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## SYLLABUS:

1. Where pursuant to Section 121.08, Revised Code, a person is appointed to serve as superintendent of banks, and serves in that capacity, such person is a state officer and not a state employee within the vacation provision of Section 121.161, Revised Code; and where such officer terminates his service in that capacity, he is not entitled to compensation for earned but unused vacation leave, regardless of what vacation he may or may not have taken during his service as an officer. Opinion No. 3548, Opinions of the Attorney General for 1963, issued on January 14, 1963, approved and followed.

2. Where pursuant to Section 121.14, Revised Code, the director of commerce appoints a person to serve as chief or superintendent of the division of securities for the purposes of Chapter 1707., Revised Code, the person so appointed is a state employee within the purview of Section 121.161, Revised Code, and upon separation from state service as such an employee, except for cause, he is entitled to compensation for any vacation leave earned but unused during such service.

3. A person appointed under Section 121.04, Revised Code, to serve as superintendent of building and loan associations is under the direction, supervision, and control of the director of commerce, and is a state employee within the purview of Section 121.161, Revised Code. Where such person is separated from state service as such an employee, except for cause, he is entitled to compensation for any vacation leave earned but unused during such service.

4. The payment of compensation for earned but unused vacation leave to a state employee under Section 121.616, Revised Code, should be at the employee's current rate of pay.

Columbus, Ohio, February 27, 1963

Hon. Warren H. Chase  
Director  
Department of Commerce  
Ohio Departments Building  
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which poses the questions of whether the Superintendent of Banks, the Superintendent of the Division of Building and Loan Associations, and the Superintendent of the Division of Securities are "state employees" within the meaning of Section 121.161, Revised Code, and entitled thereunder to compensation for the pro-rated portion of any earned but unused vacation leave upon separation from state service.

Section 121.161, Revised Code, 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, 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 fifteenth anniversary of employment and annually thereafter. Upon separation from state service, except for cause, an employee shall be entitled to compensation for the prorated 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."

In two opinions of my predecessor, Opinion No. 1575, Opinions of the Attorney General for 1960, page 531, and Opinion No. 3548, issued on January 14, 1963, it was held that under Section 121.161, *supra*, a state employee may accumulate vacation leave earned but

not used during his state service and, upon separation from state service, except for cause, such an employee should be compensated for any earned but unused vacation leave to his credit at the time of separation. I followed and approved that holding in my Opinion No. 20, issued on February 5, 1963.

The first question to consider in this opinion, therefore, is whether the persons holding the positions concerned were "state employees" within the purview of Section 121.161, *supra*, while holding such positions, so as to be entitled to compensation for earned but unused vacation leave upon separation from service. It is assumed that none of the persons concerned was dismissed "for cause."

In Opinion No. 3548, issued on January 14, 1963, my predecessor considered whether the holders of certain positions in the state government, such as that of director of finance, are state employees. The second paragraph of the syllabus of that opinion reads as follows:

"A state officer, such as the director of finance, appointed pursuant to Section 121.03, Revised Code, is not a state employee within the purview of Section 121.161, Revised Code, and not subject to the vacation provision of that statute; and where such an officer terminates his state service as an officer, he is not entitled to compensation for earned but unused vacation leave, regardless of what vacation he may or may not have taken during his service as an officer."

Also in Opinion No. 3548, *supra*, my predecessor said:

"While, loosely speaking, all persons who are compensated by the state for services rendered might be considered to be employed by the state, there are definite distinctions between a public office and a public employment. The requisite elements of a public office are: (1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the incumbent must be by virtue of his election or appointment to the office; (3) in the exercise of the duties so imposed, he cannot be subject to the direction and control of a superior officer. *State, ex rel., Morgan v. Board of Assessors*, 15 N.P. (N.S.) 535, 24 O.D. 271 (1914); *State, ex rel., Attorney General v. Jennings*, 57 Ohio St., 415 (1898); 44 Ohio Jurisprudence 2d, 483,

Section 2, and 903, Section 17; 67 Corpus Juris Secundum, 97, Section 2. An incumbent of such an office is, of course, a public officer; a person holding a position lacking one or more of the above-noted elements, is on the other hand, only an employee.

“Without reviewing the specific duties of the director of finance, I feel it safe to say that as the head of the department of finance he does exercise certain independent duties, relative to state finances and purchasing, a part of the sovereignty of the state. See Chapter 125. and Section 131.17, Revised Code. Also, such exercise is by virtue of his appointment to the office by the governor. Section 121.03, Revised Code. Further, in the exercise of such duties, the director of finance is not subject to the direction and control of a superior officer; and in this regard, the opinion of Marshall, C.J., in *State, ex rel., v. Baker*, 112 Ohio St., 356, states at page 368:

“ ‘State officials in the executive departments are not in any sense deputies of the governor, but, on the contrary, possess powers and are charged with duties and have independent discretion and judgment entirely beyond his control, except in those instances where it is otherwise provided.’

