

OPINION NO. 80-057**Syllabus:**

1. A transfer from a position as county employee to a position as a county officer constitutes a "separation" for purposes of R.C. 325.19. When a county employee with accumulated vacation leave transfers to a position as a county officer, he is entitled to payment for accrued but unused vacation leave as provided in R.C. 325.19. (1962 Op. Att'y Gen. No. 3425, p. 931 approved and followed.)
2. When a county employee, as defined by R.C. 124.01(F), has accumulated sick leave and transfers to a position of an elective

county office, he is not entitled to payment for accrued but unused sick leave pursuant to R.C. 124.39(B), although he may be entitled to such payment if the county has adopted a policy pursuant to R.C. 124.39(C) which so provides. If such individual becomes reemployed in the public service within ten years of the date of his last termination as a county employee, the previously accumulated and unused sick leave will be placed to his credit upon reemployment, unless he received payment for it pursuant to R.C. 124.39(C). The years served in the position of an elective county office will not be included in determining the amount of sick leave to which he is entitled upon reemployment as a county employee.

3. An individual who retires from an elective county office is not entitled to payment for unused sick leave accumulated as a county employee prior to his service as a county officer.
4. When a county employee is reemployed by the county after service as a county officer, the years served as a county officer are included as periods of service for purposes of computing vacation leave under R.C. 325.19(A). (1974 Op. Atty Gen. No. 74-085 approved and followed.)

To: Richard B. Hauser, Huron County Pros. Atty., Norwalk, Ohio

By: William J. Brown, Attorney General, September 11, 1980

I have before me your request for an opinion which reads in part as follows:

Where an appointed county employee with accumulated vacation and sick leave benefits is appointed to fill a vacancy in an elective county office:

1. Upon entering such elective office, is the official entitled to immediate cash payment for vacation time accrued while an employee?
2. Upon entering such elective office, what is the disposition of the employee's accrued sick leave benefits?
3. Upon leaving the elective office by retirement, is the official entitled to compensation for unused sick leave benefits? If so, on what rate will the compensation be based: the salary and county policy in effect on his last day as an appointed official, or the salary and policy on his last day as an elected official?
4. If you affirm your view taken in OAG-73-104, may an elected official recoup his previously accrued sick leave by again becoming a county employee shortly before retirement? If so, does he receive credit for his years of service as an elected official [for purposes of sick leave and vacation leave] ?

You first ask whether a county employee with accumulated vacation leave is entitled to immediate cash payment for his accrued but unused vacation leave upon leaving county employment to accept appointment as a county officer. Vacation leave of county employees is established by R.C. 325.19, which reads in part as follows:

An employee is entitled to compensation, at his current rate of pay, for the pro-rated 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 three years immediately preceding the last anniversary date of employment.

The answer to your first question depends upon whether leaving county employment to serve as a county officer is considered "separation" within the meaning of R.C. 325.19. This question was considered by one of my predecessors in 1962 Op. Att'y Gen. No. 3425, p. 931, wherein it was concluded that a person employed as clerk of a board of county commissioners who leaves that position to accept appointment to the office of county treasurer is entitled to compensation for accrued but unused vacation leave. That opinion interpreted "separation," as used in R.C. 325.19, as meaning, "any change in position wherein the employee would not be able to carry over earned vacation credit to the new position." I applied a similar analysis in 1974 Op. Att'y Gen. No. 74-021, in which I concluded that an individual was separated from state service as an employee for purposes of R.C. 121.161 when he became a state officer. I apply the same analysis in response to your request. An individual who changes status from county employee to county officer may not carry over accumulated vacation leave to his position as county officer because public officers, unlike public employees, are neither entitled to, nor limited to, any particular period of time for vacation leave 1974 Op. Att'y Gen. No. 74-085; 1962 Op. Att'y Gen. No. 3239, p. 667. I conclude, therefore, that upon leaving county employment to become an officer of the county, an individual is considered separated for purposes of R.C. 325.19.

The wording of the statute is clear: the time for payment to a county employee for accumulated vacation leave shall be upon separation. The time for payment is keyed to the time the employee leaves county employment, regardless of when he begins serving as a county officer. It is, therefore, apparent that, upon leaving county employment, the individual is entitled to payment for accrued but unused vacation leave in accordance with the provisions of R.C. 325.19.

