

OPINION NO. 91-026

Syllabus:

A person who terminates service with a school district one year prior to the commencement of service retirement under R.C. 3309.34 is not entitled by R.C. 124.39(B) to receive payment for sick leave, accumulated but unused during employment with the school district.

To: David E. Bowers, Allen County Prosecuting Attorney, Lima, Ohio
By: Lee Fisher, Attorney General, June 6, 1991

I have before me your opinion request concerning payment for unused sick leave under R.C. 124.39. As stated in your opinion request, the former employee about whom you ask served as the treasurer of a local school district for many years. The treasurer submitted her letter of resignation which indicated that her last day of work would be May 12, 1989; she remained on the payroll records, however, until August 16, 1989, to exhaust her accumulated, unpaid vacation leave. Sometime after May 12, 1989, the former treasurer became a part-time employee of the state. It then appears that as of October 1, 1990, the former treasurer became eligible for service retirement under the School Employees Retirement System, and presumably has begun receiving such retirement benefits. She has since requested payment under R.C. 124.39 for sick leave which she accumulated and did not use during her employment with the school district. Your letter states further that the terms of the former treasurer's employment were not subject to any collective bargaining agreement. Based upon these facts, you wish to know whether the former treasurer is now entitled by R.C. 124.39(B) to receive payment for sick leave which she accumulated during her service as treasurer.

The statute about which you ask, 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 or R.C. 3319.141]¹ 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. (Emphasis and footnote added.)

Deviations from the payment scheme established by R.C. 124.39(B) may be adopted by a political subdivision, including a school district, 1981 Op. Att'y Gen. No. 81-052, in accordance with the provisions of R.C. 124.39(C). Since your opinion request does not state that the employing school district has adopted an alternate policy for the payment of accumulated, unused sick leave under R.C. 124.39(C), I will assume that R.C. 124.39(B) governs the situation about which you ask.

¹ R.C. 124.38 provides sick leave for three categories of public employees: most employees in the various offices of the county, municipal, and civil service township service, employees of any state college or university, and those employees of a board of education for whom sick leave is not provided by R.C. 3319.141. Sick leave is provided under R.C. 3319.141 for "[e]ach person who is employed by any board of education in this state."

The meaning of the phrase "at the time of retirement from active service with the political subdivision," as used in R.C. 124.39(B) and its predecessors, is discussed in prior opinions of this office. For example, 1974 Op. Att'y Gen. No. 74-022 interprets the meaning of the phrase "at the time of retirement from active service," as used in an earlier version of R.C. 124.39 (1973 Ohio Laws, Part I, 533, 624 (Am. S.B. 174, eff. Dec. 4, 1973)), which, in pertinent part, was identical to the current version of R.C. 124.39(B). My predecessor states in Op. No. 74-022 at 2-108:

[T]he time at which such payments may be made is clearly specified. The statute expressly states that the time of payment shall be upon the employee's retirement from active service. 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.* To construe the statute as authorizing the payment of accumulated sick leave credit upon the mere termination of employment, would permit an unjustifiably broad application of the statute. (Emphasis added.)

Since issuance of that opinion, the legislature has further clarified the meaning of retirement, by specifically adding to R.C. 124.39 the following: "As used in this section, 'retirement' means disability or service retirement under any state or municipal retirement system in this state."

The person about whom you ask was a member of the School Employees Retirement System (SERS) during her employment and sought a service retirement, not a disability retirement. Eligibility for service retirement within SERS is governed by R.C. 3309.34 which states:

A member is eligible for service retirement if he has at least five years of total service credit and has attained sixty years of age, or if he has at least thirty years of total service credit at any age. A member is eligible for commuted service retirement if he has at least twenty-five years of total service credit and has attained fifty-five years of age.

A member may retire by filing an application for retirement with the school employees retirement board on a form provided by the board. The board shall not retire the member sooner than the first day of the month following the later of:

- (A) The last day of employment for which compensation was paid;
- (B) The attainment of minimum age and service credit eligibility for service or commuted service retirement.

Under the facts you have outlined, the person resigned from employment with the school board more than one year prior to becoming eligible for service retirement under R.C. 3309.34. Clearly, this person 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 under R.C. 3309.34, since the acts did not occur concurrently.

It is a fundamental rule of statutory construction that a statute is to be read as a whole and that full effect must be given to the words used. R.C. 1.47(B); *Carter v. Youngstown*, 146 Ohio St. 203, 65 N.E.2d 63 (1946) (syllabus, paragraph one). R.C. 124.39(B) expressly states that eligibility for payment arises when one with requisite service time retires, in accordance with the formal procedure of the governing state or municipal retirement system, "from active service with the political subdivision." At the time the service retirement of the person about whom you ask occurred, the person was no longer in active service with, or an employee of, the school district.²

² Your letter suggests that after terminating employment with the school district, the person became a part-time state employee. Whether or not the employee's accumulated sick leave should have been transferred to her new position is a matter about which you did not inquire, and I shall not, therefore, address that question.

An analogous situation is discussed by my predecessor in 1980 Op. Att'y Gen. No. 80-057 at 2-225 through 2-226, as follows:

Under R.C. 124.39, in order to be compensated upon retirement for unused sick leave, one must be in the status of employee...upon retirement. Op. No. 73-104.

According to R.C. 145.32 it may occur that a member of the Public Employees Retirement System would leave public service prior to the date on which his service retirement becomes effective, awaiting attainment of the minimum age for retirement eligibility. Service retirement would then become effective upon attainment of the minimum age required by R.C. 145.32. At such time, however, the member would not be in the status of "an employee of a political subdivision," the term used in R.C. 124.39(B), and would, therefore, not be entitled to payment under that section. R.C. 124.39(B) states that payment for accumulated but 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 his retirement becomes effective, there is no basis for computing the amount to which he would be entitled. Op. No. 73-104.

Similarly, in the situation about which you ask, because the person was no longer an employee of the school district at the time her service retirement under SERS commenced, she was not entitled by R.C. 124.39(B) to receive payment for sick leave accumulated but unused as an employee of the school district.

It is, therefore, my opinion, and you are hereby advised, that a person who terminates service with a school district one year prior to the commencement of service retirement under R.C. 3309.34 is not entitled by R.C. 124.39(B) to receive payment for sick leave, accumulated but unused during employment with the school district.