

OPINION NO. 2003-038**Syllabus:**

1. A person who takes service retirement under the State Teachers Retirement System and subsequently becomes a county employee is ineligible to be a member of the Public Employees Retirement System (PERS), and when he terminates county employment, he cannot retire under PERS. The county employee is not, therefore, entitled under R.C. 124.39(B) to elect to receive payment for his unused sick leave credit at the time he terminates his county employment.

2. The term "disability retirement," as used in R.C. 124.39, includes both disability retirement and a disability allowance provided under the State Teachers Retirement System, the Public Employees Retirement System, or the School Employees Retirement System.
3. If a person, who is receiving disability retirement or a disability allowance under the State Teachers Retirement System (STRS), is subsequently employed by a county, and if his STRS disability benefit is terminated while he is employed by the county, he will become a member of the Public Employees Retirement System (PERS). When he is otherwise eligible, the county employee may retire under PERS and elect payment for his unused sick leave credit at that time pursuant to R.C. 124.39(B). The total amount paid for unused sick leave to an employee who took a disability benefit under STRS, and then retired under PERS, may not exceed the value of thirty days of sick leave.

To: James J. Mayer, Jr., Richland County Prosecuting Attorney, Mansfield, Ohio
By: Jim Petro, Attorney General, December 23, 2003

You have asked whether an employee who was hired by the county after retiring from the State Teachers Retirement System (STRS) is entitled to receive payment for his unused sick leave upon termination of his county employment. Briefly stated, employees of political subdivisions, including county employees, accrue four and six-tenths hours of sick leave with pay for each completed eighty hours of service pursuant to R.C. 124.38(A). Unused sick leave is cumulative without limit. R.C. 124.38. An employee who earns sick leave under R.C. 124.38 "may elect, at the time of retirement from active service with the political subdivision," to receive payment in cash for one-fourth the value of his accrued but unused sick leave credit, so long as he has ten or more years of public service. R.C. 124.39(B). The payment is based on the employee's rate of pay at the time of his retirement, and eliminates all unused sick leave credit. *Id.*¹ The amount of payment may not exceed the value of thirty days of sick leave. *Id.*²

¹An eligible employee has the option whether or not to receive cash payment for his unused sick leave credit upon retirement. *State ex rel. Runyan v. Henry*, 34 Ohio App. 3d 23, 516 N.E.2d 1261 (Miami County 1986); 1994 Op. Att'y Gen. No. 94-009 at 2-38 ("R.C. 124.39(B) does not require a county employee to be paid for sick leave upon retirement from active service"). An employee may decide it is in his best interest not to extinguish his sick leave credit, by receiving payment for a fraction of the value thereof, if he intends to resume working in the public service. An employee who separates from service is entitled to have his accumulated sick leave placed to his credit if he is re-employed in the public service within ten years. R.C. 124.38. Also, an employee who transfers from one public agency to another is entitled to credit for the balance of his accumulated sick leave up to the maximum accumulation permitted by the public agency to which he transfers. *Id.*

²There are several ways in which the provisions of R.C. 124.38 and division (B) of R.C. 124.39 may be varied. For example, a political subdivision may adopt a policy permitting an employee to receive payment for unused sick leave upon termination of employment other than retirement. R.C. 124.39(C). For further discussion, *see, e.g.*, 2000 Op. Att'y Gen. No.

The employee about whom you ask was employed by the county within the same year after he retired from STRS. You state that he has at least ten years of service with the county,³ works in a position covered by the Public Employees Retirement System (PERS), and is older than sixty-five years of age. He is now planning to terminate his county employment, and you wish to know whether he is entitled to elect payment for his accrued but unused sick leave credit at the time of termination in light of the limitation in R.C. 124.39(B) that a county employee may elect payment only "at the time of retirement from active service with the political subdivision." Your questions are:

1. Can this employee "retire" from county service since he has already officially retired from the State Teachers Retirement System?
2. If this person is already considered a retiree under the State Teachers Retirement System, is such employee entitled to payment for his unused sick leave upon retirement as provided in R.C. 124.39(B)?

