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EMPLOYEE, COUNTY — DECEASED — UNUSED VACATION TIME ACCUMULATED BEFORE DEATH—NO RIGHT TO BE PAID—:§325.19, 121.161 R.C.

SYLLABUS:

The survivors or personal representatives of the estate of an employee of a county after his death have no right to receive pay for unused vacation time accumulated by the employee before his death.

Columbus, Ohio, July 16, 1958

Hon. Mathias H. Heck, Prosecuting Attorney
Montgomery County, Dayton, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Ohio Revised Code, Section 121.161 effective October 11, 1955, provides in part that upon the death of a state employee the unused vacation leave to his credit shall be paid in accordance with Revised Code, Section 2113.04 or his estate.

“Ohio Revised Code Section 325.19, which is similar to Section 121.161 in that it provides for vacation leave and holiday pay for county employees, fails to provide for accumulated vacation leave in the event of the death of a county employee.

“I have received a request for an opinion from the County Auditor of Montgomery County, Ohio, who refers to the section pertaining to county employees and states in part:

‘there is no language used in the provisions of Section 325.19 R.C., which would indicate the intentions of the legislature to pay for unused vacation leave after death, unless you could read into this section the provisions of Section 2113.04 R.C., which provides in part as follows: “Any employer, *including the state or a political subdivision*, at any time not less than thirty days after the death of his or its employee, may pay all wages or personal earnings due to such deceased employee, etc.”

“His letter requesting an opinion further states:

‘By reason of the conflict of the provisions of the Revised Code, and since one class of public employees is apparently discriminated against, may I have your written opinion whether or not a county employee has earned a vacation with pay under the terms of a statute, but is deceased before securing the benefit of such vacation allowance, may payment of such vacation allowance be made to said employee’s estate or beneficiary, subsequent to the dates of death of said employee.’

“This request appears to be of general interest and application throughout Ohio therefore I request your official opinion in answer to the question presented in the Auditor’s letter.”

Section 121.161, Revised Code, provides in pertinent part as follows:

“In the case of the death of a state employee, the unused vacation leave to the credit of any such employee shall be paid in accordance with Section 2113.04 of the Revised Code, or to his estate.”

This section plainly limits the authorization for payment for unused vacation leave in case of death to state employees and the reference to Section 2113.04, Revised Code, merely authorizes payment of all wages to certain named survivors without requiring appointment of an executor or administrator of an estate where the earnings due do not exceed \$300.00. This section cannot by inference be extended to authorize any payment not due to such deceased employee. It is a well-known principle of law that

salary statutes must be strictly construed against the claimants. See 14 Ohio Jurisprudence, 2d, p. 230.

Section 325.19, Revised Code, provides for vacation leave and holiday pay for county employees but it does not authorize any payment for unused vacation leave accumulated by a deceased employee. My immediate predecessor in Opinion No. 572, Opinions of the Attorney General for 1951, at page 338, held on a similar question as follows:

“An employe of a county, after the termination of his employment either by resignation or removal for proper cause, has no right to pay for a vacation period to which he would have been entitled under the provisions of Section 2394-4a, of the General Code, had he remained in his employment, no part of such vacation having been taken while he was so employed.”

As far as your question is concerned, the section in the General Code mentioned above contains substantially the same provisions now contained in Section 325.19, Revised Code. At page 339 of the opinion cited above the following wording pertinent to your request is found:

“In an opinion rendered by one of my predecessors, found in 1944 Opinions of the Attorney General, page 575, the question raised was stated as follows:

‘If a city employe has earned a vacation with pay under the terms of a local salary ordinance, but is deceased before securing the benefit of such vacation allowance, may payment of said vacation allowance be made to said employe’s estate or beneficiary, subsequent to the date of death of said employe?’

“The syllabus of the opinion reads as follows:

‘If a city employe has earned the right to a vacation with pay under the terms of a lawful salary ordinance, but dies before receiving the benefit of such vacation, payment of such vacation allowance may not be made to the employe’s estate or beneficiary subsequent to his death.’

“In the correspondence relating to that request it was suggested that under the circumstances presented, vacation pay should be construed as a vested right in one who has worked, but who had not received his vacation.

“In the course of that opinion, it was stated that as a matter of sound public policy even in the absence of any authorizing statute, leaves of absence for vacation or sickness are desirable and should be read into all contracts of public employment, following the general policy adopted in private business and usually in state

and federal governments. It was further suggested that the theory which underlies the granting of such vacation periods is that they give employees an opportunity for relaxation, rest or change of occupation and thereby produce a higher morale and increase the efficiency of such public employes. I quote the following from the opinion in question :

‘If the purpose of a vacation is to refresh the employe so that he may return to his work in better condition for continued service, then it is obvious that the purpose wholly fails if the employe dies before he has had his vacation. The only vested right that can possibly be asserted is the right to the vacation, and as incident thereto the right to receive the pay which he would have received had he continued on duty. The pay which he receives is not a bonus, but is his salary or wage for the period when he is on vacation. The salary or compensation of a public position is regarded in the law merely as an incident to the holding of an office or public employment.’

“It is stated in 43 American Jurisprudence, page 136 :

‘Compensation does not constitute any part of the public office to which it is annexed. It is a mere incident to the lawful title or right to the office and belongs to the officer so long as he holds the office.’

“The case of *State ex rel. Clinger vs. White*, 143 Ohio St., 175, involved the right of a prosecuting attorney who had been inducted into the military service, to receive the salary of his office, while absent and in such service. The court held that he had that right, and in its opinion quoted from 46 Corpus Juris, 1014 as follows :

‘The person rightfully holding an office is entitled to the compensation attached thereto; this right does not rest upon contract, and the principles of law governing contractual relations and obligations in ordinary cases are not applicable. * * * The right to the compensation attached to a public office is an incident to the title to the office and not to the exercise of the functions of the office; hence, the fact that officers have not performed the duties of the office does not deprive them of the right to compensation, provided their conduct does not amount to an abandonment of the office.’

“The fair implication from the last sentence in the above quotation is that if the action of the officer amounts to an abandonment of the office, then his right to receive the salary pertaining to the office terminates at once. The same result would ensue if an employe abandons or resigns from his position, and, it certainly cannot be claimed that one would be entitled to vacation pay incident to an employment from which he has voluntarily severed himself. I quote again from the 1944 Opinion :

‘Likewise, if the incumbent of an office or public employment were to tender his resignation to take effect instantly, he would certainly be so completely severed from his office or position that he could not be heard to claim the right to be paid for a vacation period to which he would have been entitled had he continued in the service. In other words, it appears to me obvious that the right to vacation pay necessarily presupposes that one remains in the service, at least until the end of the vacation period. One who is entitled to a vacation might tender his resignation to take effect at the end of the vacation period and receive his pay for that period. That right would be predicated upon the fact that he still holds the office.’ ”

I deem the reasoning contained in the foregoing quotation to be sound and applicable to your inquiry.

Accordingly, in specific answer to your question, it is my opinion that the survivors or personal representatives of the estate of an employee of a county after his death have no right to receive pay for unused vacation time accumulated by the employee before his death.

Respectfully,
WILLIAM SAXBE
Attorney General