June 8, 2006

The Honorable Roger D. Nagel
Fulton County Prosecuting Attorney
123 Courthouse Plaza
Wauseon, Ohio 43567

SYLLABUS: 2006-026

1. When there is no collective bargaining agreement covering any employees of a county board of mental retardation and developmental disabilities, those employees who are not management employees, as defined in R.C. 5126.20(C), may not use sick leave for absences due to the placement of a child with the employee for adoption, because adoption of a child is not one of the reasons for which R.C. 124.38 authorizes sick leave granted under that statute to be used. With respect to its management employees, as defined by R.C. 5126.20(C), a county board of mental retardation and developmental disabilities may establish a sick leave benefit that is not limited to the uses prescribed by R.C. 124.38, and if, in a reasonable exercise of its discretion, the board finds a rational basis for authorizing its management employees to use their sick leave benefits for absences due to the placement of a child with the employee for adoption, the board may authorize its management employees to use sick leave for that purpose.

2. If a collective bargaining agreement authorizes employees of a county board of mental retardation and developmental disabilities to use sick leave benefits for absences due to the placement of a child with the employee for adoption, the employees covered by the agreement may use their sick leave benefits for such absences. If, however, a collective bargaining agreement covering employees of a county board of mental retardation and developmental disabilities does not specify that sick leave benefits may be used for absences due to the placement of a child with the employee for adoption, the employees covered by the agreement may use sick leave only for those purposes described in R.C. 124.38, which do not include absences due to the placement of a child with the employee for adoption. When some employees of a county board of mental retardation and developmental disabilities are covered by a collective bargaining agreement and others are not, R.C. 124.38 authorizes the superintendent of the county board of mental retardation and developmental disabilities to establish an alternative schedule of sick leave for those employees "for whom the state employment relations board has not established an appropriate bargaining unit pursuant to [R.C. 4117.06]"; the provisions of such alternative sick leave schedule may address the use of sick leave for adoption placements but may not be inconsistent with the terms of the collective bargaining agreement covering other county board of mental retardation and developmental disabilities employees.

3. Absent a collective bargaining agreement or an alternative schedule of sick leave benefits that authorizes or requires a county board of mental retardation and developmental disabilities employee to use sick leave for an absence due to the placement of a child with the employee for adoption, a county board of mental retardation and developmental disabilities is without authority to require such employee to use, and the employee is not entitled to use, sick leave benefits for an absence due to the placement of a child with the employee for adoption.

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June 8, 2006

OPINION NO. 2006-026

The Honorable Roger D. Nagel
Fulton County Prosecuting Attorney
123 Courthouse Plaza
Wauseon, Ohio 43567

Dear Prosecutor Nagel:

You have submitted an opinion request in which you ask whether employees of a county board of mental retardation and developmental disabilities (county MR/DD board) may use sick leave benefits earned under R.C. 124.38 for absences due to the placement of a child with the employee for adoption. You have also informed us that almost all of the board's employees are subject to a collective bargaining agreement, and that some of those employees who are not subject to the agreement are management employees and some are not.

Based upon additional information you provided to us, we have restated your specific questions concerning these various categories of employees, as follows:

1. May an employee of a county board of MR/DD who is not subject to a collective bargaining agreement use sick leave time for an absence due to the placement of a child with the employee for adoption?

2. May an employee of a county board of MR/DD who is covered by a collective bargaining agreement use sick leave time for an absence due to the placement of a child with the employee for adoption if the collective bargaining agreement provides for such use of sick time?

3. May an employee of a county board of MR/DD who is covered by a collective bargaining agreement use sick leave time for an absence due to the placement of a child with the employee for adoption if the collective bargaining agreement does not provide for such use of sick time?

4. May an employee of a county MR/DD board use accumulated sick leave benefits for the placement of a child with the employee for adoption when

> the written policy of the board requires an employee to utilize any accrued paid leave prior to being eligible for unpaid family and medical leave?

Your first question asks whether a county MR/DD board employee who is not subject to a collective bargaining agreement may use sick leave time for an absence due to the adoption of a child.[1] As employees in the county service, most county MR/DD board employees are entitled to receive sick leave benefits in accordance with R.C. 124.38, which states, in pertinent part:

> Each of the following shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay:
>
> (A) Employees in the various offices of the county, municipal, and civil service township service, other than superintendents and management employees, as defined in [R.C. 5126.20], of county boards of mental retardation and developmental disabilities . . . .

