

OPINION NO. 72-013

Syllabus:

Section 121.161, Revised Code, amended effective May 17, 1967, providing for the forfeiture after July 1, 1968 by state employees of any vacation leave in excess of the accrual of two years, must be interpreted as including vacation leave accumulated both before and after May 17, 1967. Accordingly, a state employee must be deemed to have forfeited, as of July 1, 1968, his right to be paid on termination for any such unused vacation leave in excess of the accrual of two years. (Opinion No. 65-199, Opinions of the Attorney General for 1965, overruled.)

To: Henry W. Eckhart, Chairman, Public Utilities Commission, Columbus, Ohio
By: William J. Brown, Attorney General, February 8, 1972

I am in receipt of your request for my opinion inquiring whether a past employee of the Public Utilities Commission of Ohio may receive payment for 1656 hours (41 weeks and 2 days) of vacation time accrued over a 31-year period. An interpretation of Section 121.161, Revised Code, amended effective May 17, 1967, and its application to this employee, who retired March 1, 1969, is requested.

The pertinent part of Section 121.161, *supra*, as amended, which provides for the accrual of vacation time by state employees, reads as follows:

"Employees who have unused vacation leave to their credit in excess of the credit for two years shall have a period of one year to use such accumulated leave. On July 1, 1968 employees shall forfeit their right to take or to be paid for any vacation leave to their credit which is in excess of the accrual for two years. Such excess leave shall be eliminated from the employees leave balance.

* * * * *

"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 two years. * * *"

This Section was further amended on September 8, 1967, and on August 18, 1969, but those revisions are immaterial for present purposes.

Prior to the 1967 amendment one of my predecessors, in Opinion No. 65-199, Opinions of the Attorney General for 1965, had determined that vacation leave already accumulated by a county employee, was not affected by an amendment of Section 325.19, Revised Code, effective October 30, 1965, which placed restrictions

upon the future accumulation of vacation leave by such employees. The pertinent part of that statute reads as follows:

"* * * An employee shall be entitled to compensation, at his current rate of pay, for the prorated portion of any earned but unused vacation leave for the current year to his credit at time of separation, and in addition shall be compensated for any unused vacation leave accrued to his credit, with the permission of the appointing authority, for the two years immediately preceding the last anniversary date of employment."

After discussing Article II, Section 28 of the Ohio Constitution which forbids the legislature from passing a retroactive law, and after pointing out that there had previously been no limitation upon the amount of vacation leave an employee could accrue, my predecessor concluded that the language of the statute had to be construed within the constitutional restriction on retroactive legislation and said:

"It is clear that the intent is not to allow an employee to carry his vacation over for more than two years. But I am of the opinion that the vacation earned prior to the effective date of the act is not affected by this provision. It is only vacation which will be earned after October 30, 1965, which will not be allowed to be carried over more than two years. I base my opinion upon the fact that there was never any limitation placed upon that vacation earned prior to the act in question; therefore, it is due the employee and the fact that a retroactive interpretation of this section would place a limitation on an accrued right of the employees."

At the time Opinion No. 65-199, supra, was written, the pertinent part of the statute providing accrued vacation leave for state employees, Section 121.161, supra, was identical with Section 325.19, supra, concerning county employees. And it is clear that the General Assembly intended, by the May 17, 1967 revision of Section 121.161, supra, that all accumulated vacation leave of state employees in excess of two years be forfeited as of July 1, 1968. The logic of my predecessor's opinion would seem to lead to the conclusion that the amendment is retroactive legislation, and, consequently, invalid.

However, in 1967, the Supreme Court held that, where legislation involving the hours, wages, comfort, health, safety and general welfare of employees is concerned, it is immaterial whether it is retroactive or not. State, ex rel. Board v. Board of Trustees, 12 Ohio St. 2d 105 (1967). The case involved a challenge to legislation which transferred all local police and firemen's disability and pension funds to a single state-controlled fund. Among other arguments the local fund contended that this was retroactive legislation in violation of Article II, Section 28 of the Constitution, supra. The Court said (at pages 106-107):

"It is of no useful purpose to enter into a long discussion of the able arguments presented in the briefs of counsel. It is our opinion that the provisions of Section 34, Article II of the

Ohio Constitution, are dispositive of the issues presented in this cause. It reads as follows:

"Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the Constitution shall impair or limit this power."

(Emphasis added.)

"There can be no question that the adopters, the people, intended this section of the Constitution to apply both to local government and state employees. The cities and towns and other political subdivisions of the state of Ohio constitute en masse one of the largest of the employers in the state. It is our conclusion that the firemen and police of the various localities of Ohio are employees within the scope of this provision. It appears in clear, certain and unambiguous language that no other provision of the Constitution may impair the intent, purpose and provisions of the above section of Article II.

"Without further discussion we hold that Section 34 of Article II of the Constitution of Ohio is dispositive of the issues presented in this cause. * * *"

In the light of this language Opinion No. 65-199, supra, can no longer be considered correct. See also Vincent v. Board of Education, 7 Ohio App. 2d 58 (1966).

Furthermore, it should be noted that this employee was not deprived of the right to use his accrued vacation time. The amendment became effective on May 17, 1967, and the employee was allowed ample time, until July 1, 1968, within which to use his accrued leave. So far as appears from the facts before me, he deliberately chose not to use the accrued time. Where a reasonable time is allowed to use up rights which have accrued under the original statute, an amendment which eventually abolishes such rights can hardly be deemed retroactive. Cf. Matthews v. Raff, 15 Ohio L. Abs. 94 (1933), error dismissed, 126 Ohio St. 511.

Therefore, in specific answer to your question, it is my opinion, and you are so advised, that Section 121.161, Revised Code, amended effective May 17, 1967, providing for the forfeiture after July 1, 1968 by state employees of any vacation leave in excess of the accrual of two years, must be interpreted as including vacation leave accumulated both before and after May 17, 1967. Accordingly, a state employee must be deemed to have forfeited, as of July 1, 1968, his right to be paid on termination for any such unused vacation leave in excess of the accrual of two years. (Opinion No. 65-199, Opinions of the Attorney General for 1965, overruled.)