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A PUBLIC OFFICER, SUCH AS A COUNTY AUDITOR, IS NOT A PUBLIC EMPLOYEE AND UPON HIS DEATH NO AMOUNT MAY BE PAID, FOR EARNED BUT UNUSED VACATION LEAVE, TO HIS ESTATE—§325.19, R.C., OPINION 3081, OAG, 1962, §2113.04, R.C.

SYLLABUS:

A public officer, such as a county auditor, is not an employee as such word is used in Section 325.19, Revised Code, and, upon the death of such officer, no amount may be paid for earned but unused vacation leave under Section 2113.04, Revised Code, to his estate.

Columbus, Ohio, August 30, 1962

Hon. Thomas A. Beil, Prosecuting Attorney
Mahoning County, Youngstown, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

“Early this year, Charles B. Rayburn, Auditor of Mahoning County, died while in office and a successor was duly appointed.

Was Mr. Rayburn as County Auditor, a 'county employee' under the provisions of Revised Code 325.19, so as to entitle his estate to receive compensation for vacation time earned, but unused.?"

Section 325.19, Revised Code, reads in pertinent part as follows :

"Each full-time employee in the several offices and departments of the county service, including full-time hourly-rated 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. * * *"

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"In the 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 325.19, Revised Code, was the subject of Opinion No. 3081, Opinions of the Attorney General for 1962, issued June 21, 1962. While said opinion is not dispositive of the question posed herein, attention is directed to the following statements found therein :

"As to the second part of your question, whether a vacation was earned by an employee on a regular basis, an hourly 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."

As indicated by your question, it is apparent from the above quoted language that, if a county auditor is an "employee" within the meaning of Section 325.19, *supra*, upon his death, his estate would be entitled to payment for his earned but unused vacation leave.

The office of county auditor, established by Section 319.01, Revised Code, is a county office, and the holder thereof is a public officer. 14 Ohio Jurisprudence 2d, 238 and 268, Counties, Sections 52 and 92. As a public officer, the county auditor holds a position which is distinctly different from that of his employees or other employees. This difference is described in 44 Ohio Jurisprudence 2d, 503, Public Officers, Section 17, as follows :

“Broadly and loosely speaking, both public officers and public employees are in the public employment, and, for some purposes, such as the Public Employees Retirement System, the term ‘public employee’ may be defined by statute to include public officers. It frequently becomes necessary, however, to distinguish between a public office and a public employment, and there are very definite distinctions between the two. A public office is one which includes the various elements and characteristics herein before discussed, while a public employment, on the other hand, is a position which lacks one or more of the foregoing elements. The most important characteristic which distinguishes public office from public employment is that the creation and conferring of a public office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public, and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments and sometimes to another ; still it is a legal power which may be rightfully exercised, and in its effects it will bind the rights of others and be itself subject to revision and correction only according to the standing laws of the state. Accordingly, a public officer may be distinguished from a public employee in that the former is one who is invested by law with a portion of the sovereignty of the state and who is authorized to exercise functions of an executive, legislative, or judicial character.

“The fact that a position is held at the will or pleasure of another, as a deputy or servant who holds at the will of his principal, is held to distinguish a mere employment from a public office, for in such cases no part of the state’s sovereignty is delegated to such employees. Therefore, persons who are subject to the direction and control of someone else do not fall within the class of public officers, and an inferior or subordinate who performs no duties except such as by law are charged upon his superior holds an employment, not an office.

“In distinguishing between an office and an employment, the fact that the powers in question are created and conferred by law is an important item to be considered in determining the question, for although an employment may be created by law, it is not necessarily so and is often, if not usually, a creature of contract. A public office, on the other hand, is never conferred by contract, but finds its course and limitations in some act or expression of the governmental power. Where, therefore, the authority in question was conferred by contract, it must be regarded as an employment and not as a public office.”

persons who are elected public officers of the county. Such persons are not entitled to (or limited to) any particular period of time for vacation leave.

Accordingly, I am of the opinion and you are advised that a public officer, such as a county auditor, is not an employee as such word is used in Section 325.19, Revised Code, and, upon the death of such officer, no amount may be paid for earned but unused vacation leave under Section 2113.04, Revised Code, to his estate.

Respectfully,

MARK MCELROY

Attorney General