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SYLLABUS:

1. "Separation from * * * service," within the meaning of Section 121.161, Revised Code, means the discontinuance of service by dismissal, resignation, death, etc.

2. "Anniversary of employment" under Section 121.161, Revised Code, is the annual recurrence of the date of last hire.

3. "State service" for the purpose of determining "unused vacation leave * * * credit at time of separation" under Section 121.161, Revised Code, imports continuous service from the date of last hire.

4. The employing authority has no authority under Section 121.161, Revised Code, to compensate an employee at the time of his separation for vacation leave earned but unpaid during former state service.

Columbus, Ohio, February 11, 1963

Hon. Warren H. Chase
Director
Department of Commerce
State of Ohio
Columbus, Ohio

Dear Sir:

I am in receipt of your request for my opinion which reads, with the abbreviation of the name of the person involved, as follows:

"We would appreciate an opinion as to whether 'service of one year with the state' required for vacation purposes under section 121.161 of the Revised Code of Ohio, should be computed on a continuous basis or intermittent basis; and if the latter, the method of calculating the anniversary date.

"Mr. V. was hired as an attorney examiner in the Legal Bureau, Division of Right-of-Way, Ohio Department of Highways on July 1, 1960. He resigned that position on June 1, 1961. Mr. V. was later hired as an attorney examiner on November 22, 1961 by the Division of Administration, Ohio Department of Commerce. He has submitted his resignation effective February 15, 1963.

"Mr. V. received no vacation compensation while employed by the Department of Highways, and now claims

that this period should be included in computing his one year of service.

“He calculates his anniversary date by taking his November 22, 1961 hiring date with the Department of Commerce, backdating this eleven months (his time employed by the Department of Highways) and adding one year of service.”

Section 121.161, Revised Code, to which you refer, provides in material part:

“Each full-time state employee, including full-time hourly-rate employees, after service of one year with the state, is entitled, during each year thereafter, to two calendar weeks, excluding legal holidays, of vacation leave with full pay. Employees having fifteen or more years of service with the state are entitled, during each year thereafter, to three calendar weeks, excluding legal holidays, of vacation leave with full pay. Two calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the first anniversary of employment and annually thereafter, and three calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the fifteenth anniversary of employment and annually thereafter. Upon separation from state service, except for cause, an employee shall be entitled to compensation for the pro-rated portion of any earned but unused vacation leave to his credit at time of separation.

“In special and meritorious cases where to so limit the annual leave during any one calendar year would work peculiar hardship, it may, in the discretion of the director of the department, be extended.

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“In case of the death of a state employee, the unused vacation leave and unpaid overtime to the credit of any such employee, shall be paid in accordance with section 2113.04 of the Revised Code, or to his estate.”

The term “separation from service” while not defined in the Revised Code, has been interpreted judicially to mean a discontinuance of service to an employer by dismissal, resignation, death, etc. See *Hartman v. Braucher, et al.*, 32 O. C. A. 497; *People, ex rel. Davie v. Lynch*, 149 N. Y. S. 895, 164 App. Div. 517; *McGowan v. U. S.*, 277 F. (2) 613.

There can be little doubt under the facts that you have given that Mr. V. was separated from state service on June 1, 1961 when he voluntarily resigned his position as an attorney examiner in the Ohio department of highways. By the terms of Section 121.161, *supra*, he was at that time entitled "to compensation for the pro-rated portion of any earned but unused vacation leave to his credit."

Likewise I think that there can be no doubt but that on November 22, 1961, when hired as an attorney examiner in the department of commerce, Mr. V. stood, for the purposes of Section 121.161, *supra*, in the position of a new employee with his anniversary of employment calculable from this date. Speaking generally "anniversary of employment" is the annual recurrence of the date of last hire.

The question remains, however, whether this prior service with the state can be catenated with present service with the state, for the purpose of determining Mr. V's earned but unused vacation leave as of February 15, 1963, the effective date of Mr. V's resignation from his position in the department of commerce.

Upon consideration I am of the opinion that prior service may not be accumulated in this manner. That "state service" for the purpose of determining "unused vacation leave * * * credit at time of separation," under Section 121.161, Revised Code, means length of continuous service from the date of last hire. There is no provision in this section for the accumulation of separate periods of state service in arriving at unused vacation leave credit.

I am of the conclusion, therefore, that Mr. V. is not entitled under this section to receive compensation from the department of commerce for any earned but unused vacation leave accruing to him for his period of service in the department of highways from July 1, 1960 to June 1, 1961.

While not essential to a determination of the questions you have raised, I feel compelled to add that my conclusion does not necessarily preclude Mr. V. from recovering compensation for unused vacation leave, if any, accrued to him as of the termination date of his employment in the department of highways. In this regard, Opinion No. 1575, Opinions of the Attorney General for 1960, provides in the second paragraph of the syllabus:

“Where a state employee was separated from the state service without being paid the compensation due him under Section 121.161, Revised Code, as effective November 4, 1959, for accumulated vacation leave to his credit at the time of separation, the employing authority may, if funds are available for that purpose, make such payment subsequent to the time of separation.”

In summary, therefore, it is my opinion and you are advised:

1. “Separation from * * * service,” within the meaning of Section 121.161, Revised Code, means the discontinuance of service by dismissal, resignation, death, etc.

2. “Anniversary of employment” under Section 121.161, Revised Code, is the annual recurrence of the date of last hire.

3. “State service” for the purpose of determining “unused vacation leave * * * credit at time of separation” under Section 121.161, Revised Code, imports continuous service from the date of last hire.

4. The employing authority has no authority under Section 121.161, Revised Code, to compensate an employee at the time of his separation for vacation leave earned but unpaid during former state service.

Respectfully,
WILLIAM B. SAXBE
Attorney General