July 22, 1999

OPINION NO. 99-039

The Honorable John F. Holcomb
Butler County Prosecuting Attorney
216 Key Bank Building
6 South Second Street
P.O. Box 515
Hamilton, Ohio 45012

Dear Prosecutor Holcomb:

You have requested an opinion concerning the power of a county appointing authority, none of whose employees are in a bargaining unit, to grant its employees vacation and sick leave in amounts exceeding the minimums prescribed by statute.[1] Your letter of request states that your question arises from the apparent conflict between 1998 Op. Att'y Gen. No. 98-026 and 1998 Op. Att'y Gen. No. 98-028 concerning the authority of county appointing authorities to increase vacation leave and sick leave benefits for their employees.

Specifically, 1998 Op. Att'y Gen. No. 98-026 concludes in syllabus, paragraph two, that, "[a]n appointing authority that is empowered to hire county employees and fix their compensation may, if it chooses, grant them vacation leave in excess of the minimum entitlement prescribed by statute." 1998 Op. Att'y Gen. No. 98-028, however, states in syllabus, paragraph one, that:

> Pursuant to R.C. 124.38 and R.C. 325.19(F), a county appointing authority may not establish alternative schedules of sick leave or vacation leave and holidays for those of its employees for whom the State Employment Relations Board has not established an appropriate bargaining unit pursuant to R.C. 4117.06, unless there is a collective bargaining agreement covering other employees of that appointing authority.

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[1] *See generally* R.C. 4117.05(A) (means by which an employee organization may become the exclusive representative of employees in a bargaining unit for collective bargaining purposes); R.C. 4117.06 (factors that may be considered in determining the appropriateness of a unit for purposes of collective bargaining).

You question whether the conclusion in syllabus, paragraph one of 1998 Op. Att'y Gen. No. 98-028 prevents a county appointing authority, none of whose employees are in a bargaining unit, from granting such employees, as part of their compensation, vacation and sick leave in excess of the minimum benefits prescribed by R.C. 325.19[2] and R.C. 124.38, respectively.[3]

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[2] R.C. 325.19 states in pertinent part:

> (A)(1) The granting of vacation leave under division (A)(1) of this section is subject to divisions (A)(2) and (3) of this section. 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 with the county or any political subdivision of the state, shall have earned and will be due upon the attainment of the first year of employment, and annually thereafter, eighty hours of vacation leave with full pay. One year of service shall be computed on the basis of twenty-six biweekly pay periods. A *full-time county employee* with eight or more years of service with the county or any political subdivision of the state shall have earned and is entitled to one hundred twenty hours of vacation leave with full pay. A *full-time county employee* with fifteen or more years of service with the county or any political subdivision of the state shall have earned and is entitled to one hundred sixty hours of vacation leave with full pay. A *full-time county employee* with twenty-five years of service with the county or any political subdivision of the state shall have earned and is entitled to two hundred hours of vacation leave with full pay....
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> ....
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> (D)(1) In addition to vacation leave, a full-time county employee is entitled to eight hours of holiday pay for New Year's day, Martin Luther King day, Washington-Lincoln day, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, and Christmas day, of each year....
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> ....
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> (F) Notwithstanding this section or any other section of the Revised Code, any appointing authority of a county office, department, commission, board, or body may, upon notification to the board of county commissioners, establish alternative schedules of vacation leave and holidays for employees of the appointing authority for whom the state employment relations board has not established an appropriate bargaining unit pursuant to [R.C. 4117.06], provided that the alternative schedules are not inconsistent with the provisions of a collective bargaining agreement covering other employees of that appointing authority. (Emphasis added.)

[3] Pursuant to R.C. 124.38, various public employees, including county employees, are entitled to receive minimum sick leave benefits of four and six-tenths hours with pay for each

Let us begin the analysis of the seeming inconsistency between these two conclusions by noting that both opinions agree that a county appointing authority that has the power to fix its employees' compensation may, as part of that power, fix its employees' vacation benefits, subject to any statutory limitations upon the exercise of that power. As explained in 1998 Op. Att'y Gen. No. 98-026 at 2-139:

> [T]he amounts of vacation leave prescribed by R.C. 325.19(A) are merely minimum amounts that an appointing authority must grant to employees in the county service. An appointing authority that is empowered to hire county employees and fix their compensation may, if it chooses, grant them vacation leave in excess of the minimum entitlement prescribed by statute. *See Cataland v. Cahill*, 13 Ohio App. 3d 113, 114, 468 N.E.2d 388, 390 (Franklin County 1984) ("[s]ick leave and vacation leave prescribed by statute are minimums only and, where the appointing authority is authorized to establish compensation of employees, either sick-leave or vacation-leave benefits in addition to the minimums prescribed by statute may be granted as part of compensation").

1998 Op. Att'y Gen. No. 98-028 adopts this analysis and also applies it to the granting of sick leave benefits under R.C. 124.38.

Although the opinions appear to reach different results, they actually address different limitations upon the power of county appointing authorities to increase their employees' vacation benefits. 1998 Op. Att'y Gen. No. 98-026 discusses the limitation imposed by R.C. 325.19(A) with respect to the minimum number of vacation hours to which full-time county employees are entitled. In contrast, 1998 Op. Att'y Gen. No. 98-028 addresses the extent of a county appointing authority's power when adopting alternative schedules of vacation leave and holidays under R.C. 325.19(F) or alternative sick leave schedules under R.C. 124.38. Although the latter opinion speaks in permissive terms about the power vested in appointing authorities to adopt alternative leave schedules under R.C. 124.38 and R.C. 325.19(F), that power may be characterized more properly as a limitation imposed by those statutory provisions upon the appointing authority's power, in certain circumstances, to increase the sick leave, vacation, and holiday benefits of its non-bargaining unit employees. In other words, the establishment of

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completed eighty hours of service. Alternative schedules of sick leave are provided for in R.C. 124.38, as follows:

> Notwithstanding this section or any other section of the Revised Code, any appointing authority of a county office, department, commission, board, or body may, upon notification to the board of county commissioners, establish alternative schedules of sick leave for employees of the appointing authority for whom the state employment relations board has not established an appropriate bargaining unit pursuant to [R.C. 4117.06], provided that the alternative schedules are not inconsistent with the provisions of a collective bargaining agreement covering other employees of that appointing authority.

alternative leave schedules under R.C. 124.38 and R.C. 325.19(F) is not the exercise of a new power granted to county appointing authorities, but is, instead, a restriction on the power, in limited circumstances, to grant more than the statutory minimum vacation, holiday, and sick leave benefits as part of compensation.

