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VACATION — LAWFUL SALARY ORDINANCE — IF CITY EMPLOYEE EARNED RIGHT TO VACATION WITH PAY BUT DIED BEFORE RECEIVING BENEFIT, PAYMENT OF VACATION ALLOWANCE MAY NOT BE MADE TO EMPLOYEE'S ESTATE OR BENEFICIARY SUBSEQUENT TO HIS DEATH.

SYLLABUS:

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.

Columbus, Ohio, October 16, 1944

Bureau of Inspection and Supervision of Public Offices  
Columbus, Ohio

Gentlemen:

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

“We are inclosing herewith a letter from the City of Toledo Law Department, concerning the allowance of vacation pay earned by a deceased city employe.

This question seems to be one of general application throughout the State, therefore, may we request your official opinion in answer to the following:

Question: 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?"

Accompanying your communication I note the letter from the Director of Law of the City of Toledo, calling attention to the ordinance of that city which contains the following provision:

"Every employe of the City of Toledo, who is employed on an annual or monthly rate of compensation, shall receive twelve (12) working days annual leave with full compensation. One day of annual leave with full compensation shall accrue to each person employed on an annual or monthly basis for each full month worked. \* \* \*"

The Director suggests that in view of the particular provisions of the above ordinance it might be considered that "vacation pay would be construed as a vested right in one who had worked but had not received his vacation".

The law seems to contemplate that public employes may properly be granted a vacation with pay for a limited period. The legislature has by the provisions of Section 154-20 General Code, expressly provided for a vacation for substantially all of the employes of the several departments of the state service, in the following language:

"All employes in the several departments except the state highway department shall render not less than eight hours of labor each day, Saturday afternoons, Sundays and days declared by law to be holidays excluded, except in cases in which, in the judgment of the director, the public service will thereby be impaired. 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. No employe in the several departments, employed at a fixed compensation, shall be paid for any extra services, unless expressly authorized by law."

In an opinion which I rendered on June 9, 1939 (1939 Opinions,

Attorney General, p. 917) it was held:

“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.”

In the course of the opinion, it was stated:

“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.”

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.

The proposition just stated leads somewhat directly to the principle upon which I must base my conclusion that where a public employe has become entitled to a vacation but dies without taking advantage of the privilege, his estate cannot benefit by receiving the pay to which he would have been entitled had he lived and continued in his employment until the end of his vacation period.

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. As stated in 43 American Jurisprudence p. 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*”.

(Emphasis added.)

The same proposition in almost identical language is repeated at page 163, where it is said:

“Compensation of a public office is incidental to the office and belongs to the officer *only* as long as he holds the position”.

In the somewhat recent case of *State, ex rel. Clinger v. White*, 143 O. S. 175, the court had under consideration the right of a prosecuting attorney who had been inducted into the military service and was absent for a considerable period, to receive the salary of the office, and it was held that he had that right. The court in its opinion quotes 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.*”

(Emphasis added.)

There is significance in the final sentence of the above quotation, “provided their conduct does not amount to an abandonment of the office”. By inference, if the action of the officer amounts to an abandonment of his office, his right to the salary or compensation ceases instantly, and it would hardly be claimed by anyone that one who had abandoned and thereby lost his office, could thereafter claim the right to receive pay for a vacation to which he was entitled but had not yet taken.

Nor would it be claimed that an officer or employe who has been removed from his position for proper cause could thereafter claim the right to recover salary for a period following his removal when he might

have enjoyed a vacation had he continued in the service.

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. Manifestly, no one can post-date the time of his death. I can conceive of nothing that will terminate the tenure of an office or position more suddenly or completely than the death of the incumbent.

It is accordingly my opinion in answer to your inquiry, that 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.

Respectfully,

THOMAS J. HERBERT

Attorney General