The sick leave benefits prescribed by R.C. 124.38, however, are only a minimum sick leave benefit to which county MR/DD board employees, with the exception of management employees and the superintendent of a county MR/DD board, are entitled.[2] *See Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). *See also Cataland v. Cahill*, 13 Ohio App. 3d 113, 114, 468 N.E.2d 388 (Franklin County 1984) ("[s]ick leave and vacation leave prescribed by statute are minimums only and, where the appointing authority is authorized

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[1] Pursuant to R.C. 5126.02, each county either has its own MR/DD board or is a member of a multi-county MR/DD board. *See generally* Am. Sub. S.B. 10, 126th Gen. A. (2005) (eff. Sept. 5, 2005) (authorizing the creation of multi-county boards of mental retardation and developmental disabilities). We understand, however, that Fulton County has its own MR/DD board and is not a member of a multi-county MR/DD board. This opinion, therefore, addresses your questions with respect to employees of only single-county MR/DD boards.

[2] Management employees of a county MR/DD board are entitled to receive "employee benefits that shall include *sick leave*, vacation leave, holiday pay, and such other benefits as are *established by the board*. Sections 124.38 and 325.19 of the Revised Code do not apply to management employees." R.C. 5126.21(C) (emphasis added). *See generally* R.C. 5126.20(C) (defining "management employee" as meaning "a person employed by a board in a position having supervisory or managerial responsibilities and duties, and includes employees in the positions listed in" R.C. 5126.22(A) (including, among others, assistant superintendents and various directors, supervisors, and managers)). Thus, the sick leave benefits of management employees are determined by the county MR/DD board, without reference to the sick leave benefits established by R.C. 124.38. In addition, R.C. 124.38 expressly excludes from its coverage not only county MR/DD board management employees, but also county MR/DD board superintendents. *See generally* R.C. 5126.0226(A) (authorizing a county MR/DD board to fix the compensation of a superintendent it employs).

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").

You have informed us that some of the county MR/DD board employees who are not covered by a collective bargaining agreement are management employees. Because sick leave benefits for most county MR/DD board employees differ from those afforded management employees of a county MR/DD board, *see* note two, *supra*, we must separately address the sick leave benefits to which each group is entitled.

As explained in the *Ebert* case, "R.C. 124.38 neither establishes nor limits the power of a political subdivision. Rather, it ensures that the employees of such offices will receive at least a *minimum* sick leave benefit or *entitlement*." 63 Ohio St. 2d at 32. The *Ebert* court described the authority to increase the sick leave benefits of county MR/DD board employees, as follows:

> Since we interpret R.C. 124.38 as conferring a minimum benefit upon the board's employees, it is necessary to look elsewhere to determine the extent of the board's authority to provide increased sick leave benefits. The express powers and duties of the county board of mental retardation are set forth in R.C. 5126.03(C), which authorizes the board to "[e]mploy such personnel and provide such services, facilities, transportation, and equipment as are necessary." In order for the power to employ to have any significance, it must, of necessity, include the power to fix the compensation of such employees. It should be obvious that sick leave credits, just as other fringe benefits, are forms of compensation. There being no provision in R.C. Chapter 5126 which would constrict the board's power to provide sick leave credits in excess of the minimum level of R.C. 124.38, this court finds that the board's adoption of its pre-1975 sick leave policy [which granted more sick leave benefits than were prescribed by R.C. 124.38] was a lawful exercise of its authority.

63 Ohio St. 2d at 33.

Since the *Ebert* decision, however, the structure of county MR/DD boards has changed significantly. The power of appointment and compensation for county MR/DD board employees no longer rests solely in the county MR/DD board. Rather, the superintendent of a county MR/DD board is the appointing authority of county MR/DD board employees, *see* 2003 Op. Att'y Gen. No. 2003-013, while the county MR/DD board retains the power to prescribe its employees' compensation.[3] Because the authority to fix the compensation of county MR/DD

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[3] Broad powers over the hiring and compensation of county MR/DD board employees is vested in county MR/DD boards by R.C. 5126.05(A)(7), which requires each such board to "*[a]uthorize all positions of employment, establish compensation, including* but not limited to salary schedules and *fringe benefits* for all board employees, approve contracts of employment for management employees that are for a term of more than one year, employ legal counsel under [R.C. 309.10], and contract for employee benefits," (emphasis added). *See generally* R.C.

board employees remains in the board, it is within the power of a county MR/DD board to grant its employees more sick leave than is provided for in R.C. 124.38.

