

OPINION NO. 2007-022**Syllabus:**

1. A county employee who is not eligible to retire under a state retirement system at the time he separates from county service is not, in the absence of a county policy to the contrary, entitled to payment for his unused sick leave at the time he separates from county service or when he subsequently retires.
2. A county employee who is eligible to retire under a state retirement system at the time he separates from county service, but who does not do so, is not, in the absence of a county policy to the contrary, entitled to payment for his unused sick leave at the time he separates from county service or when he subsequently retires.

To: James J. Mayer, Jr., Richland County Prosecuting Attorney, Mansfield, Ohio

By: Marc Dann, Attorney General, July 25, 2007

You have asked whether the county has an obligation to pay former employees, upon their retirement, for their accrued, unused sick leave if they did not retire at the time they separated from county service, but did so at a later date.

You have posed two scenarios for our consideration, both of which implicate the provisions of R.C. 124.39. Division (B) of R.C. 124.39 states that, an employee of a political subdivision covered by R.C. 124.38, which includes a county employee, “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 the employee’s accrued but unused sick leave credit.”¹ (Emphasis added.)

¹ Division (B) of R.C. 124.39 reads in full:

Except as provided in division (C) of this section, an employee of a political subdivision covered by section 124.38 or 3319.141 of the

The payment is “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.” *Id.* As used in R.C. 124.39, the term, “retirement,” means “disability or service retirement under any state or municipal retirement system in this state.” R.C. 124.39. Division (C) of R.C. 124.39 authorizes a political subdivision to adopt a policy enhancing pay-out benefits for unused sick leave, including one that would allow an employee to “receive payment upon a termination of employment other than retirement.” We turn now to your questions, first addressing the application of division (B) of R.C. 124.39 to the scenarios you have posed, and then the application of division (C).

Former County Employee #1

An employee worked for the county for more than ten years, and resigned in March, 2004. At the time he resigned, he did not meet the age requirement for OPERS service retirement. He was not entitled to be paid for his accrued, unused sick leave, and left a balance of unused sick leave. In January, 2007, he became eligible for service retirement and applied for OPERS retirement benefits. May he now have his sick leave balance paid to him in cash?

This scenario is identical to the one addressed recently by the Ohio Supreme Court in *Davenport v. Montgomery County*, 109 Ohio St. 3d 135, 2006-Ohio-2034, 846 N.E.2d 504. In *Davenport*, the court concluded that, “as used in R.C. 124.39(B) ‘retirement from active service’ occurs when a public employee separates from service at a time when he or she is eligible to retire. Therefore, if an employee separates from service before he or she is eligible to retire, he or she cannot convert accrued, unused sick leave into cash under R.C. 124.39(B), unless the employing political subdivision adopts a policy permitting conversion upon a termination of employment other than retirement.” 109 Ohio St. 3d at ¶ 26. *See* 1991 Op. Att’y Gen. No.

Revised Code 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 the employee’s 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.

County employees are covered by R.C. 124.38, which entitles them to sick leave of four and six-tenths hours with pay for each completed eighty hours of service, and to be paid for accrued, unused sick leave under R.C. 124.39(B). We assume that the former employees about whom you ask were not covered by a collective bargaining agreement.

91-026 at 2-142 (a person who resigned from employment more than one year prior to becoming eligible for service retirement “was not entitled to payment for accumulated sick leave under R.C. 124.39(B) either at the time of resignation or subsequently upon the commencement of service retirement ... since the acts did not occur concurrently”). *See also State ex rel. Metzker v. Frederick*, 74 Ohio App. 3d 632, 600 N.E.2d 254 (Hancock County 1991) (city ordinance, which provided that city employees may elect at the time of retirement from active service to be paid in cash for a portion of their accrued but unused sick leave credit, did not apply to employees who resigned or whose positions were terminated by the city); 2003 Op. Att’y Gen. No. 2003-038 at 2-321, n.13 (“[i]f the person is not eligible to retire from PERS at the time he terminates his county employment, he would not be entitled to elect payment for his unused sick leave when he leaves county service”); 1974 Op. Att’y Gen. No. 74-022 at 2-108 (payment for unused sick leave may not “be made at the time of an employee’s resignation ... prior to retirement”).²

Employee #1, who was a member of the Ohio Public Employees Retirement System (PERS), was not eligible to retire when he separated from county service.³ Therefore, he was not entitled under R.C. 124.39(B) to convert his accrued, unused sick leave into cash when he separated from county service, nor was he entitled to do so when he subsequently retired.

Former Employee #2

An employee worked for the county for thirty years, and separated from service in December, 2006. Although eligible to retire at that time,

² Cf. 2005 Op. Att’y Gen. No. 2005-018 (syllabus, paragraph 4) (a person who is employed by a county after she has taken service retirement under PERS may not be paid for accumulated sick leave at the time she terminates her post-retirement county employment); 2003 Op. Att’y Gen. No. 2003-038 at 2-318 to 2-319 (“when a county employee, who previously took service retirement under [the State Teachers Retirement System], terminates his county employment, he cannot, as a matter of law, retire under PERS, regardless of his age or the duration of his county service,” and, “[b]ecause he does not retire, he is not entitled at the time he terminates county employment to elect payment for his unused sick leave credit”); 1994 Op. Att’y Gen. No. 94-009 (county employee who retired from PERS and elected not to receive payment for unused sick leave, and who later was re-employed by the county, does not have the option to receive a cash payment under R.C. 124.39(B) when she terminates her employment with the county for the second time); 1980 Op. Att’y Gen. No. 80-057 (syllabus, paragraph 3) (an “individual who retires from an elective county office is not entitled to payment for unused sick leave accumulated as a county employee prior to his service as a county officer”); 1973 Op. Att’y Gen. No. 73-104 (same).

³ See R.C. 145.32 and R.C. 145.33 (eligibility for age and service retirement); R.C. 145.35, R.C. 145.36 and R.C. 145.361 (disability retirement). *See also* 2003 Op. Att’y Gen. No. 2003-038 (describing in detail the differences in application of R.C. 124.39 to age and service retirement, and to disability retirement).

he did not do so. No sick leave was paid out in December, 2006 and a balance of sick leave remains. The former employee applied for retirement benefits in March, 2007. May he receive cash for the balance of his unused sick leave?

In contrast to former employee #1, former employee #2 was eligible to retire at the time he resigned from county service; however, he did not do so—he retired approximately six weeks later. In *Davenport*, the court agreed with the employing county’s position that, “an employee’s separation from service must coincide with the date of the employee’s retirement,” and concluded that the “requirement to retire from ‘active service’ means that a public employee must be employed by a public employer at the time he or she retires.” 109 Ohio St. 3d at ¶¶ 8, 16. The court explained that, “any other reading of R.C. 124.39(B) renders meaningless subsection (C), which permits a political subdivision to adopt a policy allowing an employee to convert sick leave to cash upon ‘a termination of employment other than retirement.’” 109 Ohio St. 3d at ¶ 17.

In this instance, the employee’s separation from county service and his retirement did not coincide, and he was not employed by the county at the time he retired. Although he was eligible to retire at the time he separated from county service, he did not do so, and thus did not “retire from active service” with the county. Therefore, he was not entitled to receive payment for his unused sick leave at the time he separated from county service, nor when he later retired.

We are aware that, in *Davenport*, the court refers at times to employees who are *eligible* to retire, rather than employees who actually do retire, at the time they separate from county service, as being entitled to sick leave payment. For example, the court states that, “we hold that the General Assembly intended ‘retirement from active service’ as used in R.C. 124.39(B) to mean the date of an employee’s separation from service *if* it coincides with (or follows) the date he or she is eligible to retire.” 109 Ohio St. 3d at ¶ 21. Later, the court restates its holding that, “as used in R.C. 124.39(B) ‘retirement from active service’ occurs when a public employee separates from service at a time when he or she is eligible to retire.” 109 Ohio St. 3d at ¶ 26.

This language could be used to argue that an employee may elect to be paid for his unused sick leave if he is *eligible* to retire at the time he terminates his county employment, even though he does not, in fact, retire, but otherwise separates from county employment and retires at a later date. The court’s references to an employee’s eligibility to retire, however, do not relate to the facts before the court—the former employee in *Davenport* was not eligible to retire at the time she resigned from county service. 109 Ohio St. 3d at ¶ 3. The court was not faced with the case of an employee who could have retired at the time she resigned from county service, but did not do so. Therefore, the court’s “eligible to retire” language does not support the position that an employee, who could have retired at the time he separated from county service, but did not do so, is entitled to be paid for unused sick leave.

Indeed, the plain language of R.C. 124.39(B) dictates the conclusion that an

employee who did not retire at the time he left county service, regardless of eligibility to do so, is not entitled to payment for his unused sick leave. R.C. 124.39(B) states that, an employee who has ten or more years of service may elect to be paid for his unused sick leave “at the time of *retirement from active service* with the political subdivision.” (Emphasis added.) To be able to retire “from active service,” with the county, an employee must necessarily be employed by the county at the time he retires. *See* 1980 Op. Att’y Gen. No. 80-057 (if a member of PERS is not in the status of an employee of a political subdivision when his service retirement becomes effective, he would not be entitled to payment under R.C. 124.39(B)). *See also* 1991 Op. Att’y Gen. No. 91-026 (an employee’s resignation and the commencement of service retirement must occur concurrently in order for the employee to be eligible for sick leave payment). R.C. 124.39(B) further states that, the payment for unused sick leave “shall be based on the employee’s rate of pay at the time of retirement.” If the member is not receiving pay as an employee at the time of his retirement, there is no basis for computing the amount to which he would be entitled. 1973 Op. Att’y Gen. No. 73-104 at 2-403 (under [what is now R.C. 124.39(B)], a person “must be a public employee at time of retirement in order to receive a cash payment of unused sick leave, since the payment ‘shall be based’ on his salary as an employee at the time he retires”). *See* 1980 Op. Att’y Gen. No. 80-057 at 2-225 to 2-226 (if a member of a public retirement system “is not receiving pay as an employee at the time his retirement becomes effective, there is no basis for computing the amount to which he would be entitled”). Therefore, to permit a county employee, whether eligible to retire or not, to be paid for unused sick leave when he separates from county service other than by retirement would be to ignore the plain language of R.C. 124.39(B).

The nature of retirement under a state or municipal retirement system also compels the conclusion that an employee must actually retire at the time he leaves county service in order to elect payment for unused sick leave. As noted, R.C. 124.39 defines the term, “retirement,” to mean “disability or service retirement under any state or municipal retirement system in this state.”

Although an employee may become eligible to retire upon meeting certain criteria, *see* note 3, *supra*, he is not automatically or involuntarily placed into retirement status at the moment he becomes eligible.⁴ An employee must take affirmative steps in order to qualify for, and receive, service or disability retirement benefits. *See* R.C. 145.32 (a member of PERS meeting age and service credit criteria “may

⁴ At one time, the retirement board was required to retire a member of the retirement system once the member attained a certain age. *See, e.g.*, 1943-1944 Ohio Laws 41 (Am. S.B. 89, filed March 31, 1943) (G.C. 486-59) (the retirement board shall retire any member on June thirtieth following the date upon which the member attained the age of seventy years). This is no longer the case, although the employer of a member is authorized by R.C. 145.32 to terminate, as of June thirtieth of any year, the employment of a member who has attained the age of seventy years, unless otherwise provided in the Age Discrimination in Employment Act of 1967 (ADEA). *See* 29 U.S.C. §§ 623, 630(b), (f), and 631.

file with the public employees retirement board an application for retirement’); R.C. 145.33 (same); R.C. 145.35 (governing application for disability benefit; the Public Employees Retirement Board must approve a member’s receipt of disability benefit). *See also* [2006-2007 Monthly Record] Ohio Admin. Code 145-1-71 (withdrawal of retirement application); [2006-2007 Monthly Record] Ohio Admin. Code 145-2-21 (application for disability benefit); 2 Ohio Admin. Code 145-2-23 (appeal from denial of disability benefit); 1959 Op. Att’y Gen. No. 567, p. 288 (an employee may elect to defer his application for retirement).

As explained in 2003 Op. Att’y Gen. No. 2003-038 at 2-317, “[e]ligibility standards, processing requirements, and benefits associated with each type of retirement are detailed in legislation and administrative regulations, and the act of taking service retirement or disability retirement is a statutorily defined and legally significant event vesting certain rights and obligations in both the retiring employee and the retirement system.” In R.C. 124.39(B), the term, “retirement,” is not used in an informal or generalized sense (such as eligibility to retire), but rather, is used in the strict sense of undertaking the formal process of retirement pursuant to statute and administrative rule. 1980 Op. Att’y Gen. No. 80-057 at 2-225 (R.C. 124.39(B) does not apply to an employee who “is not retiring according to any formal procedure upon attainment of a certain number of years of service,” but is “merely terminating or resigning his employment”); 1974 Op. Att’y Gen. No. 74-022 at 2-108 (for purposes of R.C. 124.39, the “term retirement is considerably narrower than either ‘termination’ or ‘resignation.’ Retirement specifically denotes the termination of employment after a certain number of years of service, according to a formal procedure”). If “an employee terminates his employment in a manner other than by retiring in accordance with the governing legislative and administrative requirements, he is not entitled to receive payment for his unused sick leave.” 2003 Op. Att’y Gen. No. 2003-038 at 2-317.

Based on the plain language of R.C. 124.39(B), therefore, we conclude that a county employee who is eligible to retire under an Ohio state or municipal retirement system at the time he separates from county service, but does not do so, is not entitled to payment for his unused sick leave at the time he separates from service or later when he retires.

County’s Policy

Division (C) of R.C. 124.39 authorizes a political subdivision to vary the terms of division (B) to grant employees greater sick leave payments, as follows:

A political subdivision may adopt a policy allowing an employee to receive payment for more than one-fourth the value of the employee’s unused sick leave or for more than the aggregate value of thirty days of the employee’s 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. (Emphasis added.)*

In the case of a county, the board of county commissioners would be the body to

adopt such a policy, *see* 2000 Op. Att’y Gen. No. 2000-020, at 2-121, n. 2, and the Richland County Board of Commissioners has adopted a policy for payment of unused sick leave as follows:

- a. Any County employee *who retires from active service with the County through a disability or service retirement* under the Public Employees Retirement System (P.E.R.S.) or the Police and Firemen’s Disability and Pension Fund and who has five (5) or more years of service, shall be eligible to receive payment for 25% of his/her accrued but unused sick leave up to a maximum payment for thirty (30) days. Such payment shall be based on the employee’s rate of pay at the time of retirement. (Emphasis added.)
- b. Payment for sick leave in the above manner shall be considered to eliminate all sick leave accrued by the employee at the time. Such payment shall be made only once to any employee.

The county policy thus does not vary division (B) of R.C. 124.39 to allow employees to receive payment for unused sick leave upon the termination of county employment other than retirement from active service with the county under a state retirement system (although it does allow employees with only five, rather than ten, years of service at the time of retirement to receive pay for unused sick leave).

Conclusion

In conclusion, it is my opinion, and you are advised that:

1. A county employee who is not eligible to retire under a state retirement system at the time he separates from county service is not, in the absence of a county policy to the contrary, entitled to payment for his unused sick leave at the time he separates from county service or when he subsequently retires.
2. A county employee who is eligible to retire under a state retirement system at the time he separates from county service, but who does not do so, is not, in the absence of a county policy to the contrary, entitled to payment for his unused sick leave at the time he separates from county service or when he subsequently retires.