“Accordingly, I am of the opinion that the director of finance is a public officer rather than a public employee, and the same can be said for the other state officials appointed pursuant to Section 121.03, Revised Code.”

Considering first the position of superintendent of building and loan associations, Section 121.04, Revised Code, reads in part:

“Offices are created within the several departments as follows:

“\* \* \*                      \* \* \*                      \* \* \*

“In the department of commerce:  
Superintendent of building and loan associations.  
Fire Marshal.

“\* \* \*                      \* \* \*                      \* \* \*”

Section 121.07, Revised Code, reads in part:

“The officers mentioned in sections 121.04 and 121.05 of the Revised Code shall be under the direction, supervision, and control of the directors of their respective departments, and shall perform such duties as such directors prescribe.

“\* \* \*

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Although Section 121.04, *supra*, refers to “offices” created in the several departments, I do not consider this to automatically make positions therein mentioned “offices”, rather than “employments” for the purposes of Section 121.161, *supra*, and I am of the same opinion as to the word “officers” as used in Section 121.07, *supra*. Rather, I believe that whether any of the positions concerned should be termed “offices” depends upon whether they meet the tests discussed in Opinion No. 3548, *supra*.

It will be noted that the position of superintendent of building and loan associations is mentioned in Section 121.04, *supra*, and thus, under Section 121, *supra*, such superintendent is under the direction, supervision, and control of the director of his respective department, the director of commerce. Accordingly, the position which he holds lacks at least one of the essential elements of a public office, and I am of the opinion that a person holding such position is therefore a state employee within the purview of Section 121.161, *supra*, rather than a state officer as is the director of finance and the directors of the other state administrative departments.

As to the superintendent of the division of securities, I have found no provision in the present law specifically providing for such a position or such a division. Section 121.04, *supra*, creating offices in the various departments, does not refer to such a division, nor have I found such division created in any other section of law. I note, however, that Chapter 1707., Revised Code, dealing with securities, makes frequent reference to the “division of securities,” and Section 1707.46, Revised Code, specifically gives the “chief of the division of securities” the duty to execute certain laws relative to securities. Also, Section 1707.01, Revised Code, reads in part:

“As used in sections 1707.01 to 1707.45, inclusive, of the Revised Code:

“(A) Whenever the context requires it, ‘division’ or ‘division of securities’ may be read as ‘director of commerce’ or as ‘chief of the division of securities.’

“\* \* \*

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\* \* \*”

I further note that at one time the law provided for a commissioner of securities who was appointed by the governor for a three-year term. The commissioner was, in general, given the duty to regulate the sale of bonds, stocks, and other securities (Section 744-14, General Code, 107 Ohio Laws, 506). The position of commissioner was abolished, however, in 1921 (109, Ohio Laws, 105) and the department of commerce was given all powers and duties formerly vested in the commissioner of securities (Section 154-9, General Code; section 121.08 Revised Code).

In view of the definition of the terms "division" and "division of securities" as found in Section 1707.01, *supra*, and in view of the fact that all of the duties of the former commissioner of securities are now lodged in the department of commerce, it follows that the said division is actually the department of commerce, which is administered by the director of commerce (Section 121.03, Revised Code). Further, there being no specific authority for the appointment of a superintendent, or chief, of the division of securities, it is assumed that the person concerned was appointed under Section 121.14, Revised Code, which authorizes each department to employ, subject to the civil service laws, necessary employees; and it follows that the person so appointed is a mere employee subject to the direction, supervision, and control of the director of commerce, and not a public officer. I thus conclude that the so-called superintendent of the division of securities is a state employee within the meaning of Section 121.161, *supra*.

Regarding the superintendent of banks, Section 121.08, Revised Code, as effective September 14, 1961, reads, in part, as follows:

"There is hereby created in the department of commerce a division of banks which shall have all powers and perform all duties vested by law in the superintendent of banks. Wherever powers are conferred or duties imposed upon the superintendent of banks, such powers and duties shall be construed as vested in the division of banks. The division of banks shall be administered by a superintendent of banks, who shall be appointed by the governor by and with the advice and consent of the senate, and hold his office for a term of four years, unless sooner removed at the will of the governor. All provisions of law governing the superintendent of banks shall apply to and

govern the superintendent of banks herein provided for; all authority vested by law in the superintendent of banks with respect to the management of the department of banks heretofore existing shall be construed as vested in the superintendent of banks hereby created with respect to the division of banks herein provided for; and by law upon the superintendent of banks shall be construed as conferred upon the superintendent of banks as head of the division of banks herein provided for. The director of commerce shall not impose upon the division of banks any functions other than those specified in this paragraph, nor transfer from such division any of such functions.