Because your first question specifically concerns the permissible uses of sick leave, we begin by noting that, for those county MR/DD board employees who earn sick leave under R.C. 124.38, the statute describes the purposes for which such sick leave may be used, as follows: "personal illness, pregnancy, injury, exposure to contagious disease that could be communicated to other employees, and illness, injury, or death in the employee's immediate family." Although a county MR/DD board has the authority, pursuant to its power to fix its employees' compensation, to increase the number of hours of sick leave to which its employees are entitled, this power does not include the authority to alter the statutorily defined uses of sick leave for its employees. Rather, as described in 1987 Op. Att'y Gen. No. 87-029 at 2-210:

> [W]hile *Ebert* approves the allowance of a greater number of hours of paid sick leave, an employee may use sick leave only for those purposes stated in R.C. 124.38. *South Euclid Fraternal Order of Police v. D'Amico*, 13 Ohio App. 3d 46, 468 N.E.2d 735 (Cuyahoga County 1983). There is a distinction between an appointing authority's power to increase the number of hours of allowable sick leave and the authority to allow sick leave to be used for a purpose not stated in R.C. 124.38. *R.C. 124.38 establishes a minimum entitlement to a number of hours of paid sick leave, but, in stating the permissible uses for sick leave, limits the scope of the benefit*. The list of permissible uses provided for in R.C. 124.38 is not a minimum as is the entitlement to four and six-tenths hours for every eighty hours of completed service, but rather, *the stated uses define sick leave*. *See South Euclid*. (Footnote omitted; emphasis added.)

5126.24(B) (requiring each county MR/DD board, in accordance with rules adopted by the Superintendent of Mental Retardation and Developmental Disabilities, annually to adopt salary schedules for teaching and nonteaching employees).

Pursuant to R.C. 5126.0227(C), however, the superintendent of a county MR/DD board has the duty to employ persons for the positions authorized by the board, and to "[a]pprove compensation for employees within the limits set by the salary schedule and budget set by the board and in accordance with [R.C. 5126.26 (with limited exceptions, forbids the compensation of county MR/DD board employees without certification, registration, or license required by the Director of Mental Retardation and Developmental Disabilities or the Ohio Department of Education)]," R.C. 5126.0227(D). *See* 2003 Op. Att'y Gen. No. 2003-013 (syllabus, paragraph one) ("[t]he superintendent of a county board of mental retardation and developmental disabilities (county MR/DD board), rather than the county MR/DD board, is the 'appointing authority,' as defined in R.C. 124.01(D), of a management employee holding a contract of employment for a term greater than one year").

See generally 1984 Op. Att'y Gen. No. 84-076 (recognizing that sick leave and personal leave are separate and distinct fringe benefits, and the granting of personal leave to employees of a county department of human services (now job and family services) is independent of the sick leave benefits to which the employees are entitled).

By specifying the particular reasons for which an employee may use sick leave, R.C. 124.38 constricts the authority of a county MR/DD board to fix its employees' sick leave benefits as a part of their compensation.[4] In those situations in which there is no collective bargaining agreement covering any employees of a county MR/DD board, the board is without authority, in the exercise of its power to fix its employees' compensation, to grant its employees the right to use sick leave for absences due to the placement of a child with the employee for adoption.[5]

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[4] As will be discussed more fully in answer to your second and third questions, in those situations in which some employees of a county MR/DD board are covered by a collective bargaining agreement, and others are not, the last paragraph of R.C. 124.38 authorizes a county appointing authority to 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. (Emphasis added.)

Thus, some county MR/DD board employees may be entitled to receive sick leave benefits in accordance with an alternative schedule of sick leave adopted by their appointing authority in accordance with R.C. 124.38.

[5] The minimum sick leave benefits granted to county MR/DD board employees by R.C. 124.38 may also be varied in accordance with R.C. 124.39, which states, in pertinent part: "[a] political subdivision may adopt policies similar to the provisions contained in [R.C. 124.382-.386]." Among the policies a political subdivision, including a county, may adopt under R.C. 124.39 is a sick leave policy similar to the one contained in R.C. 124.382, which establishes sick leave benefits for permanent employees "whose salary or wage is paid directly by warrant of the auditor of state," R.C. 124.382(B). *See generally* 2005 Op. Att'y Gen. No. 2005-027 at 2-289 ("R.C. 124.39(C) authorizes a 'political subdivision,' but not individual 'appointing authorities,' to adopt policies similar to those set forth in R.C. 124.382-.386. *State ex rel. Myers v. Portage County*, 80 Ohio App. 3d 584, 609 N.E.2d 1333 (Portage County 1992). The authority R.C. 124.39(C) vests in the county as a political subdivision must be exercised by the board of county commissioners, not by individual county appointing authorities"). R.C. 124.382(D) specifies the purposes for which sick leave may be used: "personal illness, pregnancy, injury, exposure to contagious disease that could be communicated to other employees, and illness, injury, or death in the employee's immediate family." Thus, although R.C. 124.39 authorizes a board of county