The term, "retirement," is defined for purposes of R.C. 124.39 to mean "disability or service retirement under any state or municipal retirement system in this state." *Id.* Eligibility 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. *See, e.g.,* R.C. 145.32, R.C. 145.33, and R.C. 145.331 (service retirement under PERS); R.C. 145.35, R.C. 145.36, and R.C. 145.361 (disability benefits under PERS); R.C. 3307.58 and R.C. 3307.59 (service retirement under STRS); R.C. 3307.62, R.C. 3307.63, and R.C. 3307.631 (disability benefits under STRS). *See also Mascio v. Public Employees Retirement System of Ohio*, 160 F.3d 310 (6th Cir. 1998). 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. *See State ex rel. Metzker v. Frederick*, 74 Ohio App. 3d 632, 600 N.E.2d 254 (Hancock County 1991) (a city employee, who notified the city he was retiring from his position, but who was not qualified to begin receiving PERS retirement benefits, did not "retire" for purposes of a city ordinance that incorporated the definition of "retirement" used in R.C. 124.39, and thus was not entitled to payment for unused sick leave upon his termination of employment); 1991 Op. Att'y Gen. No. 91-026 at 2-142 ("the person resigned from employment with the school board more than one year prior to becoming eligible for service retirement.... [c]learly, this person was not entitled to payment for accumulated sick leave under R.C.

2000-020; 1999 Op. Att'y Gen. No. 99-039; 1998 Op. Att'y Gen. No. 98-028. In this instance, however, the employee is subject to the terms of R.C. 124.38 and R.C. 124.39(B) as written.

³In order to be eligible to elect payment for unused sick leave credit upon retirement, an employee must have been employed in the public service for at least ten years. R.C. 124.39(B). Service with "the state, any political subdivisions, or any combination thereof" may be counted, *id.*, and thus, a county employee is not limited to including only his service with the county in determining whether he has the requisite ten years of service. *See also* 1992 Op. Att'y Gen. No. 92-015 (syllabus) ("[p]art-time service with the state or any political subdivision of the state is to be included in calculating the minimum ten years of service necessary for a county employee to receive a cash payment for unused sick leave at the time of retirement in accordance with R.C. 124.39(B)").

124.39(B) either at the time of resignation or subsequently upon the commencement of service retirement ... since the acts did not occur concurrently"); 1980 Op. Att'y Gen. No. 80-057 at 2-225 (the provisions of R.C. 124.39(B) are "clearly inapplicable" where an employee is not retiring but is "merely terminating or resigning his employment").

Service Retirement

In this instance, the employee in question took service retirement under STRS, *see* R.C. 3307.58; R.C. 3307.59, and, subsequent to his retirement, was employed by the county in a position covered under PERS, which he still holds.⁴ *See* R.C. 145.01(A) and (D). The employment of persons, who have previously retired from one of the public retirement systems, in positions covered by PERS is governed by R.C. 145.38. Division (B)(1) of R.C. 145.38 allows a PERS retirant or "other system retirant," including a former member of STRS who is receiving service retirement benefits,⁵ to be employed by a public employer covered by PERS, and both the employee and his employer are required to make contributions to PERS on the same basis as if the employee had not previously retired. R.C. 145.38(B)(1). Division (D) of R.C. 145.38 explicitly states, however, that the retirant "is not a member of the public employees retirement system, and, except as specified in this section does not have any of the rights, privileges, or obligations of membership." *See also* R.C. 145.01(B) (defining a "member" of PERS to exclude a public employee who is excluded from membership by, *inter alia*, R.C. 145.38). When an "other system retirant" eventually leaves his PERS-covered position, he is entitled to either an annuity or lump sum payment (separate from his retirement allowance) based on the contributions made by the employee and his employer, R.C. 145.38(B)(4)(c); R.C. 145.384,⁶ but, again, he was never a member of, and is not eligible to retire from, PERS. Only a "member" of PERS is eligible to take age and service retirement or receive disability coverage thereunder, R.C. 145.33; R.C. 145.35.

