

OPINION NO. 73-114**Syllabus:**

A board of education has discretion to allow a non-teaching employee to use the accrued portion of his annual vacation leave prior to the time the full annual amount of such leave has been earned.

To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, November 14, 1973

I have before me your request for my opinion as to vacation rights of non-teaching employees of a board of education. Your letter reads as follows:

An employee of a board of education completes his one-year of continuous employment on February 28, but due to board policy is not permitted to take his vacation as provided in Section 3319.084, Revised Code, until July.

At that time is he entitled to just two weeks vacation, or, may he use pro-rated vacation earnings through June 30 in addition to the earned two weeks?

The Bureau of Inspection and Supervision of Public Offices has taken the position that in view of your Opinion No. 72-103, dated 1972, wherein it was held that Section 3319.084, Revised Code, only allows a board of education to pay a pro-rated portion of unused vacation leave for any current year to a nonteaching employee when such employee's service is terminated by death, a board of education would be precluded from allowing a prorated portion of earned vacation under any other circumstances.

The Section of the Revised Code to which you refer, R.C. 3319.084, reads in part as follows:

In all school districts each full time non-teaching school employee including full-time hourly-rate and per diem employees, after service of one calendar year with a board of education, shall be entitled, during each year thereafter, while continuing in the employ of such board of education, to vacation leave with full pay for a minimum of two calendar weeks, excluding legal holidays. * * *

In case of the death of a nonteaching school employee, the unused vacation leave to the credit of such employee, not to exceed the vacation leave accrued to his credit for two years immediately preceding his last anniversary date and the pro-rated portion of his earned but unused vacation leave for the current year, shall be paid to the surviving spouse, or other dependent.

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(Emphasis added.)

In a recent opinion I pointed out that, while this Section requires a board of education to grant to its non-teaching employees a certain minimum vacation leave with full pay, the board has discretion to allow further vacation rights. In Opinion No. 72-079, Opinions of the Attorney General for 1972, I said:

While this section does not expressly state that boards of education may grant more than the amount of vacation time specified, the word "minimum" clearly implies that they may. It is well settled in Ohio that that which is clearly implied by a statute is as much a part of it as its express terms. See 50 O. Jur. 2d 164, Statutes, Section 186, and cases cited therein. See also, Opinion No. 72-061, Opinions of the Attorney General for 1972.

No other Section contradicts this construction of Section 3319.084. Boards of education have discretion to fix the compensation of their nonteaching employees within certain limits. Section 3317.12, Revised Code, reads in part as follows:

Any board of education participating in funds distributed under Chapter 3317. of the Revised Code shall annually adopt a salary schedule for nonteaching school employees based upon training, experience, and qualifications with initial salaries no less than the salaries in effect on October 13, 1967. * * *The compensation of all employees working for a particular school board shall be uniform for like positions except as compensation would be affected by salary increments based upon length of service.

Paid vacation is clearly a part of employees' compensation, and as such is fixed by the salary schedule. * * *

In an even more recent opinion, I reemphasized the discretionary power of a board of education to adopt rules and regulations governing leave with pay. In Opinion No. 73-084, Opinions of the Attorney General for 1973, I said:

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Although the authority of the board of education is limited strictly to such powers as are expressly granted to them, or are clearly implied and necessary for the execution of its express powers, R.C. 3313.20 has been interpreted by the Ohio Supreme Court to vest wide discretion in school boards to adopt rules and regulations necessary for the conduct of schools, as long as they do not exceed specific statutory limitations on the board's authority. Verberg v. Bd. of Education, 135 Ohio St. 246, 20 N.E. 2d 368 (1939). See also Opinion No. 71-024, Opinions of the Attorney General for 1972. Also State ex rel. Baker v. Stevenson, 189 N.E. 2d 181 (1962) and LaFleur v. Cleveland Bd. of Ed., 59 Ohio Op. 2d 90 (1971).

R.C. 3313.20 expressly grants the board of education power to make rules necessary for the government of its employees. The rules and regulations which the board may adopt under the general grant of authority in R.C. 3313.20 may not conflict with other Sections which specifically direct the board to grant leave. R.C. 1.51. For example, a rule may not conflict with R.C. 3319.141 which authorizes 15 days sick leave, with pay, for each year.

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* * *It necessarily follows that a board of education is still required to adopt regulations providing for the amount of leave with pay that may be granted. Beyond such provisions, I find nothing to indicate that the board, in its regulations, must identify every occasion or purpose for which such leave may in the future be granted. Rather, it is within the board's discretion to determine to what extent it wishes to specify the other purposes for which leave with pay may be granted under R.C. 3313.21. Thus, in the absence of abuse, determination of the specificity of the regulations is within the wise discretion vested in a board of education pursuant to R.C. 3313.20 and 3313.21. Verberg v. Bd. of Education, supra; Board of Education v. State ex rel. Goldman, 47 Ohio App. 417 (1934); Opinion No. 71-046, Opinions of the Attorney General for 1971. * * *

The Supreme Court has frequently taken note of the broad discretion vested in the boards of education. In Greco v. Roper, 145 Ohio St. 243 (1945), the first branch of the syllabus reads as follows:

Under the statutes of Ohio, a board of education is charged with the management and control of the public schools in its district and is vested with authority to make such rules and regulations as it deems necessary for the its government and the government of its employees.

And in Brannon v. Board of Education, 99 Ohio St. 369 (1919), the second branch of the syllabus holds:

A court has no authority to control the discretion vested in a board of education by the statutes of this state, or to substitute its judgment for the judgment of such board, upon any question it is authorized by law to determine.

It is clear from the language of R.C. 3319.084, supra, that the annual vacation time of a non-teaching employee accrues to his credit at a regular rate throughout the year. And I think it has been established, by the authorities just referred to, that a board of education has wide discretion in determining the time at which the employee may use his accrued leave. Your letter refers to Opinion No. 72-103, Opinions of the Attorney General for 1972, which held that, under the language of R.C. 3319.084, unused vacation time could be prorated and paid only in the event of the employee's death. But there is no implication in the statute which contradicts the discretion of the board to permit an employee to use the accrued portion of his annual vacation leave prior to time the full amount has been earned. If anything, the implication is that, since the employee had earned, and might have used, the accrued time, but did not do so, the prorated amount will be paid to his estate.

In specific answer to your question it is my opinion, and you are so advised, that a board of education has discretion to allow a non-teaching employee to use the accrued portion of his annual

vacation leave prior to the time the full annual amount of such leave has been earned.