

OPINION NO. 2000-020**Syllabus:**

1. A board of county commissioners has no authority under R.C. 124.39(C) to vary for county employees the provision in R.C. 124.39(B) that payment for accrued, unused sick leave "eliminates all sick leave credit accrued but unused by the employee at the time payment is made." Thus, the board may not adopt a policy under R.C. 124.39(C) permitting county employees who are paid upon retirement or resignation for only a percentage of their total accrued, unused sick leave to be credited with the hours of sick leave for which no payment was made, for use upon possible reemployment in the public service.

2. Pursuant to the last sentence of R.C. 124.39, granting political subdivisions the authority to adopt policies similar to those contained in R.C. 124.382 to R.C. 124.386, a board of county commissioners may adopt a policy similar to that described in R.C. 124.384 permitting county 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.
3. 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 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.

To: Charles E. Coulson, Lake County Prosecuting Attorney, Painesville, Ohio
By: Betty D. Montgomery, Attorney General, March 31, 2000

You have asked about the ability of the county to pay a county employee for accrued, unused sick leave upon retirement or resignation. Your request presents the following questions:

1. May a board of county commissioners adopt a policy varying the provision in R.C. 124.39(B) that payment for a percentage of an employee's unused sick leave credit eliminates *all* sick leave credit accrued but unused by the employee at the time payment is made?
2. May a board of county commissioners adopt a policy permitting county employees to be paid, upon retirement or resignation, for only a portion of their unused sick leave credit and retain the remaining leave for credit upon reemployment in the public service?
3. May a county appointing authority adopt a policy permitting its employees to be paid, upon retirement or resignation, for only a portion of their unused sick leave credit and retain the remaining leave for credit upon reemployment in the public service?

Lake County Sick Leave Payment Policy

The board of county commissioners for Lake County has adopted a policy providing payment for accrued, unused sick leave upon a full-time employee's resignation or retirement from a county department. Pursuant to the county commissioners' policy which you submitted, an employee who resigns or retires and wishes to be paid for his accrued but

unused sick leave credit is paid for a percentage of his unused sick leave hours. The percentage of hours to be paid and the maximum number of hours for which payment will be made are based upon the employee's number of years of full-time employment with the specified agencies. For example, an employee who has five years of employment is entitled upon resignation or retirement to receive payment for 25% of his unused sick leave, not to exceed payment for a maximum of 240 hours.

Accrual of Sick Leave Credit

In order to answer your questions, it is helpful to first review the statutory scheme governing sick leave for county employees. Pursuant to R.C. 124.38(A), county employees are entitled to receive 4.6 hours of sick leave with pay for each completed 80 hours of service.¹ See 1983 Op. Att'y Gen. No. 83-073. Unused sick leave is cumulative without limit. R.C. 124.38(C).

A county employee who terminates employment is permitted to retain all of his accrued, unused sick leave credit for use upon reemployment in the public service, so long as he is reemployed within ten years. R.C. 124.38(C). See 1994 Op. Att'y Gen. No. 94-078 (in order to be credited with previously accumulated sick leave under R.C. 124.38(C), an employee must be separated from and reemployed in the "public service," that is, one of the entities that constitutes a "public agency" for purposes of R.C. 124.38, including an agency of the state, or an agency of a county, municipality, civil service township, or board of education); 1994 Op. Att'y Gen. No. 94-009. See also 2 Ohio Admin. Code 123:1-32-10(B)(2).

Payment for Unused Sick Leave

A county employee who retires from public service may, however, choose to be paid in cash for his accrued, unused sick leave credit under certain conditions, instead of retaining his sick leave credit for use upon possible reemployment. R.C. 124.39. See *State ex rel. Runyan v. Henry*, 34 Ohio App. 3d 23, 26, 516 N.E.2d 1261, 1264 (Miami County 1986) ("it is the employee's option to receive cash payment for a percentage of accrued sick leave upon retirement"); 1983 Op. Att'y Gen. No. 83-073. R.C. 124.39(B) imposes several conditions or limitations on such payment. Division (B) states that, "[e]xcept as provided in division (C) of this section," the election to be paid must take place at the time of the employee's retirement, the employee must have at least ten years of service with a qualifying employer, and the aggregate value of accrued sick leave credit that is paid cannot exceed the value of thirty days of sick leave credit.

Division (B) of R.C. 124.39 also provides that the employee shall be paid for only one-fourth the value of the employee's unused sick leave credit, based on the employee's rate of pay at the time of retirement, and that such payment "eliminates *all* sick leave credit accrued but unused by the employee at the time payment is made." (Emphasis added.) Thus,

¹In *Ebert v. Stark County Board of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), the court held that R.C. 124.38 confers a minimum benefit upon an employee covered by its terms, but that a public entity's power to employ authorizes it to adopt a policy providing sick leave credits in excess of the minimum level of entitlement contained in R.C. 124.38, absent any statutory provision constricting such authority. The benefits bestowed under R.C. 124.38 may now also be varied pursuant to the terms of a collective bargaining agreement. See R.C. Chapter 4117; note 4, *infra*. See also 1998 Op. Att'y Gen. No. 98-028 and 1999 Op. Att'y Gen. No. 99-039 (explaining the ability of an appointing authority to vary the terms of R.C. 124.38 for employees who are not covered by a collective bargaining agreement).

although a county employee who retires from county service may choose to be paid for unused sick leave credit under the conditions set forth in R.C. 124.39(B), such payment eliminates all of the employee's sick leave credit, even though the employee is paid for only one-fourth of his unused hours.