Let us now consider whether the sick leave benefits of a county MR/DD board "management employee" may be used for absences due to the placement of a child with the employee for adoption. As mentioned above, R.C. 124.38(A) excludes from the group of employees entitled to sick leave under that statute "superintendents and management employees, as defined in [R.C. 5126.20], of county boards of mental retardation and developmental disabilities." *See* note two, *supra*. Instead, pursuant to R.C. 5126.21(C), a county MR/DD board management employee's compensation, including sick leave, is established by the county MR/DD board, and the provisions of R.C. 124.38 do not apply to such employees. Because the General Assembly has granted a county MR/DD board authority to establish sick leave benefits for its management employees and has expressly excluded such employees from the application of R.C. 124.38, the limited uses of sick leave authorized by R.C. 124.38 do not restrict the power of county MR/DD boards to grant their management employees sick leave benefits.

Accordingly, in the exercise of its authority to fix the compensation, including fringe benefits, of its management employees, a county MR/DD board is not limited by the permissible uses of sick leave set forth in R.C. 124.38 in establishing a sick leave benefit for its management employees. In fixing the sick leave benefits of its management employees, however, a county MR/DD board must reasonably exercise its discretion and have a rational basis for granting the board's management employees a right to use sick leave for purposes beyond those prescribed for other board employees. *See generally*, *e.g.*, 1984 Op. Att'y Gen. No. 84-086 at 2-295 (modified on other grounds by 1990 Op. Att'y Gen. No. 90-064) (subject to statutory limitations on granting fringe benefits, "a public employer may make distinctions among groups of employees, provided that such distinctions are reasonable, so that state and federal equal protection requirements are satisfied" (citations omitted)); 1981 Op. Att'y Gen. No. 81-082 at 2-323 ("[a]ny distinction in benefits awarded by the county commissioners must . . . comport with the equal protection guarantees of Ohio Const. art. I, § 2 and the fourteenth amendment of the United States Constitution" (footnote omitted)).

In answer to your first question, we conclude that, when there is no collective bargaining agreement covering any employees of a county MR/DD board, those employees who are not management employees, as defined in R.C. 5126.20(C), may not use sick leave for absences due to the placement of a child with the employee for adoption, because adoption of a child is not one of the reasons for which R.C. 124.38 authorizes sick leave granted under that statute to be used. With respect to its management employees, as defined by R.C. 5126.20(C), a county MR/DD board may establish a sick leave benefit that is not limited to the uses prescribed by R.C. 124.38, and if, in a reasonable exercise of its discretion, the board finds a rational basis for authorizing its management employees to use their sick leave benefits for absences due to the placement of a child with the employee for adoption, the board may authorize its management employees to use sick leave for that purpose.

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commissioners to adopt a sick leave policy for county employees similar to that prescribed by R.C. 124.382, the purposes for which R.C. 124.382 authorizes sick leave to be used do not include absences due to the placement of a child with the employee for purposes of adoption.

Your second question asks whether a county MR/DD board employee who is covered by a collective bargaining agreement may use sick leave time for an absence due to the placement of a child with the employee for adoption if the collective bargaining agreement provides for such use of sick time. Your third question asks whether an employee of a county board of MR/DD who is covered by a collective bargaining agreement may use sick leave time for an absence due to the adoption of a child if the collective bargaining agreement does not provide for such use of sick time. Because both questions concern the effect of a collective bargaining agreement on a county MR/DD board employee's ability to use sick leave benefits, we will address them together.

Pursuant to R.C. 4117.03(A)(4), "public employees," as defined in R.C. 4117.01(C),[6] have the right to "[b]argain collectively with their public employers to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements." Most county MR/DD board employees are "public employees" for purposes of R.C. Chapter 4117. *See* note six, *supra*. The effect of such an agreement is described in R.C. 4117.10(A), in pertinent part, as follows:

> An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the *wages, hours, and terms and conditions* of public employment covered by the agreement . . . . Where no agreement exists or *where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment* for public employees.[7] (Emphasis and footnote added.)

