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1. VACATION—IN ABSENCE OF STATUTE GRANTING SPECIFIC VACATION LEAVE TO OPERATIVE EMPLOYEES, BOARD OF EDUCATION, BOARD HAS IMPLIED AUTHORITY IN EXERCISE OF SOUND DISCRETION TO GRANT REASONABLE VACATION LEAVE WITH PAY.
2. SICK LEAVE, SPECIFIC—VACATION LEAVE—TOWNSHIP EMPLOYEES—IN ABSENCE OF STATUTE, TOWNSHIP TRUSTEES HAVE IMPLIED AUTHORITY IN EXERCISE OF SOUND DISCRETION TO GRANT EMPLOYEES REASONABLE PERIODS OF LEAVE WITH PAY.
3. IN ABSENCE OF STATUTORY AUTHORITY, TOWNSHIP TRUSTEES MAY NOT GRANT EMPLOYEES WORKING ON HOURLY OR DAILY BASIS PAY FOR LEGAL HOLIDAYS ON WHICH NO SERVICE PERFORMED.

SYLLABUS:

1. In the absence of a statute granting specific vacation leave to operative employees of a board of education, such board has implied authority in the exercise of a sound discretion, to grant such employees reasonable vacation leave with pay.

2. In the absence of a statute granting specific sick leave, and vacation leave to township employees, the township trustees have implied authority in the exercise of a sound discretion to grant such employees reasonable periods of leave with pay, for such purposes.

3. In the absence of specific authority granted by statute, the trustees of a township may not grant their employees working on an hourly or daily basis, pay for legal holidays on which no service is performed.

Columbus, Ohio, December 9, 1955

Hon. Danny D. Johnson, Prosecuting Attorney
Tuscarawas County, New Philadelphia, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“After perusing Sections 121.16, 143.29 and 325.19 of the Revised Code of Ohio I have been unable to determine what vacation an employee of a Board of Education is entitled to receive. I wish to point out that Section 143.29 of the Revised

Code entitled, 'Sick Leave,' employees of the Board of Education are mentioned, whereas in the other two Sections aforementioned they are not. Therefore, who determines the amount of time that employees of the Board of Education, for example the janitor, should receive annually as a paid vacation?"

I also have a letter from Hon. Harry Friberg, Prosecuting Attorney of Lucas County, in which he presents the following question:

"May I kindly have your opinion as to whether a Board of Township Trustees is authorized to make allowances to township employees, including those working on an hourly or per diem basis for holiday, vacation and sick leave pay."

The same principles will apply in answer to both of these inquiries and I shall therefore consider them together.

Section 121.16, Revised Code, 154.20 G. C., to which you refer, underwent a slight change at the hands of the recent General Assembly and the portion thereof relating to vacations appears as Section 121.161, Revised Code. This section reads in part as follows:

"Each full-time state employee, including full-time hourly-rate employees, after service of one year with the state, is entitled, during each year thereafter, to two calendar weeks, excluding legal holidays, vacation leave with full pay. Employees having fifteen or more years of service with the state are entitled to three calendar weeks of such leave.

"In special and meritorious cases where to so limit the annual leave during any one calendar year would work peculiar hardship, it may, in the discretion of the director of the department, be extended.

"Employees working on an hourly basis shall be entitled to eight hours of holiday pay for New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving and Christmas Day of each year, if they are regular employees with at least six month's full-time state service immediately prior to the month when such holiday occurs." * * *

It may be seen at a glance that this section cannot be construed as applying to either an employee of the board of education or an employee of a township. The statute itself is a part of the state administrative department laws, and by the terms of the statute which I have quoted is plainly limited to state employees.

Section 143.29, Revised Code, 486.17c, G.C., relates to sick leave. By its terms it applies only to employees whose salary or wages are paid in full or in part by the state, counties, municipalities and boards of education, and provision is made both for full-time and part-time employees. It is clear that this statute does not make any provision for sick leave for township employees. As to full-time employees, it grants one and one-fourth days leave with pay for each month of service. As to employees who are provisional or who render part-time, per diem or hourly service, it is provided that they "shall be entitled to sick leave for the time actually worked at the same rate as that granted full-time employees."

Section 325.19, Revised Code, provides for vacations for county employees and is strictly limited in its terms to such employees. The same vacations are granted to full-time employees as are allowed to state employees by Section 121.161 supra; and in addition to like pay for holidays, hourly employees are allowed vacations according to the following formula: "One day vacation leave shall be granted for each one hundred seventy-three and one-third hours worked." It is obvious that we must exclude from the provisions of this section any consideration of vacations either for employees of a board of education or of a township.

The fact, however, that the statutes referred to do not make complete provision for either sick leave or vacation leave for the employees mentioned in the two requests here considered, does not necessarily bar such employees from receiving such allowances. Prior to the enactment of the statute providing for vacations for county employees, one of my predecessors had before him the question whether county employees on a monthly salary were entitled to vacation with pay, and to sick leave with pay. It was held in Opinion No. 728, Opinions of the Attorney General for 1939, page 917:

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

"2. Section 154-20, General Code, granting leaves of absence to state employes may be used as a guide to determine what a reasonable time may be in view of the fact that no specific statute covering the subject may be found."

Reference was there made to an earlier opinion, to wit, No. 3006, Opinions of the Attorney General for 1928, page 2820, where it was held:

“County commissioners may lawfully allow their employes a reasonable leave of absence during their term of employment with full pay, whether such employes are paid on a weekly or monthly basis, or upon a per diem basis, providing the contracts of employment with such employes so provide, either expressly or by necessary reasonable implication.”

