

Note from the Attorney General's Office:

1963 Op. Att'y Gen. No. 63-500 was modified by
1983 Op. Att'y Gen. No. 83-085.

SYLLABUS:

Section 143.29, Revised Code, establishes the sick leave benefits for all full-time employees of all municipal corporations which have not provided otherwise by or pursuant to a charter adopted under authority of Section 7, Article XVIII of the Constitution of Ohio (Opinion No. 266, Opinions of the Attorney General for 1951, syllabus numbers 1 and 2 modified, syllabus number 5 overruled).

Columbus, Ohio, September 3, 1963

Hon. Roger W. Tracy
Auditor of State
State House
Columbus 15, Ohio

Dear Sir:

You have requested my opinion in answer to the following questions:

“1. Does Section 143.29, Revised Code, entitle each full-time employee of either a city or village to sick leave benefits in accordance with the terms of the statute?

“2. Are members of police or fire departments, who are employed by a non-charter city or village, granted sick leave benefits under this statute, which are different from those accruing thereunder to other employees of the same municipality?

“3. Can a non-charter city or village provide by ordinance, sick leave benefits for each full-time employee, which are either greater or less than those provided in Section 143.29, Revised Code?

“4. In the absence of a pertinent charter provision or local legislation on the subject, are policemen and firemen, who are employed by a charter municipality, entitled to sick leave benefits?

“5. In the absence of a pertinent charter provision or local legislation on the subject, are full-time employees of a charter municipality, other than policemen and firemen, entitled to sick leave benefits?

“6. Pursuant to appropriate charter authorization, can a city or village provide sick leave benefits for each

full-time employee, which are either greater or less than those provided in Section 143.29, Revised Code?"

As is apparent from your questions, the problem revolves around the sick leave provisions of Section 143.29, Revised Code. In the part here pertinent that section provides:

"Each full-time employee, whose salary or wage is paid in whole or in part by the state, and each full-time employee in the various offices of the county service and municipal service, and each full-time employee of any board of education, shall be entitled for each completed month of service to sick leave of one and one-fourth work days with pay. * * *

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On its face, this provision would appear to be determinative of the answer to each of the questions which you have asked. It can not be deemed so summarily determinative, however, because of the "home rule" powers granted to municipal corporations by Article XVIII of the Constitution of Ohio; and considerable further analysis is, therefore, required.

In your letter of request you have noted two prior Attorney General Opinions which dealt with the sick leave problem here in question: Opinion No. 1650, Opinions of the Attorney General for (1950), page 231, and Opinion No. 266, Opinions of the Attorney General for 1951, page 107. The former opinion concluded that Section 486-17c, General Code (now Section 143.29, Revised Code) applied to "all full-time municipal employees." The latter opinion expressly overruled Opinion 1650, *supra*, and concluded that, with the exception of policemen and firemen, a city was "not in any way subject to the provisions of Section 486-17c of the General Code" and could provide for such sick leave for its employees as it saw fit. In the light of more recent decisions of the Ohio Supreme Court, I am compelled to conclude that neither of those opinions represents a completely accurate statement of the law on subject of sick leave for municipal employees.

Article XVIII of the Constitution of Ohio provides in pertinent part as to "home rule" for municipal corporations:

Section 1:

"Municipal corporations are hereby classified into

cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

Section 2:

“General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

Section 3:

“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

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Section 7:

“Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

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These provisions raise the question of the existence and extent of a power in municipal corporations, or municipalities as they are termed in Sections 3 and 7, *supra*, to disregard or avoid provisions of the Revised Code.

In *State ex rel. Canada v. Phillips*, 168 Ohio St., 191 (1958) the supreme court considered this question as to a requirement for the appointment of a deputy police inspector in a charter city. The city, by provision in its charter, had a requirement as to such appointment which differed from a requirement as established by Section 143.34, Revised Code. Confronted with what it felt to be two irreconcilable lines of case authority, the court, in a rather lengthy opinion reversing, distinguishing, and questioning a number of its own prior decisions, held that the city's charter provision, rather than the Revised Code provision, was controlling. Three of the prior decisions which were limited were in cases which had

been relied on by my predecessor in concluding in Opinion No. 266, *supra*, that there was an exception in the case of fire and police employees to the general rule that a city has complete control, under its home rule powers, over sick leave for its employees. That fact, together with the result of the case and the general reasoning of the opinion, lead me to conclude that there is no such exception now. It is further my opinion, based upon the *Canada Case*, that a city or village which has adopted a charter may, by its charter or by ordinance pursuant to charter power, provide sick leave benefits either greater or less than those provided in Section 143.29, *supra*, for all or any of its employees including policemen and firemen. In other words, where taken in or pursuant to a charter adopted under authority of Article XVIII, Section 7, *supra*, a municipality's action in providing sick leave benefits for its employees is controlling over state statute, and there is no exception to this rule in the case of policemen or firemen.

Opinion No. 266, *supra*, also did nothing to limit the rule it laid down to charter municipalities. Relying in part on *Village of Perrysburg v. Ridgeway*, 108 Ohio St., 245 (1923) my predecessor concluded in the fifth paragraph of the syllabus:

“5. The actions of a city in providing for sick leave benefits may be by a charter provision, or by ordinance in case the charter does not so provide. Any city not having a charter may make such provision by ordinance.

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I am of the opinion that, in view of one recent supreme court decision in particular, such conclusion as to non-charter cities must also be considered in error.