The assumption throughout 1998 Op. Att'y Gen. No. 98-028 is that the adoption of such alternative leave schedules is the method by which an appointing authority may alter its non-bargaining unit employees' benefits if there are bargaining unit and non-bargaining unit employees within that appointing authority and some of those employees are covered by a collective bargaining agreement.[4] As concluded therein, in such a situation, the appointing authority may alter the statutory vacation and holiday and sick leave benefits of its non-bargaining unit employees only through the adoption of an alternative schedule of vacation and holiday leave or an alternative schedule of sick leave within the limits prescribed by R.C. 325.19(F) and R.C. 124.38. In other words, in this case, the adoption of such alternative schedules allows for the equivalency of such benefits among an appointing authority's employees that are in a bargaining unit and those that are not in a bargaining unit.[5]

Not addressed by 1998 Op. Att'y Gen. No. 98-028, however, were any situations in which neither R.C. 325.19(F) nor the analogous alternative sick leave schedule provision in R.C. 124.38 limits the appointing authority's power to increase its employees' vacation and holiday leave and sick leave benefits as part of their compensation. Your question specifically raises such an example. You ask whether a county appointing authority, none of whose employees are in a bargaining unit, may increase the vacation and sick leave of its employees other than through the establishment of an alternative vacation and holiday leave schedule under R.C. 325.19(F) or an alternative sick leave schedule under R.C. 124.38.

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[4] As explained in 1998 Op. Att'y Gen. No. 98-028 at 2-153:

> [W]e believe that the amendments to R.C. 124.38 and R.C. 325.19 [adding the language concerning the adoption of alternative schedules of leave] were intended simply to ensure that, within the office of a single county appointing authority, those employees who were not part of a bargaining unit could obtain sick leave, vacation leave, and holiday benefits equivalent to those obtained by bargaining unit employees either pursuant to a collective bargaining agreement or by statute, while assuring the non-bargaining unit employees the minimums otherwise specified by statute.

[5] *See, e.g.*, 1998 Op. Att'y Gen. No. 98-028 (syllabus, paragraph two) ("[i]n the establishment of alternative schedules of sick leave or vacation leave and holidays in accordance with R.C. 124.38 or R.C. 325.19(F), a county appointing authority may not provide less of such benefits than the minimums otherwise established by statute, and, if such schedules increase the benefits otherwise provided by statute, the schedules may not be inconsistent with the provisions of a collective bargaining agreement covering other employees of the appointing authority").

Because none of the employees about whom you ask are in a bargaining unit for purposes of R.C. Chapter 4117 and none of the employees are, therefore, subject to a collective bargaining agreement, the limitations imposed upon county appointing authorities with respect to the adoption of alternative schedules of vacation and holiday leave under R.C. 325.19(F) and sick leave under R.C. 124.38 do not apply. Accordingly, a county appointing authority that has the power to compensate its employees, none of whom are in a bargaining unit for purposes of R.C. Chapter 4117, retains the authority to compensate its employees and thereby grant them vacation and holiday leave or sick leave in excess of the statutory minimums to which they are entitled, unconstrained by R.C. 325.19(F) or the corresponding provision in R.C. 124.38 concerning alternative schedules of sick leave.

In answer to your question, it is my opinion and you are hereby advised, that a county appointing authority that has the power to fix the compensation of its employees, none of whom are in a collective bargaining unit for purposes of R.C. Chapter 4117, may grant such employees vacation and holiday leave or sick leave in excess of the minimum number of hours to which they are entitled by R.C. 325.19(A) and R.C. 124.38. In granting such additional leave, the appointing authority is not limited by the provisions in R.C. 325.19(F) or R.C. 124.38 concerning the adoption of alternative schedules of vacation and holiday leave or sick leave. (1998 Op. Att'y Gen. No. 98-026, syllabus, paragraph two, approved and followed; 1998 Op. Att'y Gen. No. 98-028, syllabus, paragraph one, clarified.)

Respectfully,

BETTY D. MONTGOMERY
Attorney General

July 22, 1999

The Honorable John F. Holcomb
Butler County Prosecuting Attorney
216 Key Bank Building
6 South Second Street
P.O. Box 515
Hamilton, Ohio 45012

SYLLABUS: 99-039

A county appointing authority that has the power to fix the compensation of its employees, none of whom are in a collective bargaining unit for purposes of R.C. Chapter 4117, may grant such employees vacation and holiday leave or sick leave in excess of the minimum number of hours to which they are entitled by R.C. 325.19(A) and R.C. 124.38. In granting such additional leave, the appointing authority is not limited by the provisions in R.C. 325.19(F) or R.C. 124.38 concerning the adoption of alternative schedules of vacation and holiday leave or sick leave. (1998 Op. Att'y Gen. No. 98-026, syllabus, paragraph two, approved and followed; 1998 Op. Att'y Gen. No. 98-028, syllabus, paragraph one, clarified.)