The then Attorney General appears to have considered that the general authority given the county commissioners to employ superintendents, watchmen, janitors, etc., was sufficient to furnish the necessary implication of authority to grant them a reasonable vacation. In the 1939 opinion reference was made to Section 154-20, General Code, which read in part as follows :

* * * “Each employe in the several departments shall be entitled during each calendar year to fourteen days leave of absence with full pay. In special and meritorious cases where to limit the annual leave to fourteen days in any one calendar year would work peculiar hardship, it may in the discretion of the director of the department, be extended.” * * *

The reasons for the holding are found in the following language quoted from the opinion :

“Turning to the question of whether the employe may receive both sick leave and vacation with pay, it is apparent from the foregoing, that the granting of either privilege depends upon the discretion of the employer official. It would follow then that it would be entirely within the discretion of such employer official to grant sick leave in addition to a vacation period or to grant only one period of leave which could be either used as a vacation or sick leave.

“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. 7176, Opinions of the Attorney General for 1944, page 575, the 1939 Opinion was referred to with approval, and the paragraph last quoted was commented upon in the following language :

“The principle there expressed I believe to be sound and to be reenforced by the universality of its application. The theory which manifestly underlies the granting of such vacation periods aside from the fact that it is a humane policy toward public employes, is that giving them an opportunity for relaxation, rest or

change of occupation, produces a higher morale and increases the efficiency of public employes.”

In Opinion No. 2077, Opinions of the Attorney General for 1950, page 535, my immediate predecessor, while holding that Section 486-17c, General Code, did not provide for sick leave for employees of a public library further held as shown by the second paragraph of the syllabus :

“The board of library trustees has the power pursuant to Section 7630, paragraphs 7 and 8, of the General Code, to make rules and regulations governing sick leave benefits for its employes.”

Said Section 7630 contained only authority to appoint and fix the compensation of its employees, and to make rules for the “proper operation” of the library.

In Opinion No. 1035, Opinions of the Attorney General for 1951, page 882, I was called upon to answer the question whether a township employee was entitled to sick leave under Section 486-17c, and the holding was as follows :

“1. Section 486-17c, General Code, does not provide for sick leave for township employes.

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

It will be noted that references is made in several of the opinions aforesaid to “full time” employees. I do not consider that the principles brought out in those opinions need be limited to full time employees. Apparently they were so limited only because in each instance the language of the question presented was so limited. In the case of sick leave the statute prescribes a formula by which the leave is to be granted to daily or hourly employees. The statute above referred to providing for vacation leave for county employees also contains a formula for calculating the allowance to be made for hourly workers. I do not consider that the fact that the legislature has seen fit to provide specific periods for vacation and sick leave for certain classes of public employees instead of leaving the matter entirely to the discretion of the appointing powers, is to be construed as a bar to the allowance of reasonable leaves for vacation and sickness to other public employees. I consider it worthy of consideration that in each

of the statutes above noted where the legislature has granted sick leave or vacation it has left a certain discretion in the heads of departments to grant additional leave if deemed proper.

In my opinion the township trustees in the case of township employees, and boards of education in the case of operative employees such as janitors or maintenance men, have authority in the exercise of a proper discretion to grant to their employees reasonable leaves for sickness and for vacation. In making such grants the provision of the statute granting such leaves to county employees may be drawn on not for the purpose of obtaining power but rather as indicating the general policy of the state, and furnishing a formula which might reasonably be followed.

In so far as this opinion relates to school employees, I am not including teachers, as they are clearly included within the statute relating to sick leave, and the nature of their employment manifestly affords them extended vacation periods. I understand that the request relates to operative employees such as clerks, janitors, engineers and maintenance men.

As to allowance of holiday pay to township employees working by the day or hour, I can see no basis for such allowance as an exercise of discretion by the employing body. The opinions which I have cited approving the allowance of sick leave and for relatively short periods of vacation for public employees were based, as is my present opinion, on humane considerations and on the theory that they are conducive to stronger morale and greater efficiency. The grant to one employed by the day or hour of pay for a day not worked merely because it is a so-called "legal holiday" is based on no such consideration, but is a mere gratuity. It would be as reasonable to grant such pay for Sundays on which no work is done.

In my opinion No. 4569, Opinions of the Attorney General for 1954, page 575, issued on November 24, 1954, I had the identical question presented as to holiday pay for county employes, and held:

"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."

The legislature subsequently amended the statute so as to grant such allowance. Of course, the legislature has practically unlimited discretion

in granting powers to inferior public bodies, but that does not give such bodies as the county commissioners or township trustees the right to assume them to themselves. I still adhere to the principle of my opinion last referred to, and must hold that township trustees, in the absence of express authority granted them by statute, have no authority to grant to employees working by the day or hour pay for holidays on which no work is performed.

In answer to the questions submitted, it is my opinion :

1. In the absence of a statute granting specific vacation leave to operative employees of a board of education, such board has implied authority in the exercise of a sound discretion, to grant such employees reasonable vacation leave with pay.

2. In the absence of a statute granting specific sick leave, and vacation leave to township employees, the township trustees have implied authority in the exercise of a sound discretion to grant such employees reasonable periods of leave with pay, for such purposes.

3. In the absence of specific authority granted by statute, the trustees of a township may not grant their employes working on an hourly or daily basis, pay for legal holidays on which no service is performed.

Respectfully,

C. WILLIAM O'NEILL

Attorney General