Therefore, when a county employee, who previously took service retirement under STRS, 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. Because he does not retire, he is

⁴The situation you present concerning a person who has taken service retirement under STRS, and is subsequently employed in a position covered under PERS, should be distinguished from situations involving persons holding membership in more than one system. *See, e.g.*, R.C. 145.383 and R.C. 3307.351 (person holding multiple positions retiring from one position while continuing to make contributions for another position under the same or other public retirement system); R.C. 145.37 and R.C. 3307.57 (combining total contributions and service credit in all state retirement systems to determine eligibility for retirement and retirement benefits). *Cf. also* R.C. 145.38(C) (election of PERS retirant to public office); R.C. 145.382 (employment of PERS retirants in certain upper-level state positions).

⁵An "other system retirant" includes a member or former member of STRS, the Ohio Police and Fire Pension Fund, School Employees Retirement System, State Highway Patrol Retirement System, or Cincinnati Retirement System "who is receiving age and service or commuted age and service retirement benefits or a disability benefit from a system of which the person is a member or former member." R.C. 145.38(A)(2)(a).

⁶If a retirant has received a retirement allowance or disability benefit for less than two months at the time he is reemployed, he must forfeit the allowance or benefit during that two-month period. R.C. 145.38(B)(4)(b). Service credit and contributions for that two-month period are not included in calculating his retirement allowance or benefit, or his post-employment PERS benefit, and contributions made during that period are refunded upon termination of employment. *Id.*

not entitled at the time he terminates county employment to elect payment for his unused sick leave credit. *Cf.* 1994 Op. Att’y Gen. No. 94-009 at 2-38 (county employee who retired from PERS and elected not to receive payment for sick leave, and who three days later re-entered county service, will not have another opportunity to receive a cash payment under R.C. 124.39).

Disability Allowance

In this instance, the employee took service retirement under STRS, and thus is not eligible to become a member of PERS and retire therefrom when he leaves county employment. R.C. 124.39 defines retirement, however, to include disability retirement as well as service retirement, and we will now discuss, in the interest of completeness, the situation of a county employee who has previously received a disability benefit under STRS, since it is possible for such an employee to subsequently “retire from active service” with the county for purposes of R.C. 124.39.

We begin by noting that, on or before July 29, 1992, only those members of STRS who were younger than sixty years of age were eligible to take disability retirement. In 1992, however, the General Assembly enacted 1991-1992 Ohio Laws, Pt. II, 2016 (Am. S.B. 346, eff. July 29, 1992), providing disability coverage for all members of STRS, PERS, and the School Employees Retirement System (SERS) who have at least five years of service credit, regardless of age.⁷ Pursuant to Am. S.B. 346, persons who became members of STRS on or before July 29, 1992 are provided disability coverage under R.C. 3307.63, and remain eligible to take “disability retirement” if they are younger than sixty years of age.⁸ R.C. 3307.62(A). Persons who become members of STRS after July 29, 1992 are provided disability coverage under R.C. 3307.631, and are eligible to receive a “disability allowance” regardless of age. R.C. 3307.62(A). *See* R.C. 3307.50(C)(2), (G)(2), (G)(3), (K). Thus, no person who has become a member of STRS after July 29, 1992 has been eligible to receive disability “retirement” from STRS; rather, they have been eligible to receive a “disability allowance.”

Although the terms governing disability retirement and disability allowance are not identical,⁹ both types of coverage are intended to provide protection to members who are

⁷The General Assembly’s enactment of 1991-1992 Ohio Laws, Pt. II, 2016 (Am. S.B. 346, eff. July 29, 1992) was in response to the federal “Older Workers Benefit Protection Act of 1990” (OWBPA), which amended the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and required “that state retirement systems amend by October 16, 1992, any disability benefit law that discriminates among system members on the basis of age,” Am. S.B. 346, § 5. *See State ex rel. Plavcan v. School Employees Retirement System of Ohio*, 71 Ohio St. 3d 240, 643 N.E.2d 122 (1994).

