October 27, 1993

OPINION NO. 93-027

David E. Aldstadt, Director
Governor's Office of Veterans' Affairs
77 South High Street
Columbus, Ohio 43266-0601

Dear Director Aldstadt:

You have requested an opinion on the following question: "Do the Veterans Service Commissioners or the County Commissioners have the authority to set the policy [governing payment for unused sick leave for employees of the veterans service commission]?" Information submitted with your opinion request indicates that your concern arises from a situation involving a particular employee of a county veterans service commission. This person became employed as a county veterans service officer in 1989. He had previously been employed by the state until some time in the mid-1980's, at which time he received payment for his unused sick leave accrued in his state employment. You question whether payment for this employee's accrued, unused sick leave at the time he leaves his employment with the county veterans service commission is governed by the plan adopted by the board of county commissioners for county employees generally, or whether the veterans service commission may adopt a sick leave payment policy different from that adopted by the county commissioners and pay the employee according to its own plan.[1]

Veterans Service Commission Employees

R.C. 5901.02 establishes in each county a veterans service commission. The authority of the veterans service commission to employ veterans service officers is set forth in R.C. 5901.07, stating in part: "The veterans service commission shall employ one or more county veterans service officers, who shall be veterans.... The commission shall employ each service officer on a part- or full-time basis and *fix his compensation*." (Emphasis added.) Thus, R.C. 5901.07 empowers the veterans service commission to hire veterans service officers and to fix their compensation.

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[1] For purposes of this opinion, it is assumed that there is no applicable collective bargaining agreement which might arguably modify the county commissioners' sick leave payment policy. Further, the opinion addresses the permissibility of payment for unused sick leave accumulated only during the individual's county employment.

County Appointing Authority's Powers to Prescribe Compensation

It is well established that the power to fix an employee's compensation includes the power to prescribe fringe benefits, subject to any statutory restrictions on such power to compensate. *See Ebert v. Stark County Board of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). Since a veterans service commission is a commission of the county, *see* 1982 Op. Att'y Gen. No. 82-081 (finding a soldiers' relief commission, predecessor of a veterans service commission, to be an entity of county government for purposes of R.C. 121.22), persons employed by the veterans service commission are county employees. County employees are entitled to receive sick leave benefits under R.C. 124.38, and are, therefore, governed by the sick leave payment provisions established by R.C. 124.39.[2]

Statutory Method for Payment for Accrued Unused Sick Leave

R.C. 124.39 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 (including counties) 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.

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[2] Your opinion request mentions 1977 Op. Att'y Gen. No. 77-094, as standing for the proposition that a veterans service commission, as a county appointing authority, is authorized by former R.C. 124.391 to adopt a sick leave payment policy for veterans service commission employees. R.C. 124.391, however, was repealed in 1977-1978 Ohio Laws, Part I, 2013 (Am. Sub. H.B. 179, eff. Sept. 25, 1978), and its provisions concerning payment for unused sick leave for county employees were incorporated into R.C. 124.39, where they currently appear. Further, since the issuance of Op. No. 77-094, R.C. 124.39 has been amended a number of times, significantly altering the statutory scheme then in effect. The conclusions set forth in Op. No. 77-094, therefore, no longer govern the situation about which you ask. Based upon the repeal of former R.C. 124.391, 1977 Op. Att'y Gen. No. 77-094 is hereby overruled.

> (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 value 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 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.)

R.C. 124.39 Limits Compensation Powers of County Appointing Authorities

The authority that an individual county appointing authority, such as the veterans service commission, has under R.C. 124.39 was addressed in 1990 Op. Att'y Gen. No. 90-074 (syllabus, paragraph two), stating:

> 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).

This conclusion was a departure from prior opinions, which had concluded that the power of an individual county appointing authority to fix its employees' compensation included the authority to adopt a sick leave payment policy for such employees that differed from the policy adopted for county employees generally by the board of county commissioners. In reaching this result, Op. No. 90-074 qualified a number of prior opinions that had read the powers of individual appointing authorities under prior versions of R.C. 124.39 more liberally.

The conclusion reached in Op. No. 90-074 (syllabus, paragraph two) was based on the amendment of R.C. 124.39 in 1989-1990 Ohio Laws, Part I, 449 (Sub. S.B. 58, eff. July 18, 1990). That amendment added the above-quoted portion of R.C. 124.39(C) appearing after the first paragraph of that division. Concerning this statutory amendment, Op. No. 90-074 stated: "[T]he legislature amended R.C. 124.39 in such a manner as to *expressly limit* the ability of a county appointing authority to adopt a policy different from that applicable to its employees under R.C. 124.39(B) or pursuant to a policy adopted by the board of county commissioners under R.C. 124.39(C)." *Id.* at 2-320 (emphasis added). A similar analysis concerning the constricting effect of R.C. 124.39, as most recently amended, upon an individual county appointing authority's power to fix his employees' compensation was adopted by the Portage County Court of Appeals in *State ex rel. Myers v. Portage County*, 80 Ohio App. 3d 584, 609 N.E.2d 1333 (Portage County 1992).

In the situation you describe, the board of county commissioners, pursuant to R.C. 124.39, has adopted a sick leave payment policy for county employees. Further, information accompanying your request indicates that the county veterans service commission receives more than fifty percent of its funds from the county general revenue fund. Consequently, R.C. 325.19(C)(1) permits variation in the scheme prescribed by R.C. 325.19(B) for employees of the county veterans service commission only "[b]y resolution of the board of county commissioners." The county veterans service commission about which you ask may not, therefore, adopt for its employees a sick leave payment policy that varies the provisions of such a policy already adopted by the board of county commissioners.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that, in the absence of a contrary 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). (1990 Op. Att'y Gen. No. 90-074, syllabus, paragraph two, approved and followed; 1977 Op. Att'y Gen. No. 77-094, overruled.)

Respectfully,

LEE FISHER
Attorney General

October 27, 1993

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SYLLABUS: 93-027

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