

**Note from the Attorney General's Office:**

1963 Op. Att'y Gen. No. 63-666 was overruled in part by  
1989 Op. Att'y Gen. No. 89-012.

666

## SYLLABUS:

1. Pursuant to Section 325.19, Revised Code, a county employee may accumulate earned but unused vacation leave with pay for any prior year to the extent he was entitled to vacation leave with pay in such prior year. Opinion No. 3081, Opinions of the Attorney General for 1962, approved and followed.

2. Under Section 325.19, Revised Code, a county employee with a year of county service is entitled upon separation to receive compensation for the pro-rated portion of any earned but unused vacation leave for the current year. Opinion No. 2021, Opinions of the Attorney General for 1961, approved and followed.

Columbus, Ohio, November 25, 1963

Hon. James K. Leedy  
Prosecuting Attorney  
Wayne County  
Wooster, Ohio

Dear Sir:

I am in receipt of your letter reading as follows:

“The following question has been posed to this office:

“‘A salaried employee was continuously employed from January 1, 1933, to August 15, 1963, when he died. To what unused vacation pay is his estate entitled, assuming he took no vacation during his employment?’”

I assume that the employee you have reference to was employed by the county. In considering the question you raise, however, I will examine the pertinent statutes with regard to both state and county employees, for the two statutes are for the most part identical and those prior opinions of the Attorney General which have examined related questions concerning state employees would seem to have equal application to county employees.

The applicable statute in each instance is here set forth. Section 325.19, Revised Code, provides:

“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, shall be entitled during each year thereafter, to two calendar weeks, excluding legal holidays, of vacation leave with full pay. Employees having fifteen or more years of county service are entitled, during each year thereafter, to three calendar weeks, excluding legal holidays, of vacation leave with full pay. Two calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the first anniversary of employment and annually thereafter, and three calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the fifteenth anniversary of employment and annually thereafter. The annual leave during any one calendar year may be extended to include unused vacation leave of previous years provided the total leave taken in any one year shall not exceed six weeks. An employee shall be entitled to compensation for the pro-rated portion of any earned but unused vacation leave to his credit at time of separation.

“\* \* \*

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

Section 121.161, Revised Code, provides:

“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, of vacation leave with full pay. Employees having fifteen or more years of service with the state are entitled, during each year thereafter, to three calendar weeks, excluding legal holidays, of vacation leave with full pay.

Two calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the first anniversary of employment and annually thereafter, and three calendar weeks of leave with pay will have been earned and will be due an employee upon attainment of the fifteenth anniversary of employment and annually thereafter. Upon separation from state service, except for cause, an employee shall be entitled to compensation for the pro-rated portion of any earned but unused vacation leave to his credit at time of separation.

“\* \* \*

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

For purposes of this discussion we may assume the statutes are the same.

The application of these statutes has been considered in Opinion No. 3548, Opinions of the Attorney General for 1963; Opinion Nos. 3437, 3239 and 3081, Opinions of the Attorney General for 1962, Opinion No. 2021, Opinions of the Attorney General for 1961; Opinion No. 1575, Opinions of the Attorney General for 1960; and Opinion No. 6580, Opinions for the Attorney General for 1956.

In opinion No. 6580, Opinions of the Attorney General for 1956, which was rendered before the recent amendment of Sections 121.161 and 329.15, Revised Code, effective November 4, 1959, it was stated in branches 1 and 2 of the syllabus:

“1. The paid vacation leave for state employees for which provision is made in Section 121.161, Revised Code, may not be accumulated as a matter of right, \* \* \*

"2. There is no provision in law for the compensation of state employees in money for unused vacation leave except that in the case of the death of any such employee a money payment with respect to unused vacation leave to which such employee was entitled *in the year of his death* shall be made, as provided in Section 121.161, Revised Code. \* \* \*

Thus, prior to the 1959 amendments of Sections 121.161 and 329.15, Revised Code, no state or county employee could accumulate unused vacation leave from prior years.

Opinion No. 1575, Opinions of the Attorney General for 1960, was one of the first to construe the two sections as amended and presently constituted. It was concluded as disclosed in branch No. 1 and 2 of the syllabus:

"1. Pursuant to Section 121.161, Revised Code, as effective November 4, 1959, a state employee may accumulate vacation leave earned, but not used during his state service, and in case of the death of a state employee the monetary value of all such unused vacation leave, if not exceeding \$300.00, should be paid in accordance with Section 2113.04, Revised Code, and if exceeding \$300.00, to his estate.

"2. Where a state employee was separated from the state service without being paid the compensation due him under Section 121.161, Revised Code, as effective November 4, 1959, for accumulated vacation leave to his credit at the time of separation, the employing authority may, if funds are available for that purpose, make such payment subsequent to the time of separation."

The next opinion on this point was rendered in 1961, Opinion No. 2021, Opinions of the Attorney General for 1961. The syllabus in that opinion provides:

"Pursuant to Section 325.19, Revised Code, a county employee may accumulate vacation leave earned, but not used during his county service, and the payment of such earned but unused vacation leave to an employee upon separation should be at his current rate of pay."