⁸Persons who became members of STRS on or before July 29, 1992 were entitled under Am. S.B. 346 to elect disability coverage under R.C. 3307.63 or R.C. 3307.631. R.C. 3307.62(A). STRS was required to give these members the opportunity to make their election no later than October 16, 1992, and the members were required to choose within one hundred eighty days after the date the notice was mailed. *Id.*

⁹For example, a member may remain on disability retirement under R.C. 3307.63 for as long as he remains incapacitated and complies with all verification requirements. *See* note 11, *infra*. The duration of a disability allowance provided pursuant to R.C. 3307.631 is, however, limited, depending on the age of the member as of the effective date of the benefit. R.C. 3307.631(C).

unable to work due to an incapacitating condition; eligibility for one or the other depends merely upon the date of a person's membership. There is no indication that R.C. 124.39 is intended to exclude those who take a disability allowance from the opportunity to elect payment for unused sick leave, while permitting those who take disability retirement to do so.¹⁰ Therefore, we interpret the reference to disability retirement in R.C. 124.39 as including both disability retirement and a disability allowance, and for ease of discussion, will refer to them collectively as a disability benefit. See R.C. 3307.50(G)(3) (defining "disability benefit" to include "a benefit paid as disability retirement under section 3307.63 of the Revised Code," or "as a disability allowance under section 3307.631 of the Revised Code"); R.C. 3307.50(K) (defining "disability benefit recipient" as "a member who is receiving a disability benefit").

A person receiving a disability benefit under STRS who is employed in a position covered by PERS is, like an STRS service retiree, considered to be an "other system retiree" for purposes of R.C. 145.38, see note 5, *supra*, and he and his current employer are subject to the same contribution and benefit provisions of R.C. 145.38, described above, as an employee who previously took service retirement under STRS. R.C. 145.38(A)(2)(a), (B)(1), (B)(4)(b). See also R.C. 3307.50(G)(3). Division (E) of R.C. 145.38 provides, however, that if the disability benefit of an "other system retiree" is terminated,¹¹ he "shall become a member" of PERS, "with all the rights, privileges, and obligations of membership."¹² Therefore, if a person who is receiving a disability benefit under STRS is subsequently employed by the county in a position covered by PERS, and if his STRS disability benefit is terminated during his county employment, he will become a member of PERS. When he is

¹⁰Indeed, such a distinction could, itself, raise questions under constitutional and statutory protections for older workers, since persons who became members of STRS after July 29, 1992, and who may receive a disability allowance regardless of age, would be ineligible to elect payment for unused sick leave upon taking the disability benefit, while those persons who were members as of July 29, 1992, and who may take disability retirement only if they are under the age of sixty, would be eligible to be paid for unused sick leave upon taking their disability benefit. Thus, if the "disability retirement" language in R.C. 124.39 were interpreted to exclude those persons taking a disability allowance, only those persons under the age of sixty would be eligible to elect payment for unused sick leave.

¹¹There are a number of grounds upon which STRS may terminate a member's disability benefit. See R.C. 3307.62(G) (continuing failure for one year to obtain medical treatment recommended by STRS's physician or to submit a medical report regarding the treatment); R.C. 3307.64 (refusal to submit to annual medical examination by a physician selected by STRS continuing for one year; recipient no longer incapable of resuming service; recipient becomes employed as a teacher; continuing refusal for one year to file annual statement of earnings, medical information, and any other information required by rule; at request of disability benefit recipient). See also R.C. 3307.631(C)(3) (note 9, *supra*).