However, division (C) of R.C. 124.39 must also be considered. It reads:

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.

As you note in your letter of request, division (C) authorizes a political subdivision to vary the conditions of R.C. 124.39(B) in several, specific ways.² A political subdivision may adopt a policy to permit an employee to receive payment for more than one-fourth of the value of the unused sick leave, to be paid for more than thirty days of sick leave, to qualify with less than ten years of service for payment of unused sick leave, and to receive more than one payment. R.C. 124.39(C) also authorizes a political subdivision to adopt a policy permitting an employee to be paid for unused sick leave upon termination of employment other than retirement.³

Restrictions on Payment for Accrued, Unused Sick Leave Credit

You have first asked whether a board of county commissioners may vary the provision in R.C. 124.39(B) that payment to an employee for his accrued, unused sick leave credit eliminates *all* of the employee's sick leave credit, since the payment is for only a percentage of the value of the employee's sick leave. You wish to know whether the board of county commissioners may grant an employee sick leave credit for use upon reemployment, equal to the percentage of hours for which he was not paid. Referring to the example above, an employee who retires or resigns after five years of employment, and receives payment for 25% of his unused sick leave, would be entitled under the proposed policy to retain 75% of his previously accumulated sick leave hours for credit upon reemployment. You have raised this question because R.C. 124.39(C) expressly authorizes political subdivisions to vary specific conditions or limitations in division (B) but is silent as to the provision that payment for unused sick leave eliminates all sick leave credit.⁴

²In the case of a county, it is the board of county commissioners who is responsible for adopting any policy under R.C. 124.39(C). See 1978 Op. Att'y Gen. No. 78-057.

³As discussed above, the sick leave payment policy adopted by the board of county commissioners for Lake County extends to employees upon their resignation or retirement.

⁴It is assumed for purposes of this opinion that the employees who would be covered by the policy adopted by the board of county commissioners are either not subject to a collective bargaining agreement or, if they are, the agreement does not cover the matters you have raised. See R.C. 4117.10(A) (a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 "governs the wages, hours, and terms and conditions of public employment covered by the agreement," and if no agreement exists or if an agreement makes no specifications about a matter, the public employer and its employees "are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees"). Payment for unused sick leave is an appropriate matter

It has been established in previous opinions that division (C) of R.C. 124.39 does, in fact, set forth an exclusive list of the ways in which a political subdivision may vary the terms of division (B). As stated in 1983 Op. Att'y Gen. No. 83-073 at 2-305, "R.C. 124.39(C) is a constricting statute in that it defines the parameters applicable to a political subdivision seeking to pay out unused sick leave in a manner other than that set forth in R.C. 124.39(B)" and a county may modify the terms of R.C. 124.39(B) "only if such modification accords with R.C. 124.39(C)." *Accord* 1992 Op. Att'y Gen. No. 92-079; 1984 Op. Att'y Gen. No. 84-061; 1981 Op. Att'y Gen. No. 81-052; 1981 Op. Att'y Gen. No. 81-015.

This conclusion that R.C. 124.39(C) acts as constricting authority upon the ability of the board of county commissioners to vary the terms of R.C. 124.39(B) is consistent with the principle that a board of county commissioners has only that authority which is expressly granted by statute or necessarily incidental to the performance of the board's express powers. *See State ex rel. Shriver v. Board of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). A board of county commissioners is expressly authorized by R.C. 124.39(C) to vary certain terms and conditions of division (B) of R.C. 124.39. However, there is no express authorization in R.C. 124.39(C) for the board to vary the provision that payment for accrued, unused sick leave eliminates *all* sick leave credit, nor does the board possess any express power from which such authority may be implied. The opinions are also consistent with the rule of statutory construction, *expressio unius est exclusio alterius*, that is, the expression of one or more things implies the exclusion of those not identified. *See generally State v. Droste*, 83 Ohio St. 3d 36, 697 N.E.2d 620 (1998); *Thomas v. Freeman*, 79 Ohio St. 3d 221, 680 N.E.2d 997 (1997). The fact that R.C. 124.39(C) specifically lists the terms and conditions in R.C. 124.39(B) that may be varied by a political subdivision evidences a legislative intent that the remaining terms of division (B), including the condition that payment for accrued sick leave eliminates all sick leave credit, may not be varied.

Therefore, a board of county commissioners has no authority under R.C. 124.39(C) to vary for county employees the provision in R.C. 124.39(B) that payment for accrued, unused sick leave "eliminates all sick leave credit accrued but unused by the employee at the time payment is made." Accordingly, in answer to your first question, the board of county commissioners may not adopt a policy permitting county employees who retire or resign and are paid for only a percentage of their accrued leave to be credited upon reemployment with the hours of sick leave for which no payment was made. *But see* note 6, *infra* (authority of board of county commissioners to set sick leave payment benefits for employees in a particular county office or department).