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It will be noted that the position of superintendent of banks is not one of the positions mentioned in Section 121.04, Revised Code, the holders of which are, under Section 121.07, Revised Code, subject to the direction, supervision, and control of the directors of their respective departments. Further, under the language of Section 121.08, *supra*, it is clear that the superintendent is not otherwise subject to the control of the director of commerce, but has the authority to operate the division of banks only in accordance with the directions provided by law, with no supervision by the director.

It is also evident that the superintendent of banks exercises certain independent duties, a part of the sovereignty of the state. For the sake of brevity, I will not review these duties but will only mention that they deal mainly with the examination and regulation of banks, in which examination and regulation the superintendent has extensive powers (see Chapters 1101. through 1117., Revised Code).

Accordingly, since the superintendent of banks is appointed by the governor (Section 121.08, *supra*), all of the elements of a public office discussed in Opinion No. 3548, *supra*, are present in the position which he holds, and I am of the opinion that he is a public officer under the generally accepted definition of that term.

In Opinion No. 3548, *supra*, my predecessor considered whether in enacting Section 121.161, *supra*, the legislature intended that all persons employed by the state, whether officer or employee, should be considered as state employees for the purposes of that section, and decided that such conclusion was not intended. He noted in that

regard that the compensation of a public officer is not dependent upon the performance of the duties of the office by such officer unless his failure to so perform amounts to an abandonment of the office. Referring specifically to the director of finance, he said:

“As to the director of finance, he is a state officer rather than a state employee, and I have found no indication that Section 121.161, *supra*, is intended to apply to state officers. Further, as a state officer, the director of finance is entitled to his fixed salary regardless of whether or not he performs the duties of his office, and it would appear that the director may thus take whatever time he may deem proper as vacation without being governed by the statute pertaining to state employees, and that he is not entitled to compensation over his fixed salary and reimbursement for necessary expenses as allowed by law.”

(Note: The annual salary of the superintendent of banks is set by Section 141.032, Revised Code, at \$12,000.)

Again for the sake of brevity, I will not further review the reasoning of my predecessor in Opinion No. 3548, *supra*, but suffice it to say that I am in agreement with his conclusion that Section 121.161, *supra*, is not intended to apply to state officers. Thus, since I have concluded that the person holding the position of superintendent of banks is a state officer rather than a state employee, it follows that a person serving in that position is not, upon separation from service, entitled to compensation for any unused vacation leave based upon his service in said position. Accordingly, it is my opinion that the claim of Mr. W. for compensation for vacation hours should not be honored.

Having held that the persons serving as superintendent of building and loan associations and as superintendent (chief) of the division of securities are entitled to compensation for earned but unused vacation leave during their service as such, I must still determine at what rate the compensation should be made. In this regard, my predecessor held in the fourth paragraph of Opinion No. 3548, *supra*, that the payment of compensation for earned but unused vacation leave to a state employee under Section 121.161, Revised Code, should be at the employee's current rate of pay. I am in accord with that holding and conclude that the compensation for earned but unused vacation leave to be paid to the two persons here



concerned should be at their rate of pay as existing at the time they were separated from the state service.

In summary, it is my opinion and you are advised:

1. Where pursuant to Section 121.08, Revised Code, a person is appointed to serve as superintendent of banks, and serves in that capacity, such person is a state officer and not a state employee within the vacation provision of Section 121.161, Revised Code; and where such officer terminates his service in that capacity, he is not entitled to compensation for earned but unused vacation leave, regardless of what vacation he may or may not have taken during his service as an officer. Opinion No. 3548, Opinions of the Attorney General for 1963, issued on January 14, 1963, approved and followed.

2. Where pursuant to Section 121.14, Revised Code, the director of commerce appoints a person to serve as chief or superintendent of the division of securities for the purposes of Chapter 1707., Revised Code, the person so appointed is a state employee within the purview of Section 121.161, Revised Code, and upon separation from state service as such an employee, except for cause, he is entitled to compensation for any vacation leave earned but unused during such service.

3. A person appointed under Section 121.04, Revised Code, to serve as superintendent of building and loan associations is under the direction, supervision, and control of the director of commerce, and is a state employee within the purview of Section 121.161, Revised Code. Where such person is separated from state service as such an employee, except for cause, he is entitled to compensation for any vacation leave earned but unused during such service.

4. The payment of compensation for earned but unused vacation leave to a state employee under Section 121.161, Revised Code, should be at the employee's current rate of pay.

Respectfully,  
WILLIAM B. SAXBE  
Attorney General