The discussion in this opinion is centered around Section 325.19, Revised Code, but it does state:

"In considering similar language in the statute pertaining to vacation leave for state employees, Section

121.161, Revised Code, I stated in my Opinion No. 1575, Opinions of the Attorney General for 1960, issued on July 25, 1960:

'Where the section previously did not contain a provision for an extra money payment to an employee in the event he should fail to take his vacation, it presently specifically provides that an employee upon separation, is entitled to compensation for *any* earned, but unused vacation leave. The section further states that 'two calendar weeks of leave with pay *will have been earned and will be due* an employee upon attainment of the first anniversary of employment and *annually thereafter*, and three calendar weeks of leave with pay *will have been earned and will be due* an employee upon attainment of the fifteenth anniversary of employment *and annually thereafter*.' Thus, under the present law, there is specific authority for an accumulation of leave over a period of years in the case of employees who fail 'during each year' to avail themselves of the privilege of leave with full pay.'

"\* \* \*

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\* \* \*

"The reference to 'pro-rated portion of any earned but unused vacation leave' in Section 325.19 *supra*, also might cause some confusion on the question of accumulated vacation leave. Here again, however, this reference must be read as a part of the entire section to ascertain its meaning, and *I believe that in using this language the intent was to give the employee vacation credit for the current year where he had worked only a part of that year.*

(Emphasis added)

A further question pertaining to unused vacation leave was presented and answered in Opinion No. 3081, Opinions of the Attorney General for 1962. That inquiry was very similar to the one you present here. The following is stated in the body of the opinion:

"Accordingly, since Section 325.19, *supra*, states that compensation shall be paid for *any* earned but unused vacation leave at the time of separation, and that 'the unused vacation leave' shall be paid in case of death, I am of the opinion that this includes any leave to which the employee was entitled, but did not use, either before or after November 4, 1959.

“As to the second part of your question, whether the vacation was earned by an employee on a regular basis, or a *per diem* basis, the above conclusion will apply. The question to decide in any particular case is *whether the employee was legally entitled to vacation leave which he did not take.*

“In conclusion, it is my opinion and you are advised that under Section 325.19, Revised Code, an employee is entitled at the time of separation to compensation for any vacation leave to which he was entitled but did not use, either before or after November 4, 1959.”

(Emphasis added)

This opinion is approved by Opinion No. 3239, Opinions of the Attorney General for 1962.

Opinion No. 3548, Opinions of the Attorney General for 1963, cited, approved and followed the above opinions. This is the latest expression from this office on accumulating unused vacation leave. It is provided therein:

“Under the law existing immediately prior to November 4, 1959, state employees could not accumulate vacation leave earned but not used in past years, and could not be paid for any such unused leave on separation from the state service. Opinion No. 6580, Opinions of the Attorney General for 1956, Page 388. The language of Section 121.161, *supra*, that leave ‘will have been earned’ and ‘will be due’ was not added until November 4, 1959 (128, Ohio Laws, 627). Prior to that time, the law provided that employees were ‘entitled’ to certain periods of leave after certain periods of service. But to be ‘entitled’ to leave, an employee had to ‘earn’ that leave even though the law did not then use that language. Thus, where prior to November 4, 1959, an employee was entitled to leave but did not take such leave, such leave was actually ‘earned but unused vacation leave.’ Accordingly, since Section 121.161, *supra*, states that compensation shall be paid for *any* earned but unused vacation leave at the time of separation, and that ‘the unused vacation leave’ shall be paid in case of death. I am of the opinion that where, on and after November 4, 1959, an *employee* is separated from the state service, except for cause, he is entitled at the time of separation to compensation for any vacation leave to which he was entitled but did not use, either before or after November 4, 1959. (See Opinion No. 3081, issued on June 21, 1962, construing

the similar language of Section 325.19, Revised Code, dealing with county employees.)”

There remains to be ascertained the question you have raised, viz., the amount of unused vacation leave with pay a county employee is entitled to upon death or separation from service.

There is no direct statutory limit upon the amount of earned vacation leave that may be accumulated. The amount is determined solely on the basis of the extent of vacation leave earned but unused in prior years.

With reference to county employees, it was not until January 1, 1947, with the passage of Section 2394-4 a, General Code, (122 Ohio Laws 238) that employees were entitled by statute to vacation leave with pay. Beginning January 1, 1947, a county employee was entitled to two calendar weeks vacation leave with pay annually. There has been a provision in the law granting county employees vacation leave with pay continuously since the enactment of Section 2394-4 a, General Code. Under existing legislation, then, a county employee upon separation from service (or his estate upon his death) is entitled to receive vacation pay for the year 1947 and thereafter to the extent that he was entitled but failed to take vacation leave with pay in those years.

It is therefore my opinion and you are accordingly advised that:

1. Pursuant to Section 325.19, Revised Code, a county employee may accumulate earned but unused vacation leave with pay for any prior year to the extent he was entitled to vacation leave with pay in such prior year. Opinion No. 3081, Opinions of the Attorney General for 1962, approved and followed.

2. Under Section 325.19, Revised Code, a county employee with a year of county service is entitled upon separation to receive compensation for the pro-rated portion of any earned but unused vacation leave for the current year. Opinion No. 2021, Opinions of the Attorney General for 1961, approved and followed.

Respectfully,  
WILLIAM B. SAXBE  
Attorney General