Payment for Portion of Unused Sick Leave Credit

A. Adoption of Policy by Board of County Commissioners

Your second question is whether a board of county commissioners may adopt a policy permitting county employees to be paid, upon retirement or resignation, for only a portion of their unused sick leave credit and retain the remaining leave for credit upon reemployment in the public service.

The last sentence of R.C. 124.39 states: "A political subdivision may adopt policies similar to the provisions contained in sections 124.382 to 124.386 of the Revised Code,"

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. *See also* note 5, *infra*.

which address sick leave for employees who are paid by warrant of the Auditor of State. R.C. 124.384 governs the payment for accumulated sick leave upon separation and permits an employee to request all or a portion of the payment for unused sick leave to which he is entitled. The state Director of Administrative Services has promulgated rules further amplifying the provisions of R.C. 124.384. 2 Ohio Admin. Code 123:1-32-09(A)(3) states:

Determination of amount of sick leave to be converted. An employee about to separate or who has separated from state service shall designate in writing the percentage or portion of his or her sick leave balance to be converted to cash. If an employee designates a percentage or portion less than the total of the accumulated sick leave credit, the percentage or portion of the accumulated sick leave credit not converted may be reinstated to the employee's sick leave credit upon the employee's reinstatement or reemployment to state service

See also 2 Ohio Admin. Code 123:1-32-10(B)(2) (entitling an employee who had previously accumulated sick leave credit under R.C. 124.38 and who is reemployed in the public service to "have restored all unused sick leave credit which was not converted to a cash benefit under any policies or provisions established by the employee's employing agency or political subdivision provided the employee is reemployed within ten years").

Thus, because the board of county commissioners has the authority, pursuant to the last sentence of R.C. 124.39, to adopt a policy similar to R.C.124.384, and because R.C. 124.384 and rule 123:1-32-09 permit employees who separate from state service to be paid for a portion of their sick leave and to retain the remaining leave not converted to cash for credit upon possible reemployment, the board of county commissioners may adopt a policy permitting employees who retire or resign from employment with the county 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.

B. Adoption of Policy by Appointing Authorities

We turn now to your third question, which asks whether a county appointing authority may adopt a policy permitting its employees to be paid, upon retirement or resignation, for only a portion of their unused sick leave credit and retain the remaining leave for credit upon reemployment in the public service.

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* 1998 Op. Att'y Gen. No. 98-028 (ability of a county appointing authority to grant 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. This constricting language reads as follows:

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 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.

As summarized in 1990 Op. Att'y Gen. No. 90-074 at 2-320, "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)").

Therefore, a county appointing authority may not permit its employees to be paid upon retirement or resignation for only a portion of their unused sick leave credit and retain the remaining leave for credit upon reemployment, unless such benefit is authorized by a collective bargaining agreement,⁵ 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 of the adoption of such a 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 the appointing authority's employees who retire or resign to be paid for only a portion of their unused sick leave

⁵R.C. 124.39(C)(3) does allow for the modification of the rights conferred by R.C. 124.39(B), and any policy adopted by the board of county commissioners under R.C. 124.39(C), as part of a collective bargaining agreement. *See note 4, supra*. Also, R.C. 124.38 authorizes a county appointing authority to "establish alternative schedules of sick leave for employees of the appointing authority for whom the state employment relations board has not established an appropriate bargaining unit pursuant to 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." *See generally* 1999 Op. Att'y Gen. No. 99-039; 1998 Op. Att'y Gen. No. 98-028.

credit and retain the remaining leave for credit upon reemployment in the public service. The same would hold true with regard to the ability of a county appointing authority to provide other sick pay benefits, including the first matter discussed, permitting employees sick leave credit for the percentage of hours for which they were not paid upon retirement or resignation.⁶

Conclusion

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

1. A board of county commissioners has no authority under R.C. 124.39(C) to vary for county employees the provision in R.C. 124.39(B) that payment for accrued, unused sick leave "eliminates all sick leave credit accrued but unused by the employee at the time payment is made." Thus, the board may not adopt a policy under R.C. 124.39(C) permitting county employees who retire or resign, and are paid for only a percentage of their total accrued, unused sick leave, to be credited upon reemployment in the public service with the hours of sick leave for which no payment was made.
2. Pursuant to the last sentence of R.C. 124.39, granting political subdivisions the authority to adopt policies similar to those contained in R.C. 124.382 to R.C. 124.386, a board of county commissioners may adopt a policy similar to that described in R.C. 124.384 permitting county 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.
3. 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 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.

⁶The amendment of R.C. 124.39 in 1989-1990 Ohio Laws, Part I, 449 (Sub. S.B. 58, eff. July 18, 1990) appears to authorize a board of county commissioners to adopt a resolution providing the employees of a particular county office or agency with sick leave payment benefits in excess of those granted employees under R.C. 124.39(B) or under a policy adopted by the board of county commissioners for all county employees pursuant to R.C. 124.39(C), if the office or agency receives at least one-half of its funding from the county general revenue fund.