¹²If, after termination of his STRS disability benefit, a county employee earns two years of service credit, his prior contributions as an "other system retiree" are included in his total service credit as a PERS member. R.C. 145.38(E). If this eventuality should occur, the employee would forfeit the annuity or lump sum payment he would otherwise be entitled to receive under R.C. 145.38 and R.C. 145.384 upon termination of his county employment. R.C. 145.38(E).

otherwise eligible, he may then retire under PERS and elect payment for his unused sick leave at that time.¹³

As a final matter, we note that R.C. 124.39(B) permits an employee to receive "one or more payments under this division,"¹⁴ although the total for all payments may not exceed the value of thirty days of sick leave. A recipient of an STRS disability benefit, who was employed by the county and whose STRS disability benefit was terminated during his county employment, would, therefore, be entitled to receive payment for his unused sick leave credit if he retires from the county under PERS, even if he had previously received payment for his unused sick leave credit at the time he began his disability benefit under STRS, but may receive, in total, no more than the value of thirty days of sick leave.

In so advising, we are aware of the case, *Stock v. Montgomery County Bd. of Mental Retardation and Developmental Disabilities*, Case No. 17011, 1998 Ohio App. LEXIS 6135 (Montgomery County Nov. 13, 1998), where a county employee who requested payment for his unused sick leave upon retirement sued the county when it refused payment on the grounds that R.C. 124.39 and Ohio Admin. Code 123:1-32-10, as it then read,¹⁵ limited a retiring employee to but one cash conversion during his lifetime; in that instance the employee had previously converted his unused sick leave to cash when he retired from employment with a local school district before going to work for the county. Although the Second District Court of Appeals quoted the language of R.C. 124.39(B), providing that an employee may receive one or more payments under that division, it never addressed the significance of that language or the apparent conflict between division (B) and rule

¹³If 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. Also, if the person's county employment terminates while he is continuing to receive a disability benefit under STRS, he would, like a service retiree, be ineligible for membership in PERS and retirement thereunder.

¹⁴This is in contrast to division (A)(1) of R.C. 124.39, which applies to employees of state colleges and universities, and provides that payment for sick leave "shall be made only once to any employee." Division (A)(2) permits a college or university to adopt a policy varying specific statutory provisions governing payment of sick leave for its employees, but does not authorize a college or university to provide employees the right to receive more than one payment.

¹⁵At the time the decision in *Stock* was rendered, division (D) of rule 123:1-32-10 read:

An employee of a state-supported college or university, or a political subdivision of the state shall, upon initial disability retirement or initial service retirement, be entitled to a one-time conversion of unused accumulated sick leave credit as provided for in this rule and section 124.39 of the Revised Code.

...

(3) The amount of payment shall be based upon the employee's rate of pay at the time of initial retirement. An employee shall receive a single lump-sum payment. An employee may convert sick leave, under the provisions of this rule, only once during the employee's lifetime.

1995-1996 Ohio Monthly Record, vol. II, at 1434. Neither rule 123:1-32-10, nor any other administrative rule, currently addresses payment for unused sick leave under R.C. 124.39.

123:1-32-10(D). The court noted that division (A) of R.C. 124.39 expressly limited employees of a state college or university to a one-time cash conversion (which it still does, *see* note 14, *supra*), while division (B) did not expressly so limit employees of political subdivisions, but stated that, “the bar [against more than one payment for employees of political subdivisions] is adopted by implication by division (C), which permits ‘more than one payment to any employee’ if the political subdivision adopts a policy so providing.” *Id.* at *4. Finding that the county had not adopted a policy altering “the limitation on payment of sick leave imposed by Ohio Adm. Code 123:1-32-10(D)(3),” the court concluded that the county could not pay the employee for unused sick leave at his retirement. *Id.* at *7.