In *State ex rel. Petit v. Wagner*, 170 Ohio St., 297 (1960) the court was considering the propriety of the appointment of a police chief in a non-charter city under authority of an ordinance which conflicted with provisions of the Revised Code. The opinion considered the import of the *Perrysburg Case* but pointed out that “there the powers of home rule sought to be exercised were not at variance with the general law.” Then, relying in part on *Morris v. Roseman*, 162 Ohio St., 447 (1954) the court reasoned that, while a charter municipality is, under Sections 3 and 7 of Article XVIII, *supra*, limited in the exercise of “home rule” only to the extent that

its police and sanitary regulations must not conflict with general laws on that subject, a non-charter city is, under Section 2 and 3 of that same Article, limited to the extent that none of its ordinances may conflict with provisions of general law.

As stated in the syllabus, the court's conclusion as to the case before it was as follows:

"A non-charter municipality is without authority under the provisions of Section 3, Article XVIII, Constitution to prescribe by ordinance a method for the selection of a chief of police which is at variance with the provisions of Section 143.34, Revised Code."

I am aware of no analytical principal which would warrant the application of a different rule where Section 143.29, *supra*, is concerned. I must conclude, therefore, that a non-charter municipality is likewise without authority to provide by ordinance for sick leave benefits for its employees which are at variance with the benefits provided in that section.

Your questions also require me to consider whether Section 143.29, *supra*, is applicable to villages. As noted in your letter of request it was said in *State ex rel. Heffernan v. Serp*, 125 Ohio St., 87 (1932) that "* * * the civil service provisions apply to cities, but do not apply to villages." That statement, however, appears in the opinion, not in the syllabus, of a case which involved a statute (Section 486-19, General Code) which, by its own terms, was limited in application to cities. Furthermore, it is not entirely clear whether the writer of the opinion was referring to the statutory or to the constitutional provisions on that subject. At most, the statement is no more than dictum and I can not, for reasons which I shall explain, consider it controlling on the question raised by your request.

Section 10 of Article XV of the Constitution of Ohio provides as follows:

"Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

As you will note, cities but not villages are mentioned in this pro-

vision. Some sections of Chapter 143 of the Revised Code are likewise limited in application, for instance, Section 143.27 on the subject of tenure, and Section 143.30 which established municipal civil service commissions but is clearly limited in application to cities. These sections, it should be further noted, bear a rather direct relation to the establishment of a merit and fitness civil service system which is the subject of Section 10 of Article XV, *supra*. Section 143.29, *supra*, is not so limited, however; and, since its subject, sick leave, is not related to a merit and fitness civil service system, I am unable to imply such a limitation from Section 10, Article XV, *supra*. I must assume, then, that the section was enacted under the General Assembly's general legislative power contained in Section 1, Article II of our Constitution, and not pursuant to its special responsibility to enact civil service laws of a certain type under Section 10, Article XV, *supra*.

So far as this particular question is concerned, the key phrase in Section 143.29, *supra*, is "in the municipal service." As I have indicated, I find no help in seeking to interpret this phrase in either Chapter 143 of the Revised Code or in Section 10, Article XV, the civil service provision of the Constitution. I am relegated, therefore, to the following, more general, type of analysis. The adjective "municipal" may be defined as follows: having to do with or relating to a municipality. Municipalities are dealt with in our Constitution in Sections 2, 3, and 7 of Article XVIII; and, as there used, that term is clearly synonymous with the term "municipal corporation." Finally, the term "municipal corporation," as defined in Section 1 of Article XVIII, quoted above, clearly includes both cities and villages. I am compelled to conclude, therefore, that the phrase "municipal service" as used in Section 143.29, *supra*, must be construed to mean the service of any municipal corporation, either city or village.

There remains one further situation for me to consider in order to be able to answer your questions, and that is in the case of a charter municipality that has no provision in its charter or in ordinances enacted pursuant to its charter dealing with the

subject of sick leave for its employees. In other words, the question is, does Section 143.29, *supra*, continue to apply in charter municipalities unless and until those municipalities speak otherwise in the exercise of their "home rule" powers on the subject of sick leave.

I have been able to discover no case authority on this exact question; I am persuaded, however, that *State ex rel. Sun Oil Co. v. City of Euclid*, 164 Ohio St., 265 (1955) indicates the proper answer. In that case the court was considering the exercise of the power of eminent domain by a charter municipality. As in our problem, there were Revised Code provisions delineating how that power should be exercised and neither the charter nor the ordinances of the city in question set up any different procedure. The second paragraph of the syllabus in the *Sun Oil Case* reads as follows:

"Although municipal corporations, including charter cities, are permitted to appropriate private property for public purposes, they must, in doing so, follow strictly the modes of procedure prescribed by statute, where there is no ordinance or charter provision therefore."

In the light of this statement in a case where there is clearly implied the power to act otherwise pursuant to charter, I must conclude that the court considers the generally applicable statutes to continue in force in charter municipalities unless and until changed conclude that Section 143.29, *supra*, continues to apply in municipalities adopting a charter unless and until those municipalities provide otherwise as to sick leave in or by action pursuant to their charters.

In summary and in answer to your questions it is my opinion and you are advised that Section 143.29, Revised Code, establishes the sick leave benefits for all full-time employees of all municipal corporations which have not provided otherwise by or pursuant to a charter adopted under authority of Section 7, Article XVIII of the Constitution of Ohio (Opinion No. 266, Opinions of the Attorney General for 1951, syllabus numbers 1 and 2 modified, syllabus number 5 overruled). The answers to your questions numbered 2 and 3 are in the negative while the answers to those numbered 4, 5, and 6 are in the affirmative. The answer to your first question is "yes"

except in the case of the employees of a municipality which has provided otherwise by or pursuant to a charter.

Respectfully,
WILLIAM B. SAXBE
Attorney General