

OPINION NO. 72-032**Syllabus:**

1. A board of education may, by regulation, allow its full-time employees an advance of sick leave which has not yet actually been earned. Sections 3313.21, 3319.08 and 3319.141, Revised Code.

2. There is no distinction in this respect between new employees, who have not yet earned sick leave, and old employees, who have exhausted all the leave they had earned.

3. The adoption of a regulation allowing an advance of sick leave to full-time employees rests within the discretion of the board of education, limited by the requirement of Section 3319.08, Revised Code, that not less than five days' paid leave annually must be granted for time lost due to illness or otherwise.

To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio
By: William J. Brown, Attorney General, April 19, 1972

Your request for my opinion reads in pertinent part as follows:

"Does Section 3313.21, Ohio Revised Code, require boards of education to compensate all employees for a minimum of five (5) days lost each year, or does it merely require this payment for full time new employees who would not yet have earned any sick leave?"

"We understand from the Clerk of the Board of Education of the Kettering City School District that the Bureau of Inspection and Supervision of Public Offices has interpreted this Section to mean only full time new em-

ployees, rather than all full time employees."

As I understand your question, it asks whether a board of education is required to adopt regulations permitting the advance of at least five days' sick leave to full-time school employees prior to the time it has actually been earned.

The power of a board of education to adopt general regulations governing the conduct of its affairs, and specific regulations governing the sick pay of its full-time employees, is set out in Sections 3313.20 and 3313.21, Revised Code. Section 3313.20, supra, provides in pertinent part:

"The board of education shall make such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises.
* * *"

Section 3313.21, supra, provides:

"All full-time employees of a board of education, except those employed on hourly rates, must be paid regular compensation for time lost, due to illness or otherwise, for not less than five days annually as authorized by regulations which each board shall adopt."

A similar provision appears in Section 3319.08, Revised Code, which controls the type of contract to be entered into between the board of education and the teachers it employs. That Section provides in pertinent part:

"Teachers must be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity, and for time lost due to illness or otherwise for not less than five days annually as authorized by regulations which each board of education shall adopt."

I recently discussed one aspect of your question in Opinion No. 71-024, Opinions of the Attorney General for 1971. The syllabus of that Opinion reads as follows:

"A board of education could, prior to the enactment of Section 3319.141, Revised Code [effective September 16, 1970], establish sick leave benefits by rule for full-time school employees in advance of the time they had been earned."

That Opinion traced, at some length, the legislative history of sick pay for teachers as contrasted with the history of the general sick pay act for state employees, Section 143.29, Revised Code, and pointed out that teachers and other full-time employees of a board of education had always enjoyed special treatment at the hands of the General Assembly, at least until the enactment of Section 3319.141, Revised Code, which became effective on September 16, 1970. After this review of the legislative history the Opinion said:

"To summarize the foregoing, it may be stated that the General Assembly enacted sick pay legislation for teachers prior to the enactment of the general sick pay act and that it left the amount and the manner of payment to be regulated by the boards of education; that this authority of the boards was not done away with by the 1947 general sick pay act, since in 1949 the General Assembly broadened the special treatment of school personnel to include all full-time employees, and again left the treatment of school sick pay to regulation by the boards; that the boards have considerable discretion in exercise of their regulatory powers; and that their power to regulate the amount and the manner of payment of sick leave to full-time school personnel remained in effect at least until the enactment of Section 3319.141, Revised Code, which became effective on September 16, 1970."

Since the question which gave rise to that Opinion did not involve Section 3319.141, supra, the Opinion carefully avoided any discussion of the effect of that new Section. Your question, however, requires a consideration of that statute.

In pertinent part, Section 3319.141, supra, provides as follows:

"Each person who is employed by any board of education in this state shall be entitled to fifteen days sick leave with pay, for each year under contract, which shall be credited at the rate of one and one-fourth days per month. * * *

"Except to the extent used as sick leave, leave granted under regulations adopted by a board of education pursuant to section 3319.08 of the Revised Code shall not be charged against sick leave earned or earnable under this section. Nothing in this section shall be construed to affect in any other way the granting of leave pursuant to section 3319.08 of the Revised Code and any granting of sick leave pursuant to such section shall be charged against sick leave accumulated pursuant to this section.

* * * * *

As noted in Opinion No. 71-024, supra, prior to the enactment of Section 3319.141, supra, the school boards were required to adopt regulations governing the amount and the manner of payment of sick leave for full-time employees. See Willis v. Seeley, 33 Ohio Op. 287 (1946). The only original statutory limitation on the discretion of the boards in this respect was the five-day minimum requirement. Sections 3313.21 and 3319.08, supra. In 1949, a maximum of fifteen days was allowed by Section 143.29, supra. The power of the boards to regulate sick leave within such minimum and maximum limits is, however, retained. Sections 3319.08 and 3319.141, supra. See Birkbeck v. Bd. of Edn., 17 Ohio Misc. 2d 245 (1969), affirmed, October 29, 1969, in an unreported decision by the Court of Appeals, Ninth District.

The question, then, is whether Section 3319.141, supra, takes away the previous power of the boards to allow the advance of at least five days' sick leave to full-time school employees. It should be noted that we are here concerned only with the sick leave of full-time school board employees. We are not concerned with part-time employees who are specifically covered by language in Section 3319.141, supra, other than that cited above. We are not concerned with time lost as a result of an epidemic or other public calamity. And we are not concerned with leave other than that due to illness as provided by Sections 3313.21 and 3319.08, supra.

The first sentence of the new Section 3319.141, supra, provides that each full-time school board employee shall be "entitled" to fifteen days' annual sick leave which "shall be credited at the rate of one and one-fourth days per month", and, at first glance, this might be taken to mean that sick leave cannot be granted until it has been earned. However, the mere use of the words "entitled" and "credited" does not necessarily mean that the General Assembly intended to prohibit an advance of sick leave prior to the time it has been placed to the employee's credit, and I think there are other indications that this was not the intent of the legislature. In the first place, the enactment of Section 3319.141, supra, in 1970, did not revoke the authority of a school board to adopt regulations concerning the sick leave of its employees within the statutory minimum and maximum. Consequently, the boards may still regulate the manner of payment for such leave. Furthermore, the Section specifically says that:

"Except to the extent used as sick leave, leave granted under regulations adopted by a board of education pursuant to Section 3319.08 of the Revised Code shall not be charged against sick leave earned or earnable under this section. * * *" (Emphasis added.)

I think it clear that this language can only mean that sick leave can be granted to full-time employees under the board's regulations and charged against sick leave which has not yet actually been earned.

I see no basis in any of the Sections of the Revised Code for a distinction between new employees, who have not yet earned sick leave, and old employees, who have exhausted all the leave they have earned. A board regulation which permits an advance of a certain amount of sick leave, applies equally to both classes.

Finally, there is nothing in the Code which requires any board of education to adopt regulations permitting any advance of sick leave, other than the five-day minimum requirement of Section 3319.08, supra. See Willis v. Seeley, supra. Any other regulation is a matter which the Code leaves to the discretion of the individual boards of education.

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

1. A board of education may, by regulation, allow its full-time employees an advance of sick leave which has not yet actually been earned. Sections 3313.21, 3319.08 and 3319.141, Revised Code.

2. There is no distinction in this respect between new em-

ployees, who have not yet earned sick leave, and old employees, who have exhausted all the leave they had earned.

3. The adoption of a regulation allowing an advance of sick leave to full-time employees rests within the discretion of the board of education, limited by the requirement of Section 3319.03, Revised Code, that not less than five days' paid leave annually must be granted for time lost due to illness or otherwise.