In *Stock*, limitations on an employee’s statutory right to receive more than one payment for unused sick leave, adopted as part of an administrative rule, were elevated over the entitlement granted to employees by statute, which is contrary to well-established principles of law. *See Central Ohio Joint Vocational School District Bd. of Education v. Ohio Bureau of Employment Services*, 21 Ohio St. 3d 5, 10, 487 N.E.2d 288 (1986) (“a rule is invalid where it clearly is in conflict with any statutory provision”); *Carroll v. Department of Administrative Services*, 10 Ohio App. 3d 108, 110, 460 N.E.2d 704 (Franklin County 1983) (the director of the Department of Administrative Services “may not issue rules which are unreasonable or are in clear conflict with statutory enactments covering the same subject matter;” thus, a DAS rule authorizing an appointing authority to require an employee to submit to a medical examination to determine his capacity to perform his job and to involuntarily place him on sick leave, had no relationship to an employee’s election to use sick leave as permitted under R.C. 124.38 and was invalid). Furthermore, the court did not address the meaning of division (B) of R.C. 124.39, which affirmatively permits employees of political subdivisions to receive more than one payment, in contrast with division (A), which expressly limits employees of state colleges and universities to one payment only. *See generally Metropolitan Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) (“[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended”).

Granted, division (C) of R.C. 124.39 authorizes a political subdivision to adopt a policy that would permit more than one payment for unused sick leave, along with terms that are more generous than those provided in division (B). Although this language may be superfluous in light of division (B), which already entitles eligible employees to receive more than one payment, it certainly does not act to vitiate the express language of division (B). Indeed, division (B) grants to county employees a vested right to receive more than one payment for unused sick leave, where otherwise entitled, and a county has no power to adopt a policy eliminating that right. *See Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980); *Steinhour v. Ohio State University*, 62 Ohio App. 3d 704, 577 N.E.2d 413 (Franklin County 1989).

We hesitate, therefore, to advise that a county outside of the Second Appellate District¹⁶ has the authority to deny an employee payment for unused sick leave upon

¹⁶*See generally State v. Kasnett*, 30 Ohio App. 2d 77, 82, 283 N.E.2d 636 (Athens County 1972), *rev’d on other grounds*, 34 Ohio St. 2d 193, 297 N.E.2d 537 (1973) (“while courts of coordinate jurisdiction may be taken into consideration, they are not binding on a court of equivalent rank”); *Hogan v. Hogan*, 29 Ohio App. 2d 69, 77, 278 N.E.2d 367 (Cuyahoga County 1972) (“[n]either are we bound by the decisions of our sister Courts of Appeals, although they are entitled to due consideration and respect”). *Cf. Greenwood v. City of Portsmouth*, 29 Ohio Misc. 161, 164-65, 281 N.E.2d 45 (C.P. Scioto County 1971) (“[t]he principle that a decision of the court of appeals, unless it is in conflict with the decision of

retirement, where he previously received payment upon taking a disability benefit, especially since the language in rule 123:1-32-10, upon which the court in *Stock* relied, has been eliminated. See generally 2001 Op. Att’y Gen. No. 2001-010 at 2-60 (an Attorney General opinion is provided “for purposes of offering guidance to ... interested agencies in jurisdictions where there is no controlling judicial authority”).

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

1. A person who takes service retirement under the State Teachers Retirement System and subsequently becomes a county employee is ineligible to be a member of the Public Employees Retirement System (PERS), and when he terminates county employment, he cannot retire under PERS. The county employee is not, therefore, entitled under R.C. 124.39(B) to elect to receive payment for his unused sick leave credit at the time he terminates his county employment.
2. The term “disability retirement,” as used in R.C. 124.39, includes both disability retirement and a disability allowance provided under the State Teachers Retirement System, the Public Employees Retirement System, or the School Employees Retirement System.
3. If a person, who is receiving disability retirement or a disability allowance under the State Teachers Retirement System (STRS), is subsequently employed by a county, and if his STRS disability benefit is terminated while he is employed by the county, he will become a member of the Public Employees Retirement System (PERS). When he is otherwise eligible, the county employee may retire under PERS and elect payment for his unused sick leave credit at that time pursuant to R.C. 124.39(B). The total amount paid for unused sick leave to an employee who took a disability benefit under STRS, and then retired under PERS, may not exceed the value of thirty days of sick leave.

the Supreme Court, binds the Courts of Common Pleas and constitutes conclusive evidence of the law within that appellate district, is too well established to require a statement of supporting authorities”).