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[6] R.C. 4117.01(C) defines the term "public employee," as used in R.C. Chapter 4117, as including "any person holding a position by appointment or employment in the service of a public employer." *See generally* R.C. 4117.01(B) (including a county within the definition of "public employer"). R.C. 4117.01(C) also excludes from the definition of "public employee" various categories of employees, *e.g.*, "[c]onfidential employees," R.C. 4117.01(C)(6); "[ma]anagement level employees," R.C. 4117.01(C)(7); certain fiduciary employees, R.C. 4117.01(C)(9); and "[s]upervisors," R.C. 4117.01(C)(10). *See generally* R.C. 4117.01(F) (defining "[s]upervisor," as used in R.C. Chapter 4117); R.C. 4117.01(K) (defining "[c]onfidential employee," as used in R.C. Chapter 4117); R.C. 4117.01(L) (defining "[m]anagement level employee," as used in R.C. Chapter 4117).

[7] R.C. 4117.10(A) describes those laws that prevail, or in certain circumstances may prevail, over conflicting provisions in a collective bargaining agreement, as follows:

> Laws pertaining to civil rights, affirmative action, unemployment compensation, workers' compensation, the retirement of public employees, and residency requirements, the minimum educational requirements contained in the Revised

As explained in 1998 Op. Att'y Gen. No. 98-028 at 2-150 to 2-153:

After the enactment of R.C. Chapter 4117, in order to ascertain the amount and types of compensation to which a county employee was entitled, it became necessary to determine whether the employee was subject to a collective bargaining agreement and whether the agreement addressed the particular benefit. If so, the terms of the agreement, with certain limited exceptions, prevailed over any statutory provisions regarding that benefit. *See generally* R.C. 4117.08; R.C. 4117.10(A); *Streetsboro Educ. Ass'n v. Streetsboro City School Dist. Bd. of Educ.*, 68 Ohio St. 3d 288, 291, 626 N.E.2d 110, 113 (1994) ("[w]hen a provision in a collective bargaining agreement addresses a subject also addressed by a state or local law, so that the two conflict, R.C. 4117.10(A) delineates whether the collective bargaining provision or the law prevails. To do this, R.C. 4117.10(A) specifies certain areas in which laws will prevail over conflicting provisions of collective bargaining agreements. Consequently, where a provision of a collective bargaining agreement is in conflict with a state or local law pertaining to a specific exception listed in R.C. 4117.10(A), the law prevails and the provision of the agreement is unenforceable. However, if a collective bargaining provision conflicts with a law which does not pertain to one of the specific exceptions listed in R.C. 4117.10(A), then the collective bargaining agreement prevails")*; City of Cincinnati v. Ohio Council 8, AFSCME, AFL-CIO*, 61 Ohio St.

Code pertaining to public education including the requirement of a certificate by the fiscal officer of a school district pursuant to [R.C. 5705.41], the provisions of [R.C. 124.34(A)] governing the disciplining of officers and employees who have been convicted of a felony, and the minimum standards promulgated by the state board of education pursuant to [R.C. 3301.07(D)] *prevail over conflicting provisions of agreements between employee organizations and public employers*. The law pertaining to the leave of absence and compensation provided under [R.C. 5923.05 (permanent public employees' military leave)] prevails over any conflicting provisions of such agreements if the terms of the agreement contain benefits which are less than those contained in that section or the agreement contains no such terms and the public authority is the state or any agency, authority, commission, or board of the state or if the public authority is another entity listed in [R.C. 4117.01(B)] that elects to provide leave of absence and compensation as provided in [R.C. 5923.05]. *Except for* [R.C. 306.08, R.C. 306.12, R.C. 306.35, and R.C. 4981.22] and arrangements entered into thereunder, and section 4981.21 of the Revised Code as necessary to comply with section 13(c) of the "Urban Mass Transportation Act of 1964," 87 Stat. 295, 49 U.S.C.A. 1609(c), as amended, and arrangements entered into thereunder, *this chapter prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in this chapter or as otherwise specified by the general assembly*. (Emphasis added.)

> 3d 658, 576 N.E.2d 745 (1991). In the absence of a collective bargaining agreement governing the provision of that benefit for the employee, it remained necessary to utilize the *Ebert* court's analysis to determine a county employee's right to the benefit at issue. *See generally State ex rel. Chavis v. Sycamore City School Dist. Bd. of Educ.*, 71 Ohio St. 3d 26, 29, 641 N.E.2d 188, 192 (1994) ("[a] collective bargaining agreement does not prevail over conflicting laws where it either does not specifically cover certain matters, or no collective bargaining agreement is in force" (various citations omitted)). (Footnote omitted.)

Because sick leave benefits are part of the wages of public employees, R.C. 4117.01(M), sick leave benefits are an appropriate subject for collective bargaining. *See Deeds v. City of Ironton*, 48 Ohio App. 3d 7, 548 N.E.2d 254 (Lawrence County 1988) (syllabus) ("[s]ince payment for sick leave affects wages and terms and conditions of employment, it is subject to collective bargaining between a public employer and its employees; the reservation of management rights in R.C. 4117.08(C) does not include the right to impose additional sick leave requirements not included in a collectively bargained provision regulating sick leave"); 2005 Op. Att'y Gen. No. 2005-020 at 2-188 ("collective bargaining agreements may vary fringe benefits (such as sick leave or payment for unused sick leave) from the amounts provided by statute, increasing or decreasing the benefits granted to the employees").

Thus, if a collective bargaining agreement covering certain county MR/DD board employees authorizes the employees to use sick leave for absences due to the placement of a child with the employee for adoption, the terms of the agreement conflict with the permissible uses of sick leave prescribed by R.C. 124.38 and the provisions of the agreement prevail over the terms of R.C. 124.38. *See* R.C. 4117.10(A). In contrast, if a collective bargaining agreement covering certain county MR/DD board employees makes no specification about the uses of sick leave benefits, the employees covered by the agreement are subject to the limited uses of sick leave prescribed by R.C. 124.38, which do not include the use of sick leave for absences due to the placement of a child with the employee for adoption.

When some employees of a county MR/DD board are covered by a collective bargaining agreement and others are not, we must also consider the power of the appointing authority, pursuant to R.C. 124.38, to adopt an alternative sick leave schedule for those employees who are not subject to the collective bargaining agreement, so long as they are employees "for whom the state employment relations board has not established an appropriate bargaining unit pursuant to [R.C. 4117.06]." *See generally* note three, *supra* (superintendent of county MR/DD board as appointing authority of board's management employees). Any sick leave benefit granted under such alternative sick leave schedule, however, may not be "inconsistent with the provisions of a

collective bargaining agreement covering other employees of that appointing authority." R.C. 124.38.[8]

In answer to your second and third questions, we conclude that, if a collective bargaining agreement authorizes employees of a county MR/DD board to use sick leave benefits for absences due to the placement of a child with the employee for adoption, the employees covered by the agreement may use their sick leave benefits for such absences. If, however, a collective bargaining agreement covering county MR/DD board employees does not specify that sick leave benefits may be used for absences due to the placement of a child with the employee for adoption, the employees covered by the agreement may use sick leave only for those purposes described in R.C. 124.38, which do not include absences due to the placement of a child with the employee for adoption. When some employees of a county MR/DD board are covered by a collective bargaining agreement and others are not, R.C. 124.38 authorizes the superintendent of the county MR/DD board to establish an alternative schedule of sick leave for those employees "for whom the state employment relations board has not established an appropriate bargaining unit pursuant to [R.C. 4117.06]"; the provisions of such alternative sick leave schedule may address the use of sick leave for adoption placements, but may not be inconsistent with the terms of the collective bargaining agreement covering other county MR/DD board employees.

Your final question asks whether an employee of a county MR/DD board may use accumulated sick leave benefits for absences due to the placement of a child with the employee for adoption when the written policy of the board requires an employee to utilize any accrued paid leave[9] prior to being eligible for unpaid family and medical leave.[10] In order to answer this

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[8] *See generally* 1999 Op. Att'y Gen. No. 99-039 (explaining the limiting effect of the portion of R.C. 124.38 concerning "alternative schedules of sick leave" upon the power of an appointing authority to fix its employees' compensation when there are both bargaining unit and non-bargaining unit employees within that appointing authority); 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").

[9] You have not indicated which types of leave are included within "paid leave" for purposes of such policy. We acknowledge, however, that sick leave is generally understood to be a form of paid leave.

[10] You have forwarded to us a copy of the county MR/DD board's various leave policies. Although we are unable to determine the meaning or application of particular provisions within such policies, we will address your question in general terms. *See, e.g.*, 1989 Op. Att'y Gen. No. 89-010 at 2-40 (the Attorney General is "unable to use the opinion-rendering function to make

question, we must briefly examine the provisions of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C.A. §§ 2601-2654 (West Group 1999 & 2005 Supp.), and its application to employees of a county MR/DD board.

