March 18, 1994

OPINION NO. 94-009

The Honorable R. Alan Corbin
Brown County Prosecuting Attorney
200 East Cherry Street
Georgetown, Ohio 45121

Dear Prosecutor Corbin:

You have requested an opinion concerning the proper disposition of vacation leave and sick leave benefits earned by a person while employed in the office of the clerk of courts. Information provided by the clerk of courts indicates that the employee about whom you ask had been employed full time in the office of the clerk of courts for a number of years prior to Friday, February 26, 1993, when she terminated her employment in order to retire under the Public Employees Retirement System (PERS). On the following Monday, March 1, 1993, the individual became reemployed in the same position in the clerk's office, again on a full-time basis. Further, the clerk has indicated that this person's employment has not been governed by any collective bargaining agreement. Based upon these facts, you ask the following questions:

1. Pursuant to ORC 124.39(B), does the employee have the option to NOT receive the cash value of the unused sick leave? (maximum 1/4 of 120 days) or may the employee carry the unused sick leave forward and use after reemployment[?]

2. Is the employee required to take cash payment for [accrued] but unused vacation leave...at time of retirement, or is the employee permitted to carry time forward and use as a county employee?

3. What is the proper "years of service figure" to use when calculating vacation leave? Does the employee start as a new employee or do the total years of service count?

I. Employees of Clerk of Courts

R.C. 325.17 authorizes various county officers, including the clerk of the court of common pleas, to hire employees for their offices and to fix their compensation. The compensation of the

clerk's employees is paid from moneys appropriated to the clerk's office by the board of county commissioners and "shall be paid biweekly from the county treasury, upon the warrant of the auditor." R.C. 325.17. Thus, for purposes of compensation, employees of the clerk of the court of common pleas are county employees.

II. County Employees' Sick Leave Benefits

A. Accrual

Sick leave benefits are provided for county employees generally by R.C. 124.38, which provides that each employee "shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay."[1] R.C. 124.38 sets forth permissible uses of sick leave and the manner in which such leave shall be deducted from each employee's credit. With certain exceptions, R.C. 124.38 provides that "[u]nused sick leave shall be cumulative without limit."

B. Payment for Unused Sick Leave

Payment for accumulated, unused sick leave earned under R.C. 124.38 is governed by R.C. 124.39, which states in pertinent part:

> As used in this section, *"retirement" means disability or service retirement under any state* or municipal *retirement system* in this state.
> ....
> (B) Except as provided in division (C) of this section, an employee of a political subdivision covered by [R.C. 124.38 or R.C. 3319.141] *may elect, at the time of retirement from active service* with the political subdivision, and with ten or more years of service with the state, any political subdivisions, or any combination thereof, to be paid in cash for one-fourth the value of his accrued but unused sick leave credit. The payment shall be based on the employee's rate of pay at the time of retirement and eliminates all sick leave credit accrued but unused by the employee at the time payment is made. An employee may receive one or more payments under this division, but the aggregate value of accrued but unused sick leave credit that is paid shall not exceed, for all payments, the value of thirty days of accrued but unused sick leave.
> (C) A political subdivision may adopt a policy allowing an employee to receive payment for more than one-fourth the value of his unused sick leave or for more than the aggregate of thirty days of his unused sick leave, or allowing the number of years of service to be less than ten. The political subdivision may also adopt a policy

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[1] In *Ebert v. Stark County Board of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), the court decided that the sick leave benefits prescribed for county employees by R.C. 124.38 are only a minimum entitlement that may be increased by the entity empowered to prescribe compensation for such employees.

> permitting an employee to receive payment upon a termination of employment other than retirement or permitting more than one payment to any employee.
> Notwithstanding [R.C. 325.17] or any other section of the Revised Code authorizing any appointing authority of a county office, department, commission, or board to set compensation, any modification of the right provided by division (B) of this section, and any policy adopted under division (C) of this section, shall only apply to a county office, department, commission, or board if it is adopted in one of the following ways:
> (1) By resolution of the board of county commissioners for any office, department, commission, or board that receives at least one-half of its funding from the county general revenue fund;
> (2) By order of any appointing authority of a county office, department, commission, or board that receives less than one-half of its funding from the county general revenue fund. Such office, department, commission, or board shall provide written notice to the board of county commissioners of such order.
> (3) As part of a collective bargaining agreement. (Emphasis added.)

Because county employees are covered by R.C. 124.38, *see* R.C. 124.38(A), they are subject to the provisions of R.C. 124.39. Accordingly, absent a contrary policy adopted under R.C. 124.39(C), a county employee who has the requisite service time "may elect," at the time of disability or service retirement from active service under the Public Employees Retirement System,[2] to be paid for a portion of his accrued, unused sick leave.

You specifically ask whether R.C. 124.39(B) allows a county employee the option of not being paid at the time of retirement from active service for the employee's previously accumulated, unused sick leave. R.C. 124.39(B) uses the phrase "may elect" to describe the right granted to an employee by that division of the statute. This language is clearly permissive and, therefore, grants a county employee who has the requisite service time the option, at the time of retirement from active service, whether or not to receive payment for the employee's previously accumulated, unused sick leave. *See State ex rel. Runyan v. Henry*, 34 Ohio App. 3d 23, 26, 516 N.E.2d 1261, 1264 (Miami County 1986) (pursuant to R.C. 124.39, "it is the *employee's option* to receive cash payment for a percentage of accrued sick leave upon retirement" (emphasis added)). In answer to your specific question, R.C. 124.39(B) does not require a county employee to be paid for sick leave upon retirement from active service under the Public Employees Retirement System.

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[2] Pursuant to the definition of "employee" in R.C. 145.01, county employees are included within the Public Employees Retirement System.

C. Time for Making Election under R.C. 124.39(B)

The time for making the election authorized by R.C. 124.39(B) is "at the time of retirement from active service with the political subdivision." In the situation you describe, the individual terminated her employment on February 26, 1993, in order to retire under the Public Employees Retirement System (PERS). Thus, although she returned to county employment on the first day of the month following the termination of her employment, she retired from active service with the county on February 26, 1993, for purposes of R.C. 124.39(B). At that time she became entitled to elect whether to receive payment for her previously accumulated unused sick leave. Because nothing in R.C. Chapter 145, governing the Public Employees Retirement System, authorizes a person to retire under that system more than once, *see generally* R.C. 145.38 (employment of retirant by public employer), if this employee did not elect, at the time of her retirement, to be paid for the sick leave she accumulated prior to February 26, 1993, she will not have another opportunity to receive such a cash payment under R.C. 124.39(B).

D. Alternate Disposition of Unused Sick Leave Benefits

The second portion of your first question asks, in the event that the employee need not cash in her accrued unused sick leave, may she carry that balance forward to be used during her post-retirement county employment. R.C. 124.38 provides, in pertinent part:

> (C).... *Unused sick leave shall be cumulative without limit*. When sick leave is used, it shall be deducted from the employee's credit on the basis of one hour for every one hour of absence from previously scheduled work. The previously accumulated sick leave of an employee who has been *separated* from the public service shall be placed to his credit upon his re-employment in the public service, provided that such re-employment takes place within ten years of the date on which the employee was last *terminated* from public service. (Emphasis added.)

The word "separated," as used in R.C. 124.38, is not defined by statute. As used in R.C. 325.19, concerning county employees' vacation leave, however, the word "separation" has been interpreted as including such employment actions as: leaving county employment to become employed by another county, 1983 Op. Att'y Gen. No. 83-074; leaving employment with one county appointing authority to become employed by a different appointing authority within the same county, 1981 Op. Att'y Gen. No. 81-001; and leaving county employment to serve as an officer of the county, 1980 Op. Att'y Gen. No. 80-057. An element common to these three situations is a termination of one's employment. Because both R.C. 325.19 and R.C. 124.38 relate to fringe benefits of county employees, it is reasonable to conclude that those employment actions that constitute a separation from employment for purposes of R.C. 325.19 also constitute a separation from employment under R.C. 124.38. Thus, a termination of county employment constitutes a separation for purposes of R.C. 124.38.

As stated by the clerk of courts, the employee about whom you ask terminated her employment in order to retire under PERS. Even though this individual became reemployed on the

first day of the month following the termination of her employment, she already had "been separated from the public service" within the meaning of R.C. 124.38(C). Thus, if this employee did not elect to receive payment under R.C. 124.39(B), because her reemployment occurred within ten years of her last termination from public service, R.C. 124.38 entitles her to receive credit in her new employment for the unused sick leave she accumulated in her county employment prior to her separation.

III. Vacation Leave for County Employees Under R.C. 325.19

Your second question asks whether the employee you describe is required to take a cash payment for accrued but unused vacation leave upon commencing retirement under PERS, or whether that vacation leave may be carried forward for use upon reemployment with the same appointing authority. Vacation leave for county employees is governed by R.C. 325.19, which states, in part:

> (C).... Vacation leave shall be taken by the employee during the year in which it accrued and prior to the next recurrence of the anniversary date of his employment, provided the appointing authority may, in special and meritorious cases, permit such employee to accumulate and carry over his vacation leave to the following year. No vacation leave shall be carried over for more than three years. An employee *is entitled* to compensation, at his current rate of pay, for the prorated portion of any earned but unused vacation leave for the current year to his credit *at time of separation*, and in addition *shall be compensated* for any unused vacation leave accrued to his credit, with the permission of the appointing authority, for the three years immediately preceding the last anniversary date of employment.
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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.)

Unlike the portions of R.C. 124.38(C) and R.C. 124.39 concerning the disposition of accumulated sick leave, R.C. 325.19 makes no provision for transferring unused vacation leave to a person's subsequent public employment or for granting credit for such unused vacation leave upon an employee's return to public employment.

Moreover, R.C. 325.19(C) further states that, upon separation, an employee "*shall* be compensated for any unused vacation leave accrued to his credit, with the permission of the appointing authority, for the three years immediately preceding the last anniversary date of employment" (emphasis added). The meaning of these provisions was interpreted in 1991 Op. Att'y

Gen. No. 91-050, at 2-259, as follows: "R.C. 325.19(C) establishes only one method of disposition of those vacation leave benefits remaining to a county employee's credit at the time he separates from employment. R.C. 325.19(C) thus provides that, in such a situation, the appointing authority shall compensate (*i.e.*, pay) the employee for his unused vacation leave." Op. No. 91-050 then concluded that: "County appointing authorities may not vary the provisions of R.C. 325.19(C) that require a county appointing authority to pay an employee, at the time of separation, for unused vacation leave the employee was permitted to accumulate while in the employ of that appointing authority." *Id.* (syllabus). Thus, it is reasonable to read R.C. 325.19(C) as requiring a county appointing authority to compensate a county employee for all unused vacation leave, including unused vacation leave for the current year remaining to his credit, at the time the employee separates from county employment.

IV. Service Credit for Purposes of R.C. 325.19

Your final question concerning this particular individual asks: "What is the proper _years of service figure_ to use when calculating vacation leave? Does the employee start as a new employee or do the total years of service count?" R.C. 325.19(A) grants vacation leave to county employees in an amount based upon the number of years of service the employee has "with the county or any political subdivision of the state." R.C. 9.44, however, also governs service credit for vacation leave purposes, stating, in part:

> (A) Except as otherwise provided in this section, a person employed, other than as an elective officer, by the state or any political subdivision of the state, earning vacation credits currently, is entitled to have his prior service with any of these employers counted as service with the state or any political subdivision of the state, for the purpose of computing the amount of his vacation leave....
> (B) To determine prior service for the purpose of computing the amount of vacation leave for a person initially employed on or after July 5, 1987, by:
> (1) A county, the person shall have only his prior service with a county counted....
> (C) *An employee who has retired in accordance with the provisions of any retirement plan offered by the state and who is employed by* the state or *any political subdivision of the state on or after June 24, 1987, shall not have his prior service with the state or any political subdivision of the state counted for the purpose of computing vacation leave.* (Emphasis added.)

R.C. 9.44(C) thus operates as a restriction upon the general service credit provisions of R.C. 9.44(A) by prohibiting an employee who has retired under a state retirement plan and is employed by the state or a political subdivision on or after June 24, 1987, from including as prior service any time served prior to retirement.

The person about whom you ask has retired in accordance with the provisions of R.C. Chapter 145, governing the Public Employees Retirement System, and became reemployed by the county after June 24, 1987. Thus, she "shall not have [her] prior service with the state or any political subdivision of the state counted for the purpose of computing vacation leave." R.C.

9.44(C). In answer to your third question, therefore, the individual you describe may now include as service time in calculating her vacation benefits only that service with the county that has occurred since her reemployment with the county.

V. Conclusion

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

1. Pursuant to R.C. 124.39(B), a county employee who terminates her county employment in order to retire under the Public Employees Retirement System and who has the requisite service time may elect, at the time of such retirement, whether or not to receive a cash payment for her accrued, unused sick leave.

2. The election to receive payment for unused sick leave under R.C. 124.39(B) may be made by a county employee only at the time of disability or service retirement, as defined in R.C. 124.39, from active service with the county.

3. A county employee who has terminated her employment in order to retire under the Public Employees Retirement System has retired from active service with the county for purposes of R.C. 124.39(B), even though she became reemployed by the county on the first day of the month following such termination of employment.

4. If a county employee who is subject to R.C. 124.39(B) terminates her employment in order to retire under the Public Employees Retirement System, and elects not to receive payment under R.C. 124.39(B) for her previously accumulated, unused sick leave, R.C. 124.38 entitles that employee to receive credit for such sick leave upon her reemployment by the county, as long as such reemployment occurs within ten years of the date of her last termination from public service.

5. Pursuant to R.C. 325.19(C), a county employee who terminates her employment in order to retire under the Public Employees Retirement System must be compensated at the time of such termination for unused vacation leave that she has accumulated in accordance with R.C. 325.19(C).

6. Pursuant to R.C. 9.44(C), a county employee who has retired in accordance with the provisions of R.C. Chapter 145, governing the Public Employees Retirement System, and who is employed by a county on or after June 24, 1987, "shall not have his prior service with the state

or any political subdivision of the state counted for the purpose of computing vacation leave."

Respectfully,

LEE FISHER
Attorney General

March 18, 1994

The Honorable R. Alan Corbin
Brown County Prosecuting Attorney
200 East Cherry Street
Georgetown, Ohio 45121

SYLLABUS: 94-009

1. Pursuant to R.C. 124.39(B), a county employee who terminates her county employment in order to retire under the Public Employees Retirement System and who has the requisite service time may elect, at the time of such retirement, whether or not to receive a cash payment for her accrued, unused sick leave.

2. The election to receive payment for unused sick leave under R.C. 124.39(B) may be made by a county employee only at the time of disability or service retirement, as defined in R.C. 124.39, from active service with the county.

3. A county employee who has terminated her employment in order to retire under the Public Employees Retirement System has retired from active service with the county for purposes of R.C. 124.39(B), even though she became reemployed by the county on the first day of the month following such termination of employment.

4. If a county employee who is subject to R.C. 124.39(B) terminates her employment in order to retire under the Public Employees Retirement System, and elects not to receive payment under R.C. 124.39(B) for her previously accumulated, unused sick leave, R.C. 124.38 entitles that employee to receive credit for such sick leave upon her reemployment by the county, as long as such reemployment occurs within ten years of the date of her last termination from public service.

5. Pursuant to R.C. 325.19(C), a county employee who terminates her employment in order to retire under the Public Employees Retirement System must be compensated at the time of such termination for unused vacation leave that she has accumulated in accordance with R.C. 325.19(C).

6. Pursuant to R.C. 9.44(C), a county employee who has retired in accordance with the provisions of R.C. Chapter 145, governing the Public Employees Retirement System, and who is employed by a county on or after June 24, 1987, "shall not have his prior service with the state or any political subdivision of the state counted for the purpose of computing vacation leave."