

OPINION NO. 74-022

Syllabus:

1. A pregnant employee may, pursuant to R.C. 124.38, be granted sick leave for any incapacitation due to pregnancy, whether such incapacitation occurs during the pregnancy or subsequent to the birth of a child, and for any illness whether or not such illness is related to the pregnancy. In addition, an employee may be granted sick leave for any illness that occurs among members of his immediate family, whether or not such illness is related to pregnancy.

2. A state university is without power, pursuant to R.C. 9.90, to pay insurance premiums for individuals or the families of individuals who are no longer employed by the university.

3. R.C. 124.39, as amended, authorizes a state university to make a payment for accumulated sick leave credit to an employee upon retirement. Such a payment may not, however, be made at the time of an employee's resignation from a state university prior to retirement.

4. An employee of a state university is entitled, pursuant to R.C. 5923.05, to a leave of absence for military service without any loss of pay from his employer for a period of not more than 31 days in any calendar year, regardless of the fact that such employee may also be paid for his military service. (Opinion No. 1468, Opinions of the Attorney General for 1960, approved and followed)

To: John M. Newman, Chairman, Board of Trustees, Youngstown State University, Youngstown, Ohio
By: William J. Brown, Attorney General, March 8, 1974

You have requested my opinion on the following questions:

"1. May a State University grant paid sick leave to an unclassified civil service employee (as defined in O.R.C. 143.08(A)(7)) during a period of pregnancy under any, some or all of the following conditions:

a. The absence for which paid sick leave is requested is due to illness unrelated to pregnancy.

b. The absence for which sick leave is requested is due to illness related to the pregnancy.

c. The absence for which paid sick leave is requested is the period during which the mother was hospitalized immediately after the delivery of the child.

d. The absence for which paid sick leave is requested is the recovery period at home during which the mother regains reasonable normal health and mobility after the delivery of the child.

e. The absence for which paid sick leave is requested is to permit a faculty member to care for a dependent wife whose pregnancy has incapacitated her.

"2. May a State University pay insurance benefits for former members of the unclassified civil service of the State of Ohio as defined in O.R.C. 143.08 (A)(7) or their dependents under any, some, or all of the following conditions:

a. A former member of the unclassified civil service has retired under provisions of the S.T.R.S.

b. A former member of the unclassified civil service is terminated because of retrenchment.

c. Can a State University provide insurance coverage to the surviving dependents of a deceased unclassified civil service employee for a period of time after the death of said employee whose death occurred during a period of contractual employment?

"3. May unused sick leave accumulated by a member of the unclassified civil service at a State University be used as the basis for 'terminal leave pay' (or 'buy back' by the State) at the time of retirement?

"4. May unused sick leave accumulated by a member of the unclassified civil service at a State University be used as the basis for 'terminal leave pay' (or 'buy back' by the State) at the time of resignation from a State University after specified periods of service, but before retirement?

"5. May members of the unclassified civil service at a State University be paid their regular salary less their military pay during periods of short-term military service (less than 31 days)?"

At the outset it should be noted that the statute to which you refer in your first series of questions has been changed to R.C. 124.11. The amendment to R.C. 143.08 was one of the

numerous changes effected by Am. S.B. No. 174 (effective December 4, 1973), which was enacted in order to replace the departments of finance, public works and state personnel with the newly created department of administrative services. None of the substantive changes contained in the amendment, however, is pertinent to your inquiry.

R.C. 124.11, which divides the employees of the state and the various subdivisions thereof into the classified and unclassified service, provides, in part, as follows:

"The civil service of the state and the several counties, cities, city health districts, general health districts, and city school districts thereof shall be divided into the unclassified service and the classified service.

"(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by sections 124.01 to 124.64 of the Revised Code.

" * * * * *"

"(7) All presidents, business managers, administrative officers, superintendents, assistant superintendents, principals, deans, assistant deans, instructors, teachers, and such employees as are engaged in educational or research duties connected with the public school system, colleges, and universities, as determined by the governing body of said public school system, colleges, and universities; and the library staff of any library in the state supported wholly or in part at public expense; * * *."

R.C. 124.38, which provides sick leave for all state employees, reads as follows:

"Each employee, whose salary or wage is paid in whole or in part by the state, each employee in the various offices of the county service and municipal service, and each employee of any board of education for whom sick leave is not provided by section 3319.141 of the Revised Code, shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay. Employees may use sick leave, upon approval of the responsible administrative officer of the employing unit, for absence due to personal illness, pregnancy, injury, exposure to contagious disease which could be communicated to other employees, and to illness, injury, or death in the employee's immediate family. Unused sick leave shall be cumulative without limit. When sick leave is used, it shall be deducted from the employee's credit on the basis of one hour for every one hour of absence from previously scheduled work. The previously

accumulated sick leave of an employee who has been separated from the public service shall be placed to his credit upon his re-employment in the public service, provided that such re-employment takes place within ten years of the date on which the employee was last terminated from public service. 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. The appointing authority of each employing unit shall require an employee to furnish a satisfactory written, signed statement to justify the use of sick leave. If medical attention is required, a certificate stating the nature of the illness from a licensed physician shall be required to justify the use of sick leave. Falsification of either a written, signed statement or a physician's certificate shall be grounds for disciplinary action including dismissal. This section shall be uniformly administered as to employees in each agency of the state government by the director of state personnel. No sick leave may be granted to a state employee upon or after his retirement or termination of employment.

"This section does not interfere with existing unused sick leave credit in any agency of government where attendance records are maintained and credit has been given employees for unused sick leave."

(Emphasis added)

It is clear that the foregoing statute applies to state employees in the unclassified as well as the classified civil service. Moreover, my predecessor, in Opinion No. 6579, Opinions of the Attorney General for 1965, stated in the second paragraph of the syllabus that, "Employment in the service of a state university is state service within the meaning of Chapter 143, Revised Code [now R.C. Chapter 124.]". Thus, the unclassified employees described in R.C. 124.11(A)(7) are clearly entitled to paid sick leave pursuant to R.C. 124.38.

The inclusion of the term "pregnancy" among those reasons for which an employee may be granted sick leave would indicate that the statute allows absences for any disability occurring due to pregnancy. Such disability naturally includes a period of time before birth and one afterward for recuperation. The exact length of time will depend upon the circumstances of each case, and is a matter for medical rather than administrative determination.

Although it is clear that sick leave may be granted to pregnant employees, some question might arise as to the effect of R.C. 124.38 upon an employee seeking sick leave because of a pregnancy in the immediate family. An employee may, pursuant to R.C. 124.38, be granted sick leave when there is "illness, injury, or death in the employee's immediate family." In order to determine the impact of R.C. 124.38 upon an employee who has a pregnancy in the immediate family, it is necessary to focus upon the meaning of the term "illness." "Illness" is, as yet, undefined by the courts. It is, however, synonymous with the term "sickness" which has been rather broadly defined as a

condition interfering with one's usual avocations. See Northwestern Mutual Life Insurance Co. v. Wiggins, 15 F.2d 646, 648 (1926). Under the foregoing definition, therefore, certain phases of pregnancy could properly be considered illness. Furthermore, there is a line of cases in the federal courts holding that it is a denial of equal protection of the laws for a school board to treat pregnancies differently from other medical disabilities. See La Fleur v. Board of Education, 465 F.2d 1184 (1972); Heath v. Westerville Board of Education, 32 Ohio Misc. 6 (1972). The recent decision of the United States Supreme Court in Cleveland Board of Education v. La Fleur, 42 U.S.L.W. 4186 (U.S. Jan. 22, 1974) affirmed the decision of the United States Court of Appeals for the Sixth Circuit, but based its decision on a belief that a school board's mandatory sick leave policy with respect to pregnancies constitutes a violation of the due process clause of the Fourteenth Amendment. It is significant that the Court did not reject the equal protection argument, but apparently felt only that the principles of due process provided a more appropriate basis for its decision. The reasoning set forth in the lower courts, therefore, may be of some cogency in deciding the issue at hand. It implies that, for some purposes, the disabling stages of pregnancy must be considered an illness.

However, it is significant that the General Assembly specifically included the term "pregnancy" in setting forth the causes for which an employee may be granted sick leave and, at the same time, failed to include a pregnancy in the employee's immediate family among the causes for which an employee may be granted sick leave. The application of the maxim of statutory construction, expressio unius est exclusio alterius, requires that when certain things are specified in the law an intention to exclude all others may be inferred. Therefore, I must conclude that incapacity due to pregnancy does not justify granting sick leave to the pregnant woman's spouse or other members of her immediate family for the purpose of caring for her. However, sick leave can be granted to a member of the immediate family when a pregnant woman is ill, whether such illness is related to the pregnancy or not.

Your second question relates to the procurement of insurance benefits for former members of the unclassified civil service and their families. I assume that you are referring to the payment of insurance premiums rather than benefits. The authority of a state institution to purchase insurance protection is determined by statute. R.C. 9.90, which authorizes the governing board of any public institution of higher learning to purchase insurance for educational employees, provides as follows:

"The governing board of any public institution of higher education, including without limitation state universities and colleges, community college districts, university branch districts, technical institute districts, and municipal universities, or the board of education of any school district, may, in addition to all other powers provided in the Revised Code, contract for, purchase, or otherwise procure from an insurer or insurers licensed to do business by the state of Ohio for or on behalf of such of its employees as it may determine, life insurance,

or sickness, accident, annuity, endowment, health, medical, hospital, dental, or surgical coverage and benefits, or any combination thereof, by means of insurance plans or other types of coverage, family, group or otherwise, and may pay from funds under its control and available for such purpose all or any portion of the cost, premium, or charge therefor. All or any portion of the cost, premium, or charge therefor may be paid in such other manner or combination of manners as the governing board or the school board may determine, including direct payment by the employee, and, if authorized in writing by the employee, by such governing board or school board with moneys made available by deduction from or reduction in salary or wages or by the foregoing of a salary or wage increase. Division (B)(7) of section 3917.01 and the last paragraph of section 3917.06 of the Revised Code shall not prohibit the issuance or purchase of group life insurance authorized by this section by reason of payment of premiums therefor by the governing board or the school board from its funds, and such group life insurance may be so issued and purchased if otherwise consistent with the provisions of sections 3917.01 to 3717.06, inclusive, of the Revised Code."

The operation of the foregoing statute with respect to former employees would appear obvious. The benefits authorized by R.C. 9.90 extend only to those individuals who are currently employed by a state university. It is clear that individuals who are no longer employed by any of the institutions so specified, simply do not come within the purview of this Section.

In conclusion, a state university is without power to pay insurance premiums for individuals or the families of individuals who are no longer employed by such university, whether termination of employment was brought about by retirement, retrenchment or death.

Your third and fourth questions both concern the operation of R.C. 124.39, which provides for the payment of accumulated sick leave credit to state employees, and will, therefore, be dealt with concurrently.

Since it has already been established that the unclassified civil service employees of a state university are state employees for the purpose of R.C. Chapter 124. they are included within the provisions of R.C. 124.39. That Section, which authorizes a cash payment for unused sick leave credit upon retirement, reads as follows:

"A state employee paid directly by warrant of the state auditor may elect, at the time of retirement from active service with an agency of state government and with ten or more years of service with the state or any of its political subdivisions, to be paid in cash for one-fourth of the value of his accrued but unused sick leave credit. Such payment shall be based on the employee's rate of pay at the time of retirement.

Payment for sick leave on this basis shall be considered to eliminate all sick leave credit accrued by the employee at that time. Such payment shall be made only once to any employee. The maximum payment which may be made under this section shall be for one-fourth of one hundred twenty days.

"All other employees covered by Section 124.38 of the Revised Code and those covered by Section 3319.141 of the Revised Code shall at the time of their retirement receive pay for all or part of their unused sick leave to the extent consistent with the policy in effect in the employing unit.

* * * * *

(Emphasis added.)

Since state university employees are not paid by direct warrant of the state auditor, they are governed by the provisions set forth in the second paragraph of R.C. 124.39. Prior to a recent amendment to this section, the benefits provided therein were available only to those employees paid by direct warrant of the state auditor. As amended, however, the provisions of R.C. 124.39 extend to all other employees covered by either R.C. 124.38 or R.C. 3319.141 as well. It should be noted, however, that the benefits conferred by the second paragraph of R.C. 124.39 are not of precisely the same nature as those afforded to employees paid by direct warrant of the state auditor. The amendment merely grants to each employing unit the discretionary authority to provide a payment in the amount desired, if at all. See Opinion No. 74-013, Opinions of the Attorney General for 1974.

Although the employing units do possