May 12, 2005

The Honorable Craig L. Roth
Williams County Prosecuting Attorney
1210 West High Street
Bryan, Ohio 43506

SYLLABUS: 2005-020

1. As used in R.C. 124.38, the term "alternative schedules of sick leave" does not apply to a policy permitting an employee of the county sheriff to receive payment for accrued, unused sick leave upon termination of employment other than retirement.

2. Pursuant to R.C. 124.39(C), any modification of statutory entitlement to payment for accrued, unused sick leave as provided in R.C. 124.39(B), or any policy granting additional unused sick leave compensation benefits as provided in R.C. 124.39(C), applies to a county office, department, commission, or board that receives at least one-half of its funding from the county general fund only if it is adopted by resolution of the board of county commissioners or as part of a collective bargaining agreement. (1990 Op. Att'y Gen. No. 90-074, syllabus, paragraph 2, approved and followed.)

3. If the county sheriff's office receives at least one-half of its funding from the county general revenue fund, R.C. 124.39(C) prohibits the county sheriff from applying a policy that permits an employee to receive payment for accrued, unused sick leave upon a termination of employment other than retirement, except as part of a collective bargaining agreement or pursuant to a policy adopted by the board of county commissioners under R.C. 124.39(C).

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
JIM PETRO, ATTORNEY GENERAL

Opinions Section
30 E. Broad St., 15th Floor
Columbus, OH 43215-3400
Telephone: (614) 752-6417
Facsimile: (614) 466-0013
www.ag.state.oh.us

May 12, 2005

OPINION NO. 2005-020

The Honorable Craig L. Roth
Williams County Prosecuting Attorney
1210 West High Street
Bryan, Ohio 43506

Dear Prosecutor Roth:

We have received your request for an opinion concerning payment for unused sick leave upon resignation from employment. You have asked the following questions:

1. The last paragraph of R.C. 124.38 became effective March 17, 1989 and authorized the Williams County Sheriff to "establish alternative schedules of sick leave" for the non-union members of the Williams County Sheriff's Department. Does the policy adopted by the Williams County Sheriff before March 17, 1989 and followed continuously since then until the present constitute an "alternative schedule of sick leave" under R.C. 124.38?

2. If the answer to question number 1 is "yes," may this "alternative schedule" of the Williams County Sheriff encompass the payment to county employees (i.e., Kevin Beck) for unused sick leave under R.C. 124.39? This issue was referenced but not answered in 1998 Op. Att'y Gen. No. 98-028. Does the alternative schedule under R.C. 124.38 trump R.C. 124.39(B) and (C)?

3. If the answer to question number 2 is "yes," may Kevin Beck now as sheriff lawfully exercise his discretion to pay himself for his unused sick leave per the policy for non-union members of the sheriff's department? The prior sheriff who resigned on December 31, 2004 did not address this issue as Kevin Beck's resignation occurred on January 2, 2005.

For the reasons discussed below, we conclude that, as used in R.C. 124.38, the term "alternative schedules of sick leave" does not apply to a policy permitting an employee of the

county sheriff to receive payment for accrued, unused sick leave upon termination of employment other than retirement. We conclude, further, that, pursuant to R.C. 124.39(C), any modification of statutory entitlement to payment for accrued, unused sick leave as provided in R.C. 124.39(B), or any policy granting additional unused sick leave compensation benefits as provided in R.C. 124.39(C), applies to a county office, department, commission, or board that receives at least one-half of its funding from the county general fund only if it is adopted by resolution of the board of county commissioners or as part of a collective bargaining agreement. More specifically, we conclude that, if the county sheriff's office receives at least one-half of its funding from the county general revenue fund, R.C. 124.39(C) prohibits the county sheriff from applying a policy that permits an employee to receive payment for accrued, unused sick leave upon a termination of employment other than retirement, except as part of a collective bargaining agreement or pursuant to a policy adopted by the board of county commissioners under R.C. 124.39(C).

Background

Your questions relate to a specific matter currently at issue in Williams County. As you have described the situation, deputies at the Williams County Sheriff's Department formed a union in May of 1986, and the union has remained in existence since that time. The union contract in effect in 2004 and 2005 provides for severance pay upon retirement and further provides: "In addition, severance pay may be paid to employees who *resign* under honorable conditions." (Emphasis added.) Severance pay is calculated as the value of a fraction of the deputy's accumulated sick leave, with the fraction dependent on the number of years of service and capped at a maximum of 120 days.

Since October of 1988, the Williams County Sheriff has maintained a policy for non-union employees of the Williams County Sheriff's Department that mirrors the severance pay provisions of the union contract. The Sheriff's written policy for non-union employees, which has been continuous and unchanged from 1988 until the present, provides for severance pay upon retirement and further provides: "In addition, severance pay may be paid to employees who *resign* under honorable conditions, and they shall receive pay at the discretion of the Sheriff." (Emphasis added.) The amount of severance pay for non-union employees is based on the same fraction and schedule as provided in the union contract and is subject to the same 120-day cap.

Thus, the Williams County Sheriff's policy for severance pay for non-union employees has been the same as the provisions in the union contract since October of 1988 (with the exception that the non-union policy provides for payment "at the discretion of the Sheriff"), and the Williams County Sheriff has not adopted any severance pay policy provisions for non-union employees since 1988. However, in July of 2003, the Williams County Commissioners adopted a policy pursuant to R.C. 124.39(C) providing that payment for unused sick leave is allowed only upon retirement from a state retirement system. That policy is still in effect. Further, more than one-half of the funding of the Williams County Sheriff's Department comes from the county general fund.

The questions at issue concern Kevin Beck, who served as a Williams County deputy sheriff from February of 1984 to November of 2003 and was a member of the union from May of 1986 to November of 2003. In November of 2003, Kevin Beck was appointed to the position of chief deputy with the Williams County Sheriff's Department, which is a non-union position. In November of 2004, Kevin Beck was elected Williams County Sheriff. Kevin Beck resigned his position of chief deputy at midnight on January 2, 2005, and took office as sheriff on January 3, 2005. The prior sheriff, Alan Word, resigned at midnight on December 31, 2004, thus failing to complete his term, which expired at midnight on January 2, 2005. Williams County had no sheriff on January 1st and 2nd of 2005.

Your questions concern the manner in which the severance pay policy for non-union employees applies to the current situation. We are able, by means of this opinion, to address in general terms the questions of law presented by your request. However, we are unable to use the opinions process to make findings of fact or determinations regarding the rights of particular individuals. *See, e.g.*, 2003 Op. Att'y Gen. No. 2003-017 at 2-129 ("the authority to make determinations of rights in particular circumstances rests with the courts"); 2001 Op. Att'y Gen. No. 2001-026 at 2-144 ("[t]he Attorney General cannot adjudicate the legal rights or responsibilities of particular persons"); 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").

Compensation of a county sheriff's employees

County sheriffs, like various other county officers, have statutory authority to hire employees and to fix their compensation. R.C. 325.17. Under Ohio law, the provision of a fringe benefit, such as sick leave or payment for accrued, unused sick leave, constitutes part of the compensation of a public employee. The entity with authority to fix an employee's compensation is permitted to grant the employee fringe benefits in excess of the minimums provided by statute, subject to any statutory restrictions. *See Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 33, 406 N.E.2d 1098 (1980) (a county board with the power to fix the compensation of its employees may grant fringe benefits in excess of minimums established by statute, subject to provisions that constrict the board's power); *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 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"). Accordingly, the sheriff is authorized to grant employees of the sheriff's office sick leave or other fringe benefits in excess of those provided by statute, subject to statutory provisions constricting that authority.

Ohio law also empowers the sheriff and other public employers to enter into collective bargaining agreements with the exclusive representatives of bargaining units of public employees. The 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. *See, e.g.*, R.C. 4117.01(B), (E), (M); R.C. 4117.05; R.C. 4117.06; R.C. 4117.08; R.C. 4117.10(A) ("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"); *In re Ohio Council 8*, 1986 OPER (LRP) LEXIS 277SERB 86-007 (1986) (the county sheriff is the sole public employer of the employees in the sheriff's office for purposes of R.C. Chapter 4117); 2004 Op. Att'y Gen. No. 2004-004 at 2-34 to 2-35; 2000 Op. Att'y Gen. No. 2000-020 at 2-121 n.4 ("[p]ayment for unused sick leave is an appropriate matter for inclusion in a collective bargaining agreement, and employees who are covered by a collective bargaining agreement that addresses the matter of payment for unused sick leave are entitled to the benefits under that agreement regardless of R.C. 124.39"); 1990 Op. Att'y Gen. No. 90-074 at 2-319 ("[s]ince the payment for unused sick leave is a part of compensation, such matter falls within the term 'wages,' for purposes of R.C. Chapter 4117 and, as such, is an appropriate matter for inclusion in an agreement entered into under that chapter"). When some employees of the sheriff are covered by a collective bargaining agreement, the sheriff retains authority to set the compensation of the remaining employees and, as discussed above, may grant benefits in excess of the minimums provided by statute, subject to any statutory restrictions.

Sick leave entitlement of a county sheriff's employees under R.C. 124.38

In order to address your questions, it is necessary to examine the provisions of R.C. 124.38 and R.C. 124.39 and the relationship between the two sections. R.C. 124.38 establishes a sick leave entitlement for employees of various public entities, including employees "in the various offices of the county … service." R.C. 124.38(A). Employees of the sheriff are, thus, included within the coverage of R.C. 124.38, with the sheriff serving as the appointing authority. *See* R.C. 325.17.[1] R.C. 124.38 addresses the amount of sick leave granted, the manner in which and purposes for which sick leave may be used, the accumulation of sick leave, and the crediting of sick leave upon reemployment by or transfer to another public agency.

The final paragraph of R.C. 124.38 is the portion at issue in your request. This paragraph states:

> Notwithstanding this section or any other section of the Revised Code, *any appointing authority of a county office*, department, commission, board, or body

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[1] For purposes of R.C. Chapter 124, "[a]ppointing authority" means "the officer, commission, board, or body having the power of appointment to, or removal from, positions in any office, department, commission, board, or institution." R.C. 124.01(D). An appointing authority may, but does not necessarily, have the power, subject to various statutory limitations, to fix the compensation of the persons appointed. *See, e.g.*, R.C. 124.39; R.C. 325.17 (certain elected county officers, including county sheriffs, are empowered to hire and fix the compensation of their employees); 1992 Op. Att'y Gen. No. 92-066 at 2-272; 1987 Op. Att'y Gen. No. 87-018 at 2-123 n.5; 1984 Op. Att'y Gen. No. 84-092.

> *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 section 4117.06 of the Revised Code, provided that the alternative schedules are *not inconsistent with the provisions of a collective bargaining agreement* covering other employees of that appointing authority.

R.C. 124.38 (emphasis added).

This portion of R.C. 124.38, which took effect in 1989, permits the county sheriff, and the appointing authorities of other county offices, departments, commissions, boards, or bodies 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 the appointing authority. *See* Am. Sub. S.B. 358, 117th Gen. A. (1988) (eff. Mar. 17, 1989). Thus, when the county sheriff enters into a collective bargaining agreement granting employees covered by the agreement sick leave benefits in excess of those granted by statute, the sheriff is permitted to grant non-bargaining unit employees the same benefits. The above-quoted portion of R.C. 124.38 thus serves as a restriction on the power of the sheriff to set the compensation of employees, requiring that, if some employees are covered by a collective bargaining agreement, the sheriff may grant the non-bargaining unit employees "alternative schedules of sick leave" only if the alternative schedules "are not inconsistent with" the provisions of the collective bargaining agreement.[2] *See* 1999 Op. Att'y Gen. No. 99-039 at 2-246 (the power vested in

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[2] 1998 Op. Att'y Gen. No. 98-028 suggested that R.C. 124.38 might be read as a grant of authority, enabling appointing authorities to provide their non-bargaining unit employees with sick leave benefits as great as those provided to bargaining unit employees by a collective bargaining agreement. *See* 1998 Op. Att'y Gen. No. 98-028 at 2-155 (referring to "the General Assembly's apparent intention to authorize county appointing authorities to grant equivalent sick leave . . . benefits to their employees whether or not the employees receive those benefits pursuant to a collective bargaining agreement"). That suggestion was clarified by 1999 Op. Att'y Gen. No. 99-039, which reads R.C. 124.38 as a restriction upon the authority of a county appointing authority to provide non-bargaining unit employees with sick leave benefits, prohibiting a grant of benefits in excess of those granted by the collective bargaining agreement (while requiring that any statutory minimums are met). In this regard, 1999 Op. Att'y Gen. No. 99-039, at 2-246, states:

> Although [1998 Op. Att'y Gen. No. 98-028] speaks in permissive terms about the power vested in appointing authorities to adopt alternative leave schedules under R.C. 124.38 …, 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 … benefits of its non-bargaining

appointing authorities to adopt alternative leave schedules under R.C. 124.38 "may be characterized . . . as a limitation imposed by those statutory provisions upon the appointing authority's power, in certain circumstances, to increase the sick leave . . . benefits of its non-bargaining unit employees"); *see also* 2004 Op. Att'y Gen. No. 2004-004 at 2-36 n.8.[3]

> unit employees. In other words, the establishment of alternative leave schedules under R.C. 124.38 … 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.

But see note 3, *infra*.

1999 Op. Att'y Gen. No. 99-039 concludes, in the syllabus paragraph that clarifies the first paragraph of the syllabus of 1998 Op. Att'y Gen. No. 98-028:

> 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.)

The second paragraph of the syllabus of 1998 Op. Att'y Gen. No. 98-028, which was not affected by the 1999 opinion, states:

> In 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 that appointing authority.

[3] In the event that an appointing authority described in R.C. 124.38 (that is, an appointing authority of a county office, department, commission, board, or body that has some employees who are covered by a collective bargaining agreement) is not authorized by another statute to provide its non-bargaining unit employees with sick leave benefits in excess of those granted by

Payment for accrued, unused sick leave under R.C. 124.39

R.C. 124.39 addresses benefits that are related to, but different from, the sick leave benefits addressed in R.C. 124.38. While R.C. 124.38 governs the provision of and payment for sick leave, R.C. 124.39 establishes procedures for paying employees, in certain circumstances, for sick leave that has been accrued but not used. R.C. 124.39 states that an employee of a political subdivision covered by R.C. 124.38 (including a county) with ten or more years of service with the state or a political subdivision may elect, at the time of retirement,[4] to be paid in cash for one-fourth the value of any accrued but unused sick leave credit, at the employee's rate of pay at the time of retirement, with a maximum equal to the value of thirty days of accrued but unused sick leave. R.C. 124.38(B).[5] R.C. 124.39(C) authorizes a political subdivision to adopt a policy allowing an employee to receive payment for more than one-fourth the value of unused sick leave or for more than an aggregate value of thirty days of unused sick leave, allowing the number of years of service to be less than ten, or permitting more than one payment to an employee. R.C. 124.39(C) also directly addresses the matter with which you are concerned, authorizing a political subdivision to adopt a policy "permitting an employee to receive payment upon a termination other than retirement." The final sentence of R.C. 124.39 states that a political subdivision may adopt policies similar to the provisions contained in R.C. 124.382 to R.C. 124.386, which address various matters relating to credit and payment for sick leave, disability leave, or personal leave. *See, e.g.*, 2000 Op. Att'y Gen. No. 2000-020.

In addition, R.C. 124.39(C) also includes the following language, inserted by amendment in 1990 and referred to in this opinion as the "constricting language" of R.C. 124.39(C):

> Notwithstanding section 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

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statute, R.C. 124.38 appears to grant that appointing authority the power to establish alternative schedules of sick leave, subject to the restriction that the alternative schedules may not be inconsistent with the collective bargaining agreement, and subject to other statutory restrictions. *See* note 2, *supra*.

[4] R.C. 124.39 defines "retirement" as "disability or service retirement under any state or municipal retirement system in this state."

[5] A qualified employee has the option of deciding whether to be paid for unused sick leave credit upon retirement. R.C. 124.39(B); 2003 Op. Att'y Gen. No. 2003-038 at 2-316 n.1. A decision to be paid may affect the employee's ability to have unused sick leave placed to the employee's credit upon reemployment in public service. R.C. 124.39(B); 2000 Op. Att'y Gen. No. 2000-020; 1994 Op. Att'y Gen. No. 94-009.

> only apply to a county office, department, commission, or board if it is adopted in one of the following ways:
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> (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;
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> (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.
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> (3) As part of a collective bargaining agreement.

R.C. 124.39; *see* 1989-1990 Ohio Laws, Part I, 449, 451 (Sub. S.B. 58, eff. July 18, 1990). This constricting language limits the authority to grant payment for accrued, unused sick leave. It permits a policy allowing an employee to receive payment for unused sick leave upon a termination of employment other than retirement to apply to a county office (including the office of the county sheriff) only if the policy is adopted in one of three ways: (1) by resolution of the board of county commissioners if the office receives at least one-half of its funding from the county general revenue fund; (2) by order of the appointing authority of the county office and with written notice to the board of county commissioners, but only if the office receives less than one-half of its funding from the county general revenue fund; or (3) as part of a collective bargaining agreement.

The constricting language of R.C. 124.39(C) thus limits the power of a sheriff or other county appointing authority to set compensation, restricting the power to increase payments for unused sick leave above the minimum prescribed by statute or to adopt any policy granting additional unused sick leave compensation benefits. R.C. 124.39(C) permits these increased benefits to be granted only in accordance with the provisions of R.C. 124.39(C), and not pursuant to the appointing authority's general power to set compensation for its employees. *See* 2000 Op. Att'y Gen. No. 2000-020;[6] 1990 Op. Att'y Gen. No. 90-074 at 2-320 (because of the

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[6] 2000 Op. Att'y Gen. No. 2000-020, at 2-123 to 2-124, summarizes the impact of Sub. S.B. 58 upon R.C. 124.39, as follows:

> Prior to the enactment of 1989-1990 Ohio Laws, Part I, 449 (Sub. S.B. 58, eff. July 18, 1990), county appointing authorities were deemed to have the ability to adopt a sick leave payment policy for their employees, including payment for unused sick leave, so long as the benefits provided under that policy were at least as great as benefits to which their employees were entitled under R.C. 124.39(B) or under any policy adopted by the board of county commissioners pursuant to R.C. 124.39(C). *See* 1990 Op. Att'y Gen. No. 90-074; 1981 Op. Att'y Gen. No. 81-015. *But see State ex rel. Seidita v. Philomena*, No. 89 C.A. 48, 1990 Ohio App. LEXIS 3758 (Ct. App. Mahoning County Aug. 24, 1990). *See generally*

language added to R.C. 124.39(C) by Sub. S.B. 58, "R.C. 124.39(C) now limits the manner in which a payment for unused sick leave policy may be adopted, other than through a collective bargaining agreement, for employees of individual county appointing authorities").

Relationship between R.C. 124.38 and R.C. 124.39

As discussed in 1998 Op. Att'y Gen. No. 98-028 and 1999 Op. Att'y Gen. No. 99-039, the general intent behind enactment of the final paragraph of R.C. 124.38 was to restrict county appointing authorities so that, in establishing alternative schedules of sick leave for non-bargaining unit employees, they may establish only alternative schedules that are not inconsistent with the collective bargaining agreements covering other employees of the appointing authority (while also meeting the minimums prescribed by statute). *See* Am. Sub. S.B. 358, 117th Gen. A. (1988) (eff. Mar. 17, 1989); 1999 Op. Att'y Gen. No. 99-039 at 2-247 ("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" (footnote omitted)); 1998 Op. Att'y Gen. No. 98-028 at 2-153 (qualified by 1999 Op. Att'y Gen. No. 99-039) ("we believe that the amendments to R.C. 124.38 … by Am. Sub. S.B. 358 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 ... benefits equivalent to those obtained by bargaining unit employees either pursuant to a collective bargaining

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> 1998 Op. Att'y Gen. No. 98-028 (ability of a county appointing authority to grants [sic] its employees fringe benefits). In Sub. S.B. 58, however, the General Assembly amended R.C. 124.39 for the purpose of limiting the ability of a county appointing authority to provide benefits to its employees different from the benefits granted to employees under division (B) or under any policy adopted by the county commissioners pursuant to division (C). *See* 1990 Op. Att'y Gen. No. 90-074. . . .
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> As summarized in 1990 Op. Att'y Gen. No. 90-074 at 2-230, "R.C. 124.39 now limits the manner in which a payment for unused sick leave policy may be adopted, other than through a collective bargaining agreement, for employees of individual county appointing authorities." *See also State ex rel. Myers v. Portage County*, 80 Ohio App. 3d 584, 588, 609 N.E.2d 1333, 1336 (Portage County 1992) ("this amended provision [Sub. S.B. 58] expressly rejects the power of the appointing authority to set sick pay policies under the general power to compensate," and thus employees of the county prosecutor are not entitled to payment for unused sick leave under a policy adopted by the prosecutor); 1993 Op. Att'y Gen. No. 93-027 (syllabus) (because of the constricting language added by Sub. S.B. 58, "a county veterans service commission ... that receives more than fifty percent of its funds from the county general revenue fund has no authority to vary for its employees the sick leave payment policy adopted by the board of county commissioners for county employees generally under R.C. 124.39(C)").

agreement or by statute, while assuring the non-bargaining unit employees the minimums otherwise specified by statute").

R.C. 124.39 imposes additional restrictions on an appointing authority's ability (apart from collective bargaining) to grant fringe benefits in excess of those provided by statute, establishing limits with regard to the benefits granted under R.C. 124.39, including payment for accrued, unused sick leave upon termination of employment other than retirement. R.C. 124.39 grants the right to be paid for unused sick leave at the time of retirement to "an employee of a political subdivision" covered by R.C. 124.38 or R.C. 3319.141, *see* R.C. 124.39(B), and authorizes the "political subdivision" (in this case, the county) to adopt policies allowing additional unused sick leave payment benefits, including payment upon termination of employment other than retirement, *see* R.C. 124.39(C). The constricting language of R.C. 124.39(C) prescribes the instances in which modified sick leave payment policies may be adopted by a county office, department, commission, or board, rather than by the county. The constricting language of R.C. 124.39(C) applies "[n]otwithstanding" R.C. 325.17, which establishes the county sheriff and other county officers as appointing authorities, "or any other section of the Revised Code authorizing any appointing authority of a county office, department, commission, or board to set compensation." R.C. 124.39(C). This "notwithstanding" language thus indicates the General Assembly's intent to restrict the power of a sheriff or other county appointing authority to vary for its employees the statutory scheme governing payment for unused sick leave, regardless of the appointing authority's general power to set the compensation of its employees.

In enacting the constricting language of R.C. 124.39, the General Assembly provided a clear indication of its intent that (apart from collective bargaining) the board of county commissioners should have authority to decide whether any increased unused sick leave compensation benefits should be granted to the employees of an office, department, commission, or board that receives at least one-half of its funding from the county general revenue fund. Sub. S.B. 58, which enacted the pertinent language of R.C. 124.39(C), includes among its purposes: "to limit the conditions under which alternative policies may be adopted for paying county employees not covered by a collective bargaining agreement for unused sick leave upon separation." 1989-1990 Ohio Laws, Part I, 449 (Sub. S.B. 58, eff. July 18, 1990) (title). The Legislative Service Commission Analysis states that the bill "[p]rohibits county offices, departments, commissions, and boards from adopting alternative payment of sick leave policies upon an employee's retirement or other separation unless approved by resolution of the board of county commissioners for offices, department [sic], commissions, and boards receiving more than half of their funding from the general revenue fund." 118-SB58 LSC Analysis (Am. S.B. 58, as reported by H. Commerce & Labor);[7] *see also* 118-SB58 LBO Fiscal Note (Sub. S.B. 58,

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[7] The Legislative Service Commission Analysis contains the following description of the bill:

as enacted) ("[t]his act requires any county office/appointing authority authorized to set employee compensation for any office, department, board or commission receiving at least one-half of its funding from the county general fund to obtain approval from the board of county

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> Currently employees in the various offices of the county service may elect, at the time of retirement from active service with the county and with ten or more years of service with the state, any political subdivision, or any combination of these, to receive a cash payment for one-fourth the value of their accrued but unused sick leave for up to 30 days of sick leave credit. The law expressly permits counties, among other political subdivisions, to adopt a policy of payment for unused sick leave that is more generous in specified ways than that described above.
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> Existing law authorizes certain elected county officials (county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer, county recorder) to set compensation for their employees. . . . The statutory provisions regarding terms of employment, including the payment of a sick leave benefit, do not apply to employees covered by a collective bargaining agreement with conflicting provisions.
>
> The bill provides that, notwithstanding the authority of the county officers named above or any other county appointing authority who is authorized to set their employees compensation, no county office, department, commission, or board may adopt an alternative policy for employees not covered by a collective bargaining agreement that varies from the statutory minimums except alternative policies may be adopted in either of the following cases:
>
> (1) if a county office, department, commission, or board receives at least half of its funding from the county general revenue fund, by resolution of the board of county commissioners; or
>
> (2) if a county office, department, commission, or board receives less than half of its funding from the county general revenue fund by providing written notice of the policy to the board of county commissioners.
>
> Thus, under the bill, without the approval of the board of county commissioners or without providing written notice, county elected officers, and other county departments, commissions, and boards may pay only one-fourth the value of accrued but unused sick leave for no more than 30 days of leave and only may pay such portion of accrued sick leave to employees with ten or more years of service, unless the employees are covered by a collective bargaining agreement with a different policy.

118-SB58 LSC Analysis (Am. S.B. 58, as reported by H. Commerce & Labor).

commissioners for any sick-leave reimbursement policy which varies from statutory limits").[8] Although analyses prepared by the Ohio Legislative Service Commission are not binding authorities on matters of statutory construction, they have been recognized by the courts in some instances, and may be found helpful. *See, e.g., Meeks v. Papadopulos*, 62 Ohio St. 2d 187, 191, 404 N.E.2d 159 (1980); 2005 Op. Att'y Gen. No. 2005-003; 1996 Op. Att'y Gen. No. 96-011 at 2-43 to 2-44 n.4.

As reflected in the history outlined in this opinion, the apparent intent of the General Assembly in enacting the constricting language of R.C. 124.39(C) was to prohibit a county sheriff or other county appointing authority from adopting a policy of payment for unused sick leave that is more generous than the statutory minimum, except as provided in R.C. 124.39(C). Consideration of the language and history of R.C. 124.39 compels the conclusion that the General Assembly intended to treat payment for the unused sick leave benefits addressed in R.C. 124.39 differently from fringe benefits addressed elsewhere in the Revised Code, and to allow the board of county commissioners to make decisions regarding unused sick leave compensation benefits in instances in which the county general fund provides at least one-half of the funding of a particular county office, department, commission, or board.

Indeed, this precise conclusion was reached in 1990 Op. Att'y Gen. No. 90-074, which states, in the second paragraph of the syllabus: "Only in the manner set forth in R.C. 124.39(C) may a county appointing authority establish a policy concerning payment for unused sick leave for its employees who are not covered by a collective bargaining agreement, where such policy differs from R.C. 124.39(B) or from a policy established by the board of county commissioners pursuant to R.C. 124.39(C)." *See also See State ex rel. Myers v. Portage County*, 80 Ohio App. 3d 584, 588, 609 N.E.2d 1333 (Portage County 1992) (R.C. 124.39(C), as amended by Sub. S.B. 58, limits the power of an appointing authority and permits the appointing authority to adopt a sick pay policy only in this limited situation); 2000 Op. Att'y Gen. No. 2000-020 (syllabus, paragraph 3);[9] 1993 Op. Att'y Gen. No. 93-027 (syllabus) ("[i]n the absence of a contrary

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[8] The history of Sub. S.B. 58 indicates that the bill was enacted in response to a situation in which a county sheriff was asked to leave and several of his relatives left at the same time, burdening the county with $114,000 in severance payments. 118-SB58 Bill History, *available at* http://han2.hannah.com/htbin/f.com/oh_ban_118:SB58.notes. Testimony included statements that the authority to grant unused sick leave benefits in addition to those provided by statute should be exercised by the county commissioners, who would be required to pay the bill, rather than by various county appointing authorities.

[9] The third paragraph of the syllabus of 2000 Op. Att'y Gen. No. 2000-020 states:

> A county appointing authority may not permit its employees who retire or resign to be paid for only a portion of their unused sick leave credit and retain the remaining leave for credit upon reemployment in the public service, unless such

provision in an applicable collective bargaining agreement adopted under R.C. Chapter 4117, a county veterans service commission that has been created under R.C. 5901.02 and that receives more than fifty percent of its funds from the county general revenue fund has no authority to vary for its employees the sick leave payment policy adopted by the board of county commissioners for county employees generally under R.C. 124.39(C)").

Analysis of questions presented

Your first question asks if the policy adopted by the Williams County Sheriff in 1988 and followed continuously from that time until the present constitutes an "alternative schedule of sick leave" under R.C. 124.38, and your second question asks if this policy encompasses payment to county employees for unused sick leave under R.C. 124.39. There may be some question as to whether the Williams County Sheriff's policy was a permissible grant of fringe benefits when it was adopted.[10] Even if it was, however, the constricting language of R.C. 124.39(C) enacted by

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> benefit is granted by a collective bargaining agreement, or unless the appointing authority receives less than one-half of its funding from the county general revenue fund and provides written notice to the board of county commissioners that it has adopted such a sick leave payment policy. If the appointing authority receives fifty percent or more of its funding from the county general revenue fund, then only the board of county commissioners is authorized to permit an appointing authority's employees who retire or resign to be paid for only a portion of their unused sick leave credit and retain the remaining leave for credit upon reemployment in the public service.

[10] The facts you have provided indicate that the policy in question was adopted prior to the enactment of the final paragraph of R.C. 124.38, which became effective on March 17, 1989, *see* Am. Sub. S.B. 358, 117th Gen. A. (1988) (eff. Mar. 17, 1989), and also prior to the enactment of the constricting language of R.C. 124.39(C), which became effective on July 18, 1990, *see* 1989-1990 Ohio Laws, Part I, 449, 451 (Sub. S.B. 58, eff. July 18, 1990). Compliance with the paragraph enacted by Am. Sub. S.B. 358 would require notification to the board of county commissioners, as provided in R.C. 124.38.

When the Williams County Sheriff's policy was adopted, formal opinions of the Ohio Attorney General took the position that R.C. 124.39 did not restrict a county appointing authority from adopting a policy providing payment for accrued, unused sick leave upon termination of employment other than retirement pursuant to its authority to fix the compensation of employees. *See* 1984 Op. Att'y Gen. No. 84-071 (qualified by 1990 Op. Att'y Gen. No. 90-074); 1984 Op. Att'y Gen. No. 84-061 (qualified by 1990 Op. Att'y Gen. No. 90-074); 1983 Op. Att'y Gen. No. 83-073 (qualified by 1990 Op. Att'y Gen. No. 90-074); 1981 Op. Att'y Gen. No. 81-015 (qualified by 1990 Op. Att'y Gen. No. 90-074); *see also* 1983 Op. Att'y Gen. No. 83-060; note 6, *supra*. Under this analysis, the Williams County Sheriff's policy would have been valid in 1988. Certain courts considering the law as in effect prior to Sub. S.B. 58 reached a different

Sub. S.B. 58 in 1990 prevents a county sheriff whose office receives at least one-half of its funding from the county general revenue fund from applying a policy that permits the payment of accrued, unused sick leave upon a termination other than retirement, unless the policy has been adopted by resolution of the board of county commissioners or as part of a collective bargaining agreement.[11] Hence, because the Williams County Sheriff's Department receives at least one-half of its funding from the county general revenue fund, the Williams County Sheriff is not empowered (apart from a collective bargaining agreement) to apply a policy permitting

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conclusion, however, finding that, because of the specific provisions of R.C. 124.39 giving a political subdivision (including the county) authority over payment for unused sick leave, the general authority of county officers to fix the compensation of their employees did not include the authority to establish a policy governing payment for unused sick leave that was different from the statutory policy. For example, in *State ex rel. Myers v. Portage County*, 80 Ohio App. 3d 584, 609 N.E.2d 1333 (Portage County 1992), the court found, under the law as in existence prior to Sub. S.B. 58, that only the political subdivision had the authority to adopt a policy permitting an employee to receive payment for accrued, unused sick leave upon resignation, rather than retirement, and that the county prosecutor did not have authority to authorize such a sick pay policy for assistant county prosecutors. *See also State ex rel. Seidita v. Philomena*, No. 89 C.A. 48, 1990 Ohio App. LEXIS 3758, at *3-4 (Mahoning County Aug. 24, 1990) (considering the law as in existence prior to Sub. S.B. 58 and stating: "[w]e do not intend to conclude that the appointing authority may make provision for the payment of unused sick leave. The reason for this is that R.C. 124.39(C) very specifically vests this authority with 'a political subdivision'"). Hence, even without the constricting language of R.C. 124.39(C), some authorities concluded that a sheriff or other appointing authority was not permitted to vary the statutory compensation for unused sick leave granted by R.C. 124.39.

[11] 1998 Op. Att'y Gen. No. 98-028 states that "it is unclear whether the General Assembly intended such schedules [established under R.C. 124.38] to encompass all aspects of the sick leave policy established by R.C. 124.38, as well as provisions outside R.C. 124.38 that address other aspects of sick leave, *e.g.*, R.C. 124.39 (payment to county employees for unused sick leave), or whether such schedules were intended to prescribe only different amounts of sick leave to which the appointing authority's employees will be entitled." 1998 Op. Att'y Gen. No. 98-028 at 2-147; *see also* 1998 Op. Att'y Gen. No. 98-028 at 2-156 to 2-157 n.5. As noted in your request, 1998 Op. Att'y Gen. No. 98-028 thus raises the question whether the "alternative schedules of sick leave" portion of R.C. 124.38 applies only to the sick leave factors expressly mentioned in R.C. 124.38, or whether it encompasses also payment for unused sick leave upon retirement or upon termination other than retirement, a factor that is addressed in detail in R.C. 124.39. Other authorities indicate that unused sick leave is governed by R.C. 124.39, rather than R.C. 124.38, and the history of R.C. 124.39(C) confirms this conclusion. *See* 2000 Op. Att'y Gen. No. 2000-020; 1993 Op. Att'y Gen. No. 93-027; 1990 Op. Att'y Gen. No. 90-074; note 10, *supra*; note 13, *infra*.

employees to be paid for accrued, unused sick leave upon resignation, unless the policy has been adopted by resolution of the board of county commissioners.[12]

You have stated specifically that, in July of 2003, the Williams County Commissioners adopted a policy requiring retirement from a state retirement system before the election to be paid for unused sick leave, and that this policy is still in effect. In accordance with R.C. 124.39(C), this is the policy that is applicable to the Williams County Sheriff's Department. *See generally State ex rel. Myers v. Portage County*.

Your questions suggest that an "alternative schedule of sick leave" adopted under R.C. 124.38 might somehow "trump" R.C. 124.39. The analysis set forth above, construing both R.C. 124.38 and 124.39 as restrictions upon the power of an appointing authority to grant fringe benefits in excess of the minimums established by statute, requires the rejection of this suggestion. The language of R.C. 124.38 stating that alternative schedules of sick leave may be established "[n]otwithstanding this section or any other section of the Revised Code" does not grant the sheriff power to ignore other restrictions on the power to fix compensation. Rather, it assures that R.C. 124.38's restriction on the sheriff's power to increase sick leave benefits applies "notwithstanding" other statutes that grant the sheriff power to fix compensation and grant fringe benefits in excess of the minimums provided by statute.[13] Hence, R.C. 124.38 does

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[12] As discussed above, this opinion does not attempt to determine the rights of particular individuals under current statutes or policies. General principles of law provide some guidance in this regard. *See, e.g., State ex rel. Myers v. Portage County*, 80 Ohio App. 3d at 588 ("[c]ustom cannot alter the requirements of the statute"); *State ex rel. Metzker v. Frederick*, 74 Ohio App. 3d 632, 636, 600 N.E.2d 254 (Hancock County 1991) (that an individual was paid for unused sick leave in certain circumstances in the past is not determinative of current entitlements, for "erroneous construction of the ordinance in 1982 will not bar the city auditor from properly applying the ordinance today"); 1998 Op. Att'y Gen. 98-026 at 2-139 (if county employees have not been credited with the full amounts of vacation leave to which they were entitled, there is "implied authority to correct payroll records to reflect the full amounts of vacation benefits that the employees should have received" (citations omitted)); 1989 Op. Att'y Gen. No. 89-088 at 2-417 ("a county appointing authority has the obligation to keep records of the compensation and fringe benefits granted to its employees and the corresponding authority to modify such records when appropriate" (citations omitted)); 1984 Op. Att'y Gen. No. 84-087 at 2-302 ("[a]s a general matter, payments of public funds which have been made in good faith and under color of law for services rendered may not be recovered, even though the payments are later determined to be unlawful" (citations omitted)).

[13] 1998 Op. Att'y Gen. No. 98-028 states that "a literal reading of the phrase '[n]otwithstanding … any other section of the Revised Code' would arguably authorize the terms of such schedules to prevail, not only over the provisions of R.C. 124.38 and R.C. 325.19, but also over those of R.C. 124.39 concerning payment for unused sick leave, R.C. 9.44 concerning prior service credit for purposes of computing vacation leave, or any other statute." 1998 Op.

not authorize a county appointing authority to adopt policies granting payment for unused sick leave upon termination of employment other than retirement. Rather, benefits of this nature may be provided only pursuant to R.C. 124.39. We conclude, accordingly, that, as used in R.C. 124.38, the term "alternative schedules of sick leave" does not apply to a policy permitting an employee of the county sheriff to receive payment for accrued, unused sick leave upon termination of employment other than retirement.

As discussed above, R.C. 124.38 and R.C. 124.39 impose separate restrictions upon the authority to establish fringe benefits in excess of the minimums provided by statute. The provisions of the statutes reflect this fact, with R.C. 124.38 providing for the accrual and use of sick leave and R.C. 124.39(C) addressing payment for accrued, unused sick leave. The distinction between the statutes is evident also from the fact that R.C. 124.39 is directed primarily to political subdivisions, while R.C. 124.38 governs appointing authorities. Further, as discussed above, the history of the constricting language of R.C. 124.39(C) indicates that, notwithstanding the provisions of R.C. 124.38, the General Assembly intended that (apart from collective bargaining agreements) the board of county commissioners should have authority to decide whether to grant any increased unused sick leave compensation benefits to an office, department, commission, or board that receives at least one-half of its funding from the county general revenue fund.

The constricting language of R.C. 124.39(C) (enacted in Sub. S.B. 58, effective July 18, 1990) was adopted subsequent to the final paragraph of R.C. 124.38 (enacted in Am. Sub. S.B. 358, effective March 17, 1989) and pertains specifically to payment for accrued, unused sick leave upon separation. *See* 1989-1990 Ohio Laws, Part I, 449 (Sub. S.B. 58, eff. July 18, 1990). Should any conflict between the two statutes exist, the more recent and specific provisions of R.C. 124.39(C) would prevail over the general language of R.C. 124.38 and prevent a policy governing payment for accrued, unused sick leave from applying to a county sheriff's department that is funded primarily by the county, unless there is a collective bargaining agreement or the board of county commissioners adopts the policy by resolution. *See* R.C. 1.51; *State ex rel. Seidita v. Philomena*, No. 89 C.A. 48, 1990 Ohio App. LEXIS 3758, at *4 (Mahoning County Aug. 24, 1990) (a special statutory provision applying to a specific subject matter constitutes an exception to a general statutory provision covering other subjects as well as the specific subject matter that might otherwise be included under the general provision); 2000

Att'y Gen. No. 98-028 at 2-156. That 1998 opinion goes on to reject the literal reading of the "notwithstanding" language for various legal and practical reasons, including the fact that such a reading would permit the appointing authority to disregard statutory minimums if a collective bargaining agreement provides benefits that are less than the statutory minimums. The clarification of 1998 Op. Att'y Gen. No. 98-028 made by 1999 Op. Att'y Gen. No. 99-039, indicating that the language in question provides a restriction on authority, rather than simply a grant of authority, supports the less expansive reading of the "notwithstanding" provisions that we adopt in this opinion. *See* note 11, *supra.*

Op. Att'y Gen. No. 2000-020; 1993 Op. Att'y Gen. No. 93-027; 1990 Op. Att'y Gen. No. 90-074. It must be assumed that the General Assembly was aware of R.C. 124.38 when it enacted the constricting language of R.C. 124.39(C), and that it could not have intended to have its reason for amending R.C. 124.39 thwarted by the provisions of R.C. 124.38. The construction adopted in this opinion achieves this result.

We conclude, accordingly, that, pursuant to R.C. 124.39(C), any modification of statutory entitlement to payment for accrued, unused sick leave as provided in R.C. 124.39(B), or any policy granting additional unused sick leave compensation benefits as provided in R.C. 124.39(C), applies to a county office, department, commission, or board that receives at least one-half of its funding from the county general fund only if it is adopted by resolution of the board of county commissioners or as part of a collective bargaining agreement. Thus, if the county sheriff's office receives at least one-half of its funding from the county general revenue fund, R.C. 124.39(C) prohibits the county sheriff from applying a policy that permits an employee to receive payment for accrued, unused sick leave upon a termination of employment other than retirement, except as part of a collective bargaining agreement or pursuant to a policy adopted by the board of county commissioners under R.C. 124.39(C). Because we have reached these conclusions, it is not necessary to address your third question.

Conclusions

Therefore, it is my opinion, and you are advised, as follows:

1. As used in R.C. 124.38, the term "alternative schedules of sick leave" does not apply to a policy permitting an employee of the county sheriff to receive payment for accrued, unused sick leave upon termination of employment other than retirement.

2. Pursuant to R.C. 124.39(C), any modification of statutory entitlement to payment for accrued, unused sick leave as provided in R.C. 124.39(B), or any policy granting additional unused sick leave compensation benefits as provided in R.C. 124.39(C), applies to a county office, department, commission, or board that receives at least one-half of its funding from the county general fund only if it is adopted by resolution of the board of county commissioners or as part of a collective bargaining agreement. (1990 Op. Att'y Gen. No. 90-074, syllabus, paragraph 2, approved and followed.)

3. If the county sheriff's office receives at least one-half of its funding from the county general revenue fund, R.C. 124.39(C) prohibits the county sheriff from applying a policy that permits an employee to receive payment for accrued, unused sick leave upon a termination of employment other than retirement, except as part of a collective bargaining agreement

or pursuant to a policy adopted by the board of county commissioners under R.C. 124.39(C).

Respectfully,

JIM PETRO
Attorney General