Pursuant to 29 U.S.C.A. § 2612(a), an "eligible employee," including a county employee,[11] is entitled to receive "a total of twelve workweeks of leave during any 12-month period for," among other reasons, "the placement of a son or daughter with the employee for adoption or foster care," 29 U.S.C.A. § 2612(a)(1)(B). In accordance with 29 U.S.C.A. § 2612(a)(2), the entitlement to FMLA leave for the placement of a child with the employee for adoption expires at the end of the twelve-month period following such placement. 29 U.S.C.A. § 2614 provides various employment and benefit protections for those who take a leave authorized by 29 U.S.C.A. § 2612. In addition, 29 U.S.C.A. § 2615 prohibits an employer from interfering with any employee's right to exercise any of the rights to FMLA leaves.

Pursuant to 29 U.S.C.A. § 2612(c) and with certain exceptions, FMLA leaves may be unpaid leaves.[12] *See* 29 CFR § 825.207(a) (stating, in part, "[g]enerally, FMLA leave is

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findings of fact or to determine the rights of parties to a particular contract"); 1986 Op. Att'y Gen. No. 86-076 at 2-422 ("it is inappropriate for [the Attorney General] to use the opinion-rendering function to make findings of fact or determinations as to the rights of particular individuals").

[11] 29 U.S.C.A. § 2611(2)(A) defines the term "eligible employee," as used in 29 U.S.C.A. § 2612, as meaning, with certain exceptions, an employee who has been employed "(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." For purposes of 29 U.S.C.A. § 2612, the term "employer" includes, among others, "any 'public agency,' as defined in section 203(x) of this title." 29 U.S.C.A. § 2611(4)(A)(iii). Included within the definition of "public agency" is any political subdivision of the United States or an agency of such a political subdivision. 29 U.S.C.A. § 203(x).

[12] 29 U.S.C.A. § 2612 provides, in part, as follows:

> **(c) Unpaid leave permitted**
>
> Except as provided in subsection (d) of this section, leave granted under subsection (a) may consist of *unpaid leave*. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 213(a)(1) of this title, the compliance of an employer with this subchapter by providing unpaid leave shall not affect the exempt status of the employee under such section.
>
> **(d) Relationship to paid leave**
>
> **(1) Unpaid leave**
>
> If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this subchapter may be provided without compensation.

unpaid"). 29 U.S.C.A. § 2612(d)(2)(A), however, provides an exception for an FMLA leave taken for the placement of an adopted child. In such a case, the employee may elect, or the employer may require the employee, "to substitute any of the accrued paid *vacation leave*, *personal leave*, or *family leave* of the employee . . . for any part of the 12-week period of such leave." 29 U.S.C.A. § 2612(d)(2)(A) (emphasis added). Thus, although a county MR/DD board employee is entitled by 29 U.S.C.A. § 2612(a)(1)(B) to take a twelve-week leave for the placement of a child with that employee for adoption, 29 U.S.C.A. § 2612 does not require that such leave be a paid leave, unless the employee elects, or the employer requires the employee, to substitute any of three types of paid leave, *i.e.*, vacation leave, personal leave, or family leave, for any part of the twelve-week FMLA leave period. 29 U.S.C.A. § 2612 does not, however, give the employee the option, or the employer the option to require the employee, to substitute paid sick leave for any part of the twelve-week period of leave granted for the adoption of a child.[13]

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(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or *medical or sick leave* of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave. (Emphasis added.)

[13] 29 CFR § 825.207 states, in pertinent part:

(b) Where an employee has earned or accrued paid *vacation*, *personal* or *family* leave, that paid leave may be substituted for all or part of any (otherwise) unpaid FMLA leave relating to birth, placement of a child for adoption or foster care, or care for a spouse, child or parent who has a serious health condition. The term "family leave" as used in FMLA refers to paid leave provided by the employer covering the particular circumstances for which the employee seeks leave for either the birth of a child and to care for such child, placement of a child for adoption or foster care, or care for a spouse, child or parent with a serious health condition. For example, if the employer's leave plan allows use of family

Concerning the substitution of paid sick or medical leave for time spent on FMLA leave, 29 CFR § 825.207(c) states:

> Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any (otherwise) unpaid FMLA leave needed to care for a family member or the employee's own serious health condition. *Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical leave*. An employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave "in any situation" where the employer's uniform policy would not normally allow such paid leave. *An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose*. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan. (Emphasis added.)