Your second question requires an interpretation of the provisions of R.C. 124.38 and R.C. 124.39, the former establishing the sick leave benefits of county employees and the latter providing for payment upon retirement for unused sick leave. R.C. 124.38 reads in part as follows:

[E]ach employee in the various offices of the county. . . shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay. . . . Unused sick leave shall be cumulative without limit. . . . The previously accumulated sick leave of an employee who has been separated from the public service shall be placed to his credit upon his reemployment in the public service, provided that such reemployment takes place within ten years of the date on which the employee was last terminated from public service. An employee who transfers from one public agency to another shall be credited with the unused balance of his accumulated sick leave up to the maximum of the sick leave accumulation permitted in the public agency to which the employee transfers.

R.C. 124.39 provides in part:

As used in this section, "retirement" means disability or service retirement under any state or municipal retirement system in this state.

. . . .

(B) Except as provided in division (C) of this section, an employee of a political subdivision covered by section 124.38 or 3319.141 of the Revised Code [including a county] may elect, at the time of retirement from active service with the political subdivision, and with ten or more years of service with the state, any political subdivisions, or any combination thereof, to be paid in cash for one-fourth the value of his accrued but unused sick leave credit. The

payment shall be based on the employee's rate of pay at the time of retirement and eliminates all sick leave credit accrued but unused by the employee at the time payment is made. . . .

(C) A political subdivision may adopt a policy allowing an employee to receive payment for more than one-fourth the value of his unused sick leave or for more than the aggregate value of thirty days of his unused sick leave, or allowing the number of years of service to be less than ten. The political subdivision may also adopt a policy permitting an employee to receive payment upon a termination of employment other than retirement or permitting more than one payment to any employee.

In applying these sections of R.C. Chapter 124 to the individual involved here, it is necessary to consider R.C. 124.01(F), where "employee," as used in Chapter 124, is defined as "any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer." The individual in the question you pose is leaving his position as a county employee to accept appointment as an elective county officer. Although he is accepting appointment to the office, the office itself is an elective position, not a position which is subject to appointment, removal, promotion, or reduction by an appointing officer. In this instance, therefore, it is clear that the employee is transferring to a position as a public officer, and not continuing his status as an employee within the meaning of R.C. Chapter 124.

The provisions for the crediting of accumulated sick leave outlined in R.C. 124.38 apply in only two situations, either where an employee who has separated from the public service is reemployed in the public service within ten years or where an employee transfers from one public agency to another. Clearly, the situation you pose is not one in which a separated county employee is becoming reemployed in the public service. The individual involved here is separating from public service as a county employee to serve as an elected public officer, rather than a public employee. This is also not a situation covered by the latter provision of R.C. 124.38, which, as noted previously, provides for a transferring employee to be credited with up to the maximum of the sick leave accumulation permitted in the agency to which the employee transfers. In this instance, the employee is transferring to a position as a public officer. There is no provision in the Revised Code for either payment for or accumulation of sick leave benefits for one who holds the position of an elective county officer. The transferring employee is, therefore, not entitled under the above-stated provision of R.C. 124.38 to transfer his unused sick leave to his new position as county officer.

As noted previously, R.C. 124.39(B) provides for payment upon retirement for one-fourth of unused sick leave for certain public employees, including county employees. This section is, however, limited by the introductory language of the section: "As used in this section, 'retirement' means disability or service retirement under any state or municipal retirement system in this state." R.C. 124.39. County employees come within the Public Employees Retirement System pursuant to the definition of "[p]ublic employee" set forth in R.C. 145.01. In order to qualify for disability retirement under the Public Employees Retirement System, governed by Chapter 145 of the Revised Code, an employee must be determined to be "mentally or physically incapacitated for the performance of duty by a disabling condition either permanent or presumed to be permanent." R.C. 145.35. The individual involved in the situation you pose, in leaving his position as a county employee merely to accept a position as a county officer, would, therefore, not be classified as retiring because of a physical or mental disability.

I interpreted the term "service retirement" in a prior opinion dealing with an earlier version of R.C. 124.39 (1973 Ohio Laws 83 (Am. Sub. S.B. 31, eff. Aug. 1, 1973)), which used the same language as the present version of R.C. 124.39. Pursuant to statute, the time designated for payment of accumulated sick leave is "at the time of retirement from active service." R.C. 124.39. I stated in 1974 Op. Att'y Gen. No. 74-022, at 2-108:

The term retirement is considerably narrower than either

"termination" or "resignation." Retirement specifically denotes the termination of employment after a certain number of years of service, according to a formal procedure. To construe the statute as authorizing the payment of accumulated sick leave credit upon the mere termination of employment, would permit an unjustifiably broad application of the statute.

I concluded in that opinion that resignation prior to retirement does not entitle an employee to payment of accumulated sick leave.

