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1. HOURLY BASIS — PER DIEM BASIS WORK — COUNTY EMPLOYES — IN ABSENCE OF SPECIFIC STATUTORY PROVISION AUTHORIZING PAYMENT, NOT ENTITLED TO PAY FOR LEGAL HOLIDAYS ON WHICH THEY DO NOT WORK.

2. COUNTY ENGINEER — NO AUTHORITY TO GRANT HOURLY EMPLOYES PAY FOR LEGAL HOLIDAYS ON WHICH THEY DO NOT WORK—SECTION 325.17 RC.

SYLLABUS:

1. In the absence of a specific statutory provision authorizing such payment, county employes working on an hourly basis are not entitled to pay for legal holidays on which they do not actually work.

2. A county engineer has no authority under the provisions of Section 325.17, Revised Code, to grant hourly employes in his department pay for legal holidays on which they do not work.

Columbus, Ohio, November 24, 1954

Hon. Robert L. Perdue, Prosecuting Attorney
Ross County, Chillicothe, Ohio

Dear Sir:

I have your request for opinion stating the following questions:

"(1) Are the hourly paid employes of the Ross County Engineering Department entitled, as a matter of right, to New Years, Memorial Day, July Fourth, Labor Day, Thanksgiving and Christmas as paid holidays?

"(2) In the event that you are of the opinion that these hourly paid employes are not entitled, as a matter of right, to be paid for the holidays set forth, may the County Engineer, under authority of Section 325.17 of the Revised Code, grant and pay his hourly employes holiday pay for New Years, Memorial Day, July Fourth, Labor Day, Thanksgiving and Christmas?"

The statute which fixes vacations for county employes, Section 325.19, Revised Code, provides that "each employe in the several offices and departments of the county service, after service of one year, shall be entitled

during each year thereafter to two calendar weeks, *excluding legal holidays,* vacation leave with full pay. * * * In the case of an employe working on an hourly basis, one day vacation shall be granted for each one hundred seventy-three and one-third hours worked by such employe." A similar provision is made for employes working on a per diem basis, one day vacation for each twenty-four days worked.

At first impression it would seem that the phrase "excluding legal holidays" may have indicated a general policy or intent on the part of the General Assembly to accord to all employes in the county service vacation with pay for legal holidays. But a closer scrutiny of the statute will disclose two distinct modes of computing vacation periods, one applicable to employes "after service of one year," or yearly employes, and another to per diem or hourly workers, based on the number of days or hours "worked by such employe." Construing this statute in Opinion No. 528, Opinions of the Attorney General for 1949, page 247, it was observed that in the computation of leave in the case of per diem or hourly employes, "the fewer hours or days worked, the less vacation." In the case of a full-time employe, however, a fixed amount annually is allowed, i.e., two calendar weeks.

While there is no specific statutory provision which entitles hourly county employes to pay for legal holidays, such allowances have been made for state employes. Section 121.16, Revised Code, provides that "employes in the several departments of the state service * * * working on an hourly basis shall be entitled to eight hours of holiday pay for New Years Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas Day of each year, if they are regular employes with at least six months full time *state service* prior to the month when such holiday occurs."

The application of this statutory provision in the case of county employes could be justified only by adoption of the view that the county is a "department of the state service." The statute does not lend itself to such interpretation, however. While counties are subdivisions and agencies of the state in the nature of constituent parts of the scheme of the permanent organization of the government of the state, they are not necessarily departments of the state service. Moreover, it is to be observed that the term here involved is not regarded as sufficient even to comprehend all state employes. Thus, in Opinion No. 830, Opinions of the Attorney General for 1946, page 224, it was held that the word "depart-

ment" did not include the Industrial Commission, because not named as one of the state departments designated by Section 121.02, Revised Code. The opinion states:

> "Where the legislature has seen fit to exercise its power to define the sense in which words are employed in a statute, the legislature's own construction of its language should be followed in the interpretation of the section to which it is intended to apply."

This principle is similarly applicable in the case of a county which is not included among the several state administrative departments by statutory designation.

As to your question whether the county engineer may grant such allowances to employes of his department under the provisions of Section 325.17, Revised Code, you will observe that the section authorizes the county officers specified in Section 325.17, Revised Code, (which includes the county engineer,) to "fix the compensation" of their employes and to file certificates of such action with the county auditor, such compensation not to exceed in the aggregate for each office the amount fixed by the board of county commissioners. The provisions of this section, to the effect that the county commissioners shall fix an "aggregate sum" to be expended during the period fixed by law for the compensation of employes of the respective county officials, has been held not to confer upon the county commissioners the power to fix the compensation of such employes and deputies, and that each county officer may fix the compensation of his employes and deputies, provided that such compensation does not exceed the aggregate amount fixed by the county commissioners for such office. County Commissioners v. Rafferty, 19 N. P. (N. S.). To like effect are Opinion No. 3429, Opinions of the Attorney General for 1926, page 253, and Opinion No. 1339, Opinions of the Attorney General for 1927, page 2432.

The word "fix" has been held to authorize the naming of the amount of compensation, the establishment of a definite rate of wages. Morse v. Delaney, 218 N. Y. S., 571. But it cannot be construed to carry with it the power to allow pay for days not worked, or for legal holidays, except when specifically authorized by statute.

Construing this section in Opinion No. 549, Opinions of the Attorney General for 1919, page 969, it was held that an allowance to employes in

excess of the amount fixed and certified, purporting to be made in consideration of extra work or for extra hours, was unauthorized. The opinion stated:

> "The manifest purpose and policy of the statute governing the employment of deputies, clerks, assistants, etc., in the various county offices, would be circumvented and the way opened for the practice of fraud and imposition by the recognition of a liability against the public treasury on account of services of the character under consideration incurred otherwise than in faithful compliance with the provisions of the statute."

The statute confers no legislative power upon the county or the heads of county departments to grant hourly workers pay allowances for legal holidays. And although the right of a municipality, or similarly a metropolitan housing authority, to fix vacation allowances has been recognized, Opinion No. 1536, Opinions of the Attorney General for 1950, page 138, the rule is different in the case of a county which is governed by specific statutory provisions. Section 325.19, Revised Code, fixes vacation allowances for county hourly employes on the basis of "hours worked," and there is no way for the county or its officers to depart from that limitation. The principle applicable is stated in 14 American Jurisprudence, page 203:

> "Since a county derives its authority from the legislature, it ought not to be inferred, in the absence of clearly expressed terms in the act under which the county is organized, that the legislature has delegated to it the power to legislate concerning its local affairs in such way as to supersede general laws or render them unnecessary."

Accordingly, in specific answer to your questions, it is my opinion that:

1. In the absence of a specific statutory provision authorizing such payment, county employes working on an hourly basis are not entitled to pay for legal holidays on which they do not actually work.

2. A county engineer has no authority under the provisions of Section 325.17, Revised Code, to grant hourly employes in his department pay for legal holidays on which they do not work.

Respectfully,
C. WILLIAM O'NEILL
Attorney General