Accordingly, although the FMLA requires a county MR/DD board to allow an employee to take a twelve-week unpaid leave for the placement of a child with the employee for adoption, it does not require an employer to allow an employee to use paid sick or medical leave for such a leave, if the sick or medical leave plan does not authorize the use of such leave for that purpose.

As discussed in answer to your previous questions, other than through collective bargaining with its employees or the adoption of an alternative schedule of sick leave under R.C. 124.38, a county MR/DD board is without authority to expand the permissible uses of sick leave beyond those prescribed by R.C. 124.38.[14] Thus, the sick leave benefits to which a county MR/DD employee is entitled by R.C. 124.38 may not be used for an absence due to the placement of a child with the employee for adoption. Accordingly, absent a collective bargaining agreement or an alternative schedule of sick leave adopted under R.C. 124.38 that authorizes sick leave to be used for an absence due to the placement of a child with the employee for adoption, 29 U.S.C.A. § 2612 does not authorize a county MR/DD board employee to use, or a county MR/DD board to require an employee to use, sick leave benefits for such an absence.

In answer to your final question, we conclude that, absent a collective bargaining agreement or an alternative schedule of sick leave benefits that authorizes or requires a county MR/DD board employee to use sick leave for an absence due to the placement of a child with the

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> leave to care for a child but not for a parent, the employer is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent. (Emphasis added.)

[14] You have not asked, and this opinion does not address, the question whether a county MR/DD board may grant its employees another type of leave, *e.g.*, personal or family leave, apart from sick leave, that would allow employees to use paid leave for absences due to the placement of a child with the employee for adoption.

employee for adoption, a county MR/DD board is without authority to require a county MR/DD board employee to use, and a county MR/DD board employee is not entitled to use, sick leave benefits for an absence due to the placement of a child with the employee for adoption.

The conclusion that R.C. 124.38 does not authorize an employee to use sick leave accrued thereunder for an absence due to the placement of a child with the employee for adoption seems harsh. We are constrained, however, to read and apply R.C. 124.38 as it is written. A result more favorable to the interests of adoptive parents will require an amendment to the terms of R.C. 124.38, and that can be accomplished only through the efforts of our elected representatives in the General Assembly.

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. When there is no collective bargaining agreement covering any employees of a county board of mental retardation and developmental disabilities, those employees who are not management employees, as defined in R.C. 5126.20(C), may not use sick leave for absences due to the placement of a child with the employee for adoption, because adoption of a child is not one of the reasons for which R.C. 124.38 authorizes sick leave granted under that statute to be used. With respect to its management employees, as defined by R.C. 5126.20(C), a county board of mental retardation and developmental disabilities may establish a sick leave benefit that is not limited to the uses prescribed by R.C. 124.38, and if, in a reasonable exercise of its discretion, the board finds a rational basis for authorizing its management employees to use their sick leave benefits for absences due to the placement of a child with the employee for adoption, the board may authorize its management employees to use sick leave for that purpose.

2. If a collective bargaining agreement authorizes employees of a county board of mental retardation and developmental disabilities to use sick leave benefits for absences due to the placement of a child with the employee for adoption, the employees covered by the agreement may use their sick leave benefits for such absences. If, however, a collective bargaining agreement covering employees of a county board of mental retardation and developmental disabilities does not specify that sick leave benefits may be used for absences due to the placement of a child with the employee for adoption, the employees covered by the agreement may use sick leave only for those purposes described in R.C. 124.38, which do not include absences due to the placement of a child with the employee for adoption. When some employees of a county board of mental retardation and developmental disabilities are covered by a collective bargaining agreement and others are not, R.C. 124.38 authorizes the superintendent of the county board of mental retardation and developmental disabilities to establish an alternative schedule of sick leave for those employees "for

whom the state employment relations board has not established an appropriate bargaining unit pursuant to [R.C. 4117.06]"; the provisions of such alternative sick leave schedule may address the use of sick leave for adoption placements but may not be inconsistent with the terms of the collective bargaining agreement covering other county board of mental retardation and developmental disabilities employees.

3. Absent a collective bargaining agreement or an alternative schedule of sick leave benefits that authorizes or requires a county board of mental retardation and developmental disabilities employee to use sick leave for an absence due to the placement of a child with the employee for adoption, a county board of mental retardation and developmental disabilities is without authority to require such employee to use, and the employee is not entitled to use, sick leave benefits for an absence due to the placement of a child with the employee for adoption.

Respectfully,

JIM PETRO
Attorney General