The individual involved in the situation you pose is not retiring according to any formal procedure upon attainment of a certain number of years of service; rather, he is merely terminating or resigning his employment. Because the employee involved here is not being reemployed or being transferred to a position which allows accumulation of sick leave, he does not qualify under R.C. 124.38 to have his accumulated sick leave credited to him in his new position. The provisions of R.C. 124.39(B) which outline when payment may be made for unused sick leave authorize payment only when an employee is leaving his position under service or disability retirement and are clearly inapplicable in this situation.

Under R.C. 124.39(C) a political subdivision may adopt a policy allowing a larger payment for unused sick leave, allowing a lesser number of years service before payment may be made, permitting more than one payment per employee, or permitting payment upon termination other than retirement. Unless the county in question has adopted a more permissive payment policy which includes a situation of the type presented here, the county employee transferring to county office may not be paid for unused sick leave at the time of his transfer.

Your next question asks whether an elected county official who had accumulated sick leave while a county employee may be compensated for the unused sick leave upon retirement as a county officer, and if so, upon what rate this compensation will be based. The Revised Code makes no provision for payments to an individual retiring from an elective county office who had previously accumulated sick leave while a county employee. R.C. 124.38 provides for accumulated sick leave of an employee who has been "separated" from the public service to be placed to his credit upon his reemployment in the public service. The phrase "separated from the public service," as used in R.C. 143.29 (recodified by 1973 Ohio Laws 533 (Am. S.B. 174, eff. Dec. 4, 1973) (currently at R.C. 124.38)), was discussed in 1973 Op. Att'y Gen. No. 73-104, where I determined that, for purposes of R.C. 143.29, "public service" refers only to those who have the status of public employees; when one leaves his status as an employee to become an officer, he separates from the public service. Although Op. No. 73-104 deals with state officers and employees, the statutory provisions authorizing payments to state employees for unused sick leave benefits apply to county employees as well.

In applying the rationale of the 1973 opinion to the individual involved here, I conclude that when the county employee transfers to the position of county officer, he separates from the public service, within the meaning of R.C. 124.38. Upon separation from service, a county employee loses all accrued and unpaid sick leave unless he returns to employment in the public service within ten years. Under R.C. 124.39, in order to be compensated upon retirement for unused sick leave, one must be in the status of employee, not officer, upon retirement. Op. No. 73-104.

According to R.C. 145.32 it may occur that a member of the Public Employees Retirement System would leave public service prior to the date on which his service retirement becomes effective, awaiting attainment of the minimum age for retirement eligibility. Service retirement would then become effective upon attainment of the minimum age required by R.C. 145.32. At such time, however, the member would not be in the status of "an employee of a political subdivision," the term used in R.C. 124.39(B), and would, therefore, not be entitled to payment under that section. R.C. 124.39(B) states that payment for accumulated but unused sick leave "shall be based on the employee's rate of pay at the time of retirement." If the member is not receiving pay as an employee at the

time his retirement becomes effective, there is no basis for computing the amount to which he would be entitled. Op. No. 73-104. One who retires from county office is, therefore, not entitled to payment for unused sick leave accumulated as a county employee prior to his service as a county officer.

You also ask whether one who retires from county office with sick leave previously accumulated as a county employee may recoup those sick leave benefits by becoming reemployed with the county shortly before retirement, and if so, whether upon reemployment he is credited for his years of service as an elected official for purposes of sick leave and vacation leave.

R.C. 124.38, quoted above, provides that when a former public employee is reemployed in the public service previously accumulated sick leave of the former employee is placed to the employee's credit, provided that his reemployment occurs within ten years of the date on which he was last terminated from public service. The statute clearly states that crediting of previously accumulated sick leave shall occur upon reemployment. There is nothing in the wording of R.C. 124.38 which limits the crediting of such sick leave, except that the former employee must be reemployed within ten years of his last termination from public service. If the individual involved here is reemployed with the county after having served as an elected official, he will be credited with previously accumulated sick leave upon reemployment, provided that his reemployment with the county occurs within ten years of the date he previously left county employment. The only exception would be if the individual had been paid for sick leave pursuant to a policy adopted under R.C. 124.39(C). In such case, the sick leave credit would have been eliminated, as provided by R.C. 124.39(B).

The next part of your question asks whether, upon reemployment with the county, a former county officer is credited with time spent as a county officer in computing vacation and sick leave. The sick leave benefits authorized by R.C. 124.38 apply only to county employees; as noted previously, R.C. 124.01(F) defines "employee," for purposes of R.C. Chapter 124, as "any person holding a position subject to appointment, removal, promotion, or reduction by an appointing office."

The statutory provision contained in R.C. 124.38 for the computation of sick leave benefits bases such computation on the number of hours of completed service. To credit the individual in question with his time spent as a county officer would have the effect of granting him sick leave for the time he was a county officer in the same manner as if he had been an employee, but merely delaying the time for him to use such benefits until he is reemployed by the county. In light of the fact that county officers are not entitled to sick leave, to credit this individual with time spent as a county officer would simply award a county officer with sick leave retroactively upon reemployment with the county.

It is clear that such a result goes against the intention of the legislature, which provided sick leave benefits to those defined as employees, while excluding officers from such benefits. Upon his reemployment with the county, the individual involved here is, therefore, not entitled to credit for his years of service as a public officer for purposes of computing the sick leave to which he is entitled.

In determining whether a county employee who formerly served as a county officer is entitled to credit for his years of service as an officer in computing the amount of vacation leave to which he is entitled, it is necessary to examine R.C. 325.19, which governs vacation benefits of county employees. R.C. 325.19(A) provides in part:

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. A full-time county employee with twenty-five years of service with the county or any political subdivision of the state shall have earned and is entitled to two hundred hours of vacation leave with full pay. Such vacation leave shall accrue to the employee at the rate of three and one-tenth hours each biweekly period for those entitled to eighty hours per year; four and six-tenths hours each biweekly period for those entitled to one hundred twenty hours per year; six and two-tenths hours each biweekly period for those entitled to one hundred sixty hours per year; and seven and seven-tenths hours each biweekly period for those entitled to two hundred hours per year. (Emphasis added.)

Under R.C. Chapter 325, the computation of the number of weeks of vacation leave to which an employee is entitled is based on the number of "years of service with the county or any political subdivision of the state." As I stated in 1974 Op. Att'y Gen. No. 74-085:

The question, then, is whether "county service," as used in R.C. 325.19 which governs the vacation rights of employees, includes service as an officer of the county.

Although it is true that there is no specific statutory definition of "county service" and that R.C. 325.19 has specific application only to county employees, Chapter 124 of the Revised Code which deals with the civil service system of the State defines 'civil service' as including "all offices and positions of trust or employment in the service of the state and the counties, * * *." R.C. 124.01(A). I think it clear, therefore, that both the officers of a county and the employees thereof are included in the "county service." Cf. Opinion No. 66-149, Opinions of the Attorney General for 1966, in which my predecessor said that "it would seem that the General Assembly intended the broadest coverage legally permissible for Section 325.19, Revised Code."

Because "county service" as used in R.C. 325.19 includes time spent as a county officer as well as time spent as a county employee, the individual involved here should be credited for his years as a county officer in determining the number of weeks vacation leave to which he is entitled under R.C. 325.19 when he resumes employee status; he will not, of course, be awarded vacation during the time that he serves as a public officer. It should be noted that, unlike the result which would occur were a county employee credited with time served as an officer for purposes of sick leave, a county employee who is awarded credit for time served as an officer for purposes of vacation leave does not receive the identical benefit he would have received had he been an employee during the time served as an officer. The effect is not to award vacation leave benefits to a county officer retroactively upon reemployment with the county, but is, rather, to enable him to accrue vacation leave as a county employee at a rate which reflects his years of service as an officer. See also 1975 Op. Att'y Gen. No. 75-025; 1974 Op. Att'y Gen. No. 74-085.

In specific answer to your questions, it is my opinion, and you are advised, that:

1. A transfer from a position as county employee to a position as a county officer constitutes a "separation" for purposes of R.C. 325.19. When a county employee with accumulated vacation leave transfers to a position as a county officer, he is entitled to

payment for accrued but unused vacation leave as provided in R.C. 325.19. (1962 Op. Atty Gen. No. 3425, p. 931 approved and followed.)

2. When a county employee, as defined by R.C. 124.01(F), has accumulated sick leave and transfers to a position of an elective county office, he is not entitled to payment for accrued but unused sick leave pursuant to R.C. 124.39(B), although he may be entitled to such payment if the county has adopted a policy pursuant to R.C. 124.39(C) which so provides. If such individual becomes reemployed in the public service within ten years of the date of his last termination as a county employee, the previously accumulated and unused sick leave will be placed to his credit upon reemployment, unless he received payment for it pursuant to R.C. 124.39(C). The years served in the position of an elective county office will not be included in determining the amount of sick leave to which he is entitled upon reemployment as a county employee.
3. An individual who retires from an elective county office is not entitled to payment for unused sick leave accumulated as a county employee prior to his service as a county officer.
4. When a county employee is reemployed by the county after service as a county officer, the years served as a county officer are included as periods of service for purposes of computing vacation leave under R.C. 325.19(A). (1974 Op. Atty Gen. No. 74-085 approved and followed.)