

OPINION NO. 81-062

Syllabus:

- i. R.C. 124.38, concerning the accrual and transfer of sick leave benefits, has no application to employees of community college districts, established and organized under R.C. Chapter 3354, or

to employees of technical college districts, established and organized under R.C. Chapter 3357.

2. The sick leave payment provisions of R.C. 124.39 do not apply to community or technical college district employees.
3. A community or technical college district may adopt a sick leave payment policy for its employees without regard to the provisions of R.C. 124.39.
4. The vacation leave benefits of R.C. 121.161 do not apply to community or technical college district employees.
5. Any vacation or sick leave policy adopted by a community or technical college district which does not apply to all employees of the district must be reasonable to comport with the equal protection guarantees of Ohio Const. art. I, §2 and the Fourteenth Amendment of the United States Constitution.

To: Edward Q. Moulton, Chancellor, Ohio Board of Regents, Columbus, Ohio
By: William J. Brown, Attorney General, October 22, 1981

I have before me your request for an opinion on the following questions:

(1) Are the entitlements of Section 124.38 of the Ohio Revised Code with regard to the accrual of sick leave, and the transfer of unused balances of accumulated sick leave from one public agency to another, applicable to the employees of technical colleges and community colleges organized under Chapters 3357 and 3354 of the Ohio Revised Code, respectively?

(2) Are the employees of these institutions "state employees" within the meaning of Section 124.39(A) and (B), and thereby entitled to cash payment for one-fourth of the value of accrued but unused sick leave credit upon retirement?

(3) Are these institutions political subdivisions within the meaning of Section 124.39(C), enabling them to adopt policies providing sick leave benefits in excess of the entitlements provided in this section? May they adopt policies in this regard providing benefits below the level described in this section?

(4) Similarly, are employees of these institutions "state employees" within the meaning of Section 121.161, and thereby entitled to the accrual of vacation leave and compensation for unused portions thereof at the time of separation from the employing agency, as provided in this section?

(5) Regardless of whether Sections 121.161, 124.38, and 124.39 apply to technical colleges and community colleges, must whatever policies they adopt with regard to sick leave accrual, vacation accrual, and compensation for unused portions thereof at the time of separation, also apply to teachers and staff employed on a part-time basis?

Your first question is whether the provisions of R.C. 124.38 apply to the employees of either technical college districts established pursuant to R.C. Chapter 3357, or community college districts organized under R.C. Chapter 3354. R.C. 124.38 provides sick leave benefits for "[e]ach employee, whose salary or wage is paid in whole or in part by the state, each employee in the various offices

of the county, municipal, and civil service township service, and each employee of any board of education for whom sick leave is not provided by [R.C. 3319.141]." To determine whether R.C. 124.38 applies to the employees of technical or community college districts, it will first be necessary to examine the provisions of R.C. Chapters 3357 and 3354 which establish and organize such districts.

R.C. 3354.02 and R.C. 3357.02 provide for the creation of community college districts and technical college districts, respectively. Within a district, either a community college, R.C. 3354.01(C), or a technical college, R.C. 3357.01(A), provides certain instructional programs for persons within the district.¹ A board of trustees is appointed to govern each district. R.C. 3354.05, 3354.09 (community college district); R.C. 3357.05, 3357.09 (technical college district). R.C. 3354.09(D) provides that a community college district board of trustees may:

[a]ppoint the administrative officers, faculty, and staff, necessary and proper for such community college, and fix their compensation except in instances in which the board of trustees has delegated such powers to a college or university operating such community college pursuant to a contract entered into by the board of trustees of the district.² (Emphasis added.)

Similarly, R.C. 3357.09(D) empowers the board of trustees of a technical college district to "[a]ppoint the president, faculty, and such other employees as necessary and proper for such technical college, and fix their compensation." It is clear from these provisions that the college districts are authorized to appoint and fix the compensation of their employees.

R.C. 3354.03 defines a community college district organized pursuant to R.C. 3354.02, in part as:

a political subdivision of the state and a body corporate with all the powers of a corporation, existence, with power to sue and be sued, to incur debts, liabilities, and obligations, to exercise the right of eminent domain and of taxation and assessment as provided in sections 3354.01 to 3354.18, inclusive, of the Revised Code, to issue bonds, and to do all acts necessary and proper for the carrying out of the purposes for which the district was created and for executing the powers with which it is invested. (Emphasis added.)

¹For the purpose of receiving federal or state financial aid only, a university owned and operated by a qualifying municipality may be considered a community college. R.C. 3354.01(C). See generally R.C. 3354.01(A).

²From the information provided by your office, it is my understanding that all but one of the community colleges in Ohio are owned and operated by the board of trustees of the community college district in which the college is located. The board of trustees of the remaining community college district has contracted with a private college for the operation of a community college within the district. Pursuant to such contract, the private college appoints and fixes the compensation of the administrative officers, faculty, and staff of that community college. With the exception of two individuals who are employed directly by the board of trustees of that district, the remaining employees are employees of the private college. As employees of a private institution, such employees are not entitled to the sick leave benefits provided by R.C. 124.38. For purposes of this opinion, any reference to community college employees is intended to include only those employed directly by community college districts.

R.C. 3357.04, defining a technical college district in nearly identical language, reads in part as follows:

A technical college district organized pursuant to section 3357.02 of the Revised Code shall be a political subdivision of the state and a body corporate with all the powers of a corporation, and shall have perpetual existence, with power to sue and be sued, to incur debts, liabilities, and obligations, to exercise the right of eminent domain and of taxation and assessment, to issue bonds, and to do all acts necessary and proper for the carrying out of the purposes for which the district was created and for executing the powers with which it is invested. (Emphasis added.)

Because both of these districts are defined as distinct political subdivisions of the state, any person employed by either entity is an employee of that particular college district. See 1962 Op. Att'y Gen. No. 3073, p. 486, syllabus ("[e]mployees of a community college district created under [R.C. Chapter 3354] are not employees of the state, counties, cities, city health districts or city school districts. . ."). Employees of these districts are, therefore, not employed in the various offices of the county, municipal, or civil service township service, nor are they employees of a board of education.

Whether employees of community or technical college districts are entitled to the sick leave benefits contained in R.C. 124.38 depends, therefore, on whether such employees are paid in whole or in part by the state. R.C. 3354.18, pertaining to community colleges, and the corresponding technical college provision, R.C. 3357.15, require that state financial aid be paid directly to the boards of trustees of the various districts. Pursuant to these provisions the state does not pay any money directly to the employees of community college or technical college districts. Thus, such state financial assistance is not payment in whole or in part by the state to community or technical college district employees.

I conclude, therefore, that community or technical college district employees are not encompassed within the provisions of R.C. 124.38. Thus, community or technical college districts are not bound to grant their employees sick leave benefits pursuant to the scheme set forth in R.C. 124.38.

You also ask whether a community or technical college district employee who has previously accumulated sick leave under R.C. 124.38 is entitled to credit for this accumulated leave upon his employment with a community or technical college district. The applicable language of R.C. 124.38 reads as follows: "An employee who transfers from one public agency to another shall be credited with the unused balance of his accumulated sick leave up to the maximum of the sick leave accumulation permitted in the public agency to which the employee transfers." (Emphasis added.) In order for a person currently employed by a community or technical college district to receive credit for sick leave previously accumulated, the district must be a "public agency," within the meaning of R.C. 124.38.

In 1954 Op. Att'y Gen. No. 3643, p. 128, one of my predecessors concluded that the term, "public agency," as used in R.C. 143.29 (currently R.C. 124.38), encompasses only the state, the several counties, all municipalities, and all boards of education. I concur with this conclusion. Therefore, since the employees of community college districts and technical college districts are employees of the districts, which are not public agencies for purposes of R.C. 124.38, such employees are not entitled under R.C. 124.38 to have sick leave benefits previously

³ See 1980 Op. Att'y Gen. No. 80-087 (although general health districts receive a state subsidy which is paid into the general fund of the health district, general health district employees are not considered to be paid in whole or in part by the state for purposes of R.C. 124.38).

accumulated in a public agency placed to their credit upon employment with a community or technical college district.

Your second question concerns the application of R.C. 124.39 to community and technical college district employees. R.C. 124.39(A) allows cash payment for accumulated, unused sick leave upon retirement by "[a] state employee paid directly by warrant of the state auditor or an employee of a state college or university." R.C. 124.39(B) provides a similar benefit for "an employee of a political subdivision covered by section 124.38 or 3319.141 of the Revised Code." As employees of a community or technical college district, the individuals in the situation you pose are clearly not state employees. 1962 Op. No. 3073. R.C. 3319.141, which establishes sick leave for board of education employees, does not cover technical or community college district employees, and, as stated in answer to your first question, R.C. 124.38 does not apply to such employees.

In order to qualify for the benefits of R.C. 124.39(A) or (B), the community or technical college district employee would, therefore, have to be a state college or university employee. The term "state college or university," as used in R.C. 124.39, is not defined.⁴ I note, however, that an employee of a technical or community college district is actually an employee of the district and not of the college itself. It appears, therefore, that such employees are not state university or college employees. Furthermore, I believe that R.C. 124.39 must be read in conjunction with R.C. 124.38, which establishes sick leave benefits for state employees generally. As stated above, technical and community college district employees are not paid in whole or in part by the state and are not otherwise entitled to the sick leave benefits of R.C. 124.38. It appears that because the legislature has not established a statutory scheme entitling such employees to sick leave, the legislature did not intend to include these employees within the meaning of state college or university employees for purposes of R.C. 124.39(A) governing payment for accumulated sick leave. I conclude, therefore, that community and technical college district employees are not entitled to payment for accumulated sick leave pursuant to R.C. 124.39(A) or (B).

Your third question asks whether community or technical college districts are political subdivisions within the meaning of R.C. 124.39(C), which reads as follows:

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.

If community and technical college districts were political subdivisions, as that term is used in R.C. 124.39(C), they would be authorized to adopt a sick leave payment policy in accordance with that section. I concluded in 1981 Op. Att'y Gen. No. 81-015, however, that only those political subdivisions covered by R.C. 124.38 or 3319.141 (the terms used to modify "political subdivision" in R.C. 124.39(B)) are authorized to act pursuant to R.C. 124.39(C). Because community and technical college districts are not political subdivisions covered by R.C. 124.38 or 3319.141, R.C. 124.39(C) does not authorize them to adopt a sick leave payment policy pursuant to that division.

⁴R.C. Title 33 is not helpful in defining the term "state college or university" for purposes of R.C. 124.39. In certain instances technical and community colleges are classified as state colleges. See, e.g., R.C. 3345.29. For other purposes, however, a distinction is made between state universities or colleges and community or technical colleges. See, e.g., R.C. 3345.031.

The second portion of your third question is whether a technical or community college district may adopt a sick leave payment policy which gives its employees a lesser benefit than prescribed by R.C. 124.39. Pursuant to R.C. 3354.09(D)⁵ and 3357.09(D), community and technical college districts are authorized to appoint necessary employees and to fix their compensation. The power of a political subdivision to fix its employees' compensation includes the power to establish fringe benefits for such employees, subject to any constricting statutory authority. Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). Because R.C. 124.39 does not apply to community or technical college district employees, it does not restrict the power of the board of trustees of such district to adopt a policy providing a sick leave payment policy as a fringe benefit for its employees. See 1981 Op. Att'y Gen. No. 81-052. A community or technical college district may, therefore, adopt a sick leave payment policy for its employees without regard to R.C. 124.39.

Your fourth question asks whether community or technical college employees are "state employees" within the meaning of R.C. 121.161, which governs vacation leave for full-time state employees.⁶ As previously discussed in this opinion, community and technical college districts are political subdivisions of the state. Their employees are hired and compensated by the districts themselves. It is clear that because community or technical college district employees are employees of the district, they are not state employees. Thus, such employees are not entitled to the vacation benefits set forth in R.C. 121.161.

Your final question asks whether policies adopted by boards of technical and community college districts with regard to sick leave accrual, vacation accrual, and compensation for unused portions thereof, must also apply to teachers and staff employed on a part-time basis. Since I have already determined that R.C. 121.161, 124.38 and 124.39 do not apply to the employees of these boards, I understand that the policies in question will be those that may be adopted by the district boards pursuant to their power to compensate their employees. See Ebert, supra. See also Op. No. 81-052.

Your question is whether the boards must apply any policies they adopt concerning sick leave and vacation leave to part-time employees as well as to full-time employees. Because there are no statutory provisions constricting the districts' authority to establish sick leave and vacation leave policies for their

⁵The authority of a community college district board of trustees to fix the compensation of its employees is limited to those instances where the board has not delegated such power to a college or university operating the college pursuant to contract. This opinion is limited to those situations where the board has not delegated its authority to fix its employees' compensation.

⁶R.C. 121.161 reads, in pertinent part, as follows:

Each full-time state employee, including full-time hourly-rate employees, after service of one year with the state, or any political subdivision of the state, shall have earned and will be due upon the attainment of the first year of employment, and annually thereafter, eighty hours of vacation leave with full pay. . . .

⁷See 1980 Op. Att'y Gen. No. 80-087. That opinion discussed the application of R.C. 121.161 to employees of a general health district. I concluded that because a general health district is a political subdivision of the state and may hire its own employees, such employees are employed by the health district, as a distinct entity separate from the state, and not by the state. Therefore, general health district employees are not entitled to the vacation benefits established by R.C. 121.161.

employees, it appears that the only restriction on the policies they adopt is that the policies be reasonable to comport with the equal protection requirements of Ohio Const. art. I, §2 and the Fourteenth Amendment of the United States Constitution. See 1978 Op. Att'y Gen. No. 78-057.

It is, therefore, my opinion, and you are advised, that:

1. R.C. 124.38, concerning the accrual and transfer of sick leave benefits, has no application to employees of community college districts, established and organized under R.C. Chapter 3354, or to employees of technical college districts, established and organized under R.C. Chapter 3357.
2. The sick leave payment provisions of R.C. 124.39 do not apply to community or technical college district employees.
3. A community or technical college district may adopt a sick leave payment policy for its employees without regard to the provisions of R.C. 124.39.
4. The vacation leave benefits of R.C. 121.161 do not apply to community or technical college district employees.
5. Any vacation or sick leave policy adopted by a community or technical college district which does not apply to all employees of the district must be reasonable to comport with the equal protection guarantees of Ohio Const. art. I, §2 and the Fourteenth Amendment of the United States Constitution.