may contract for the services of an electrical safety engineer"). *See also* Op. No. 76-040 at 2-135 ("[i]ndividuals rendering services pursuant to contract are not appointed, removed, promoted or reduced by an appointing authority"). The judges of the court of common pleas are, by R.C. 3375.48, given the authority to fix the compensation of the law librarian, after the librarian has been appointed by the board of trustees of the county law library association. The county has no authority to determine what agency will operate the law library and no authority over the appointment of the librarian. The county treasurer is simply required by statute to pay the person appointed the amount fixed by the judges. This procedure for employing the county law librarian is established by statute as part of the overall scheme of providing public support to the county law library. It appears, accordingly, that R.C. 3375.48 provides no authority, either express or implied, for the county to contract for the services of a county law librarian.

I turn now to your second question concerning the computation of the amount of credit to be given. R.C. 325.19(A) states: "One year of service shall be computed on the basis of twenty-six biweekly pay periods." Your county law librarian was paid annually, however, rather than in biweekly periods.⁶ 1982 Op. Att'y Gen. No. 82-055 involved a situation in which a county board of mental retardation wished to exercise its authority to determine payroll periods by paying seasonal employees throughout a full calendar year even though they actually worked only nine months of that time. My predecessor held that vacation benefits could accrue only during the pay periods actually worked, reasoning as follows:

[I]t is necessary to keep in mind the obvious intent of the legislature that service time be the determining factor in computing the amount of vacation leave to which an employee is entitled under R.C. 325.19. Additionally, I note that pursuant to R.C. 1.47(C) it is presumed that, in enacting a statute, the legislature intended a just and reasonable result. Since vacation benefits accrue on the basis of time in service, I believe that it would be unreasonable to interpret R.C. 325.19 as entitling a seasonal employee to a full year's worth of vacation

5 "Employer" as defined at R.C. 145.01(D) includes "county law library."

6 There are no statutory provisions specifying the intervals at which a county law librarian should be paid. Therefore the judges of the court of common pleas have the authority to establish a reasonable pay schedule as part of their power to fix compensation. *Jewett v. Valley Railway Co.*, 34 Ohio St. 601, 608 (1878) ("[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner").

benefits merely because such employee's salary payments extend over an entire year. Rather, the twenty-six biweekly pay periods referred to in R.C. 325.19 must be interpreted as meaning *those biweekly periods in which an employee actually works or is scheduled to work.* (Emphasis added.)

Op. No. 82-055, at 2-159. It is equally unreasonable to interpret R.C. 325.19 as limiting your employee to vacation credit for only one biweekly pay period out of each full year of her service as librarian, merely because she was compensated only once during each year. I conclude that a county law librarian is entitled to service credit for all biweekly pay periods in which she actually worked, regardless of the number of installments in which she was paid for such work.⁷

It is well settled, for purposes of determining vacation benefits, that a part-time employee accrues years of service at the same rate as a full-time employee, as neither R.C. 9.44 nor R.C. 325.19 provide any reduction factor for credits earned for part-time service. 1987 Op. Att'y Gen. No. 87-055; 1966 Op. Att'y Gen. No. 66-120. Compare R.C. 9.44 and R.C. 325.19 (service credit for computation of vacation benefits) with R.C. 145.01(T) (service credit for computation of PERS benefits). Thus the number of hours worked in a given biweekly period has no effect on the amount of service credit awarded for that period.

Therefore, it is my opinion and you are hereby advised, that:

1. For purposes of computing vacation benefits under R.C. 325.19(A), a full-time county employee is entitled to prior service credit for time served as a county law librarian who was appointed and compensated pursuant to R.C. 3375.48.
2. A full-time county employee who served as a part-time county law librarian and who was compensated in yearly lump-sum payments is entitled to service credit for each biweekly pay period during which she actually worked as a county law librarian, regardless of the number of installments in which her compensation was paid. (1982 Op. Att'y Gen. No. 82-055, syllabus paragraph two, approved and followed.)