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EMPLOYEE—STATE—SICK LEAVE—

1. PHYSICIAN EMPLOYED PART-TIME IS A STATE EMPLOYEE UNDER §143.29 RC.
2. PROVISIONAL EMPLOYEE UNDER §143.29 RC ENTITLED TO SICK LEAVE BASED ON TIME ACTUALLY WORKED AT SAME RATE AS FULL-TIME EMPLOYEES.
3. OFFICER OF EMPLOYING UNIT SHOULD MAKE DETERMINATION AS TO AMOUNT OF SICK LEAVE CREDIT UNDER §143.29 RC.

SYLLABUS:

1. A physician duly employed as a part-time consulting physician in the Columbus State School, his employment being by the month, and it being stipulated that he was to be paid at a certain hourly rate for not to exceed seventy-six hours per month, is an employee of the state within the purview of Section 143.29, Revised Code, relating to sick leave.
2. Under the provisions of Section 143.29, Revised Code, a provisional employee of the state or one who renders part-time, seasonal, intermittent, per diem, or hourly service shall be entitled to sick leave for the time actually worked, at the same rate as that granted full-time employees.
3. The responsible officer of the employing unit should determine for how many days a provisional, part-time, seasonal, intermittent, per diem or hourly employee is entitled to sick leave credit on the basis fixed by Section 143.29, Revised Code.

Columbus, Ohio, June 6, 1957

Hon. James A. Rhodes, Auditor of State
Columbus, Ohio

Dear Sir :

I have before me your letter requesting my opinion and reading as follows :

“Dr. S has been employed as a part time consulting physician in the Columbus State School. His employment began August 1, 1952 and according to the employment contract he was to be paid for a maximum of 76 hours per month consultation service. There was no required fixed minimum number of hours for which he was to render service. In the past, it has been the practice to pay him on the basis of the hours of work times the monthly rate divided by 76 hours.

“Since December 12, 1956, at which time he became physically unable to render any further service, he has been paid to date at the rate of 76 hours per month on the regular department payroll, presumably on the basis of accrued earned sick leave.

“R. C. 143.29, the Sick Leave Statute, provides for the payment of sick leave to each ‘full time employee of the state, etc.’ However, it also provides in this section :

‘Provisional appointees or those who render part-time, seasonal, *intermittent*, per diem, or *hourly service* shall be entitled to sick leave for the time actually worked at the same rate as that granted full time employees.’ (Underscoring the Writer’s.)

“There appears to be a conflict in the reading of R. C. 143.29 in that it provides for granting of sick leave to each full time employee at the rate of $1\frac{1}{4}$ days for each *completed* month of service. But it also states that sick leave is to be granted part-time employees ‘at the same rate as that granted full time employees’. There would be little difficulty in reconciling the amount of sick leave if such part time employees were to work a definite number of hours each day or a definite number of days in each month. The problem in the above case concerns one who is ‘part-time’, ‘intermittent’ and ‘hourly’ with no fixed or definite work schedule other than that such ‘employee’ is not to be paid for more than 76 hours of work in each month.

“An opinion accordingly is requested as to whether or not :

“1. The service performed by Dr. S. comes within the purview of R. C. 143.09 and whether Dr. S is an employee or

rendering contractual service without the relationship of employer and employee existing.

"2. If you hold that Dr. S is an employee, how shall his sick leave credits be determined, in view of the fact that there is no monthly minimum of time for which such service is to be supplied.

"3. The responsible officer of the employing unit may or shall determine whether or not sick leave is to be granted and for how many days and at what rate."

The pertinent portion of Section 143.29, Revised Code, reads as follows:

"Each full-time employee, whose salary or wage is paid in whole or in part by the state, and each full-time employee in the various offices of the county service and municipal service, and each full-time employee of any board of education, shall be entitled for each completed month of service to sick leave of one and one-fourth work days with pay. Employees may use sick leave, upon approval of the responsible administrative officer of the employing unit, for absence due to illness, injury, exposure to contagious disease which could be communicated to other employees, and to illness or death in the employee's immediate family. Unused sick leave shall be cumulative up to ninety work days, unless more than ninety days are approved by the responsible administrative officer of the employing unit. * * * Provisional appointees or those who render part-time, seasonal, intermittent, per diem, or hourly service shall be entitled to sick leave *for the time actually worked at the same rate* as that granted full-time employees. * * * This section shall be uniformly administered as to employees in each agency of the state government. * * *"

(Emphasis added.)

It may be noted that a certain latitude of discretion is left to the administrative officer of the employing unit who is permitted to allow an accumulation of sick leave in excess of ninety work days if he deems it proper. However, there appears to be complete uniformity of right to sick leave as between full-time employees and "provisional appointees or those who render part-time, seasonal, intermittent, per diem, or hourly service." As to these, the statute plainly provides that they "shall be entitled to sick leave for the time actually worked *at the same rate as that granted full-time employees.*" There can be no ambiguity in this language and in my opinion there should be no great difficulty in applying it in a case such as you present.

There is probably no absolute uniformity in the departments and agencies of the state as to the hours of work of full-time employees. Allowing for such differences the head of the department can easily determine the general rule as to the number of hours of work in a month in his department, and can then determine the time actually worked by a part-time, seasonal, intermittent, per diem or hourly employee. It would thus be a very simple calculation to determine when such part-time employee has earned the right to $1\frac{1}{4}$ days of sick leave.

I think it is worthy of note that the right of public employees to certain intervals of vacation or sick leave was recognized long before the enactment of the original sick leave statute in 1947, 122 Ohio Laws, 368. In Opinion No. 728, Opinions of the Attorney General for 1939, page 917, after the enactment of Section 154-20, General Code, granting leaves of absence for vacation to state employees of two weeks per year, and to those working on an hourly basis, one day for each 192 hours worked, the question was raised as to the right of county employees working on a monthly basis, to a reasonable leave of absence for vacation or sick leave, and it was held :

“County employees on a monthly basis are entitled to a reasonable leave of absence for vacation or sick leave if the contract of hire so provides either expressly or by necessary reasonable implication.”

It was further held that Section 154-20, General Code, granting leaves of absence to state employees for vacation, might be used as a guide in determining what a reasonable time may be for an allowance to county employees. In the course of that opinion the Attorney General said :

“As a matter of sound public policy, leaves of absence for vacation or sickness are desirable and in all instances should be read into the contract of hire, if not expressly, then by reference to the general policy followed in private business and in state and federal governments.”

In Opinion No. 1035, Opinions of the Attorney General for 1951, page 882, it was held :

“In the absence of a statute expressly granting sick leave for a definite period to township employees, township trustees may grant their full time employees reasonable sick leave with pay.”

The 1939 opinion above referred to and the paragraph quoted from the opinion were approved. It appears, therefore, that it has been the view of this office that the policy of the state favors a rather liberal application of the laws relating to allowances of vacation and sick leave.

You have raised the question whether the person mentioned in your letter is an employee of the state or is simply rendering contractual service. It appears to me that Section 143.29, from which I have quoted, clearly recognizes the status of a part-time employee as differing in no respect from a full-time employee. The words used would appear to regard a full-time employee as one on a salary which is fixed and paid on a monthly or yearly basis, whereas a part-time employee is on a wage which is determined by the nature of his employment. Both are clearly employees of the state or the subdivision. The doctor in question was clearly on the staff of the institution. If he had been a specialist who was called in when a patient was stricken with a particular ailment with which the staff of the institution was not qualified to deal, that would doubtless have resulted in a mere contractual relation which would have none of the elements of a regular public employment.

You present the further question whether a responsible officer of the employing unit may determine whether or not such sick leave is to be granted, and at what rate. It appears to me clear that it is not within the province of the head of the employing unit to decide whether such sick leave is to be granted. That is a matter of law which the legislature has determined. The clerical duty of determining how many days such sick leave is to be granted is manifestly for the responsible officer of the unit. The rate of his pay must certainly have been determined when he was employed, and accordingly the rate he shall receive while on sick leave is not left to the discretion or caprice of the responsible head.

It is accordingly my opinion and you are advised:

1. A physician duly employed as a part-time consulting physician in the Columbus State School, his employment being by the month, and it being stipulated that he was to be paid at a certain hourly rate for not to exceed seventy-six hours per month, is an employee of the state within the purview of Section 143.29, Revised Code, relating to sick leave.

2. Under the provisions of Section 143.29, Revised Code, a provisional employee of the state or one who renders part-time, seasonal,

intermittent, per diem, or hourly service shall be entitled to sick leave for the time actually worked, at the same rate as that granted full-time employees.

3. The responsible officer of the employing unit should determine for how many days a provisional, part-time, seasonal, intermittent, per diem or hourly employee is entitled to sick leave credit on the basis fixed by Section 143.29, Revised Code.

Respectfully,
WILLIAM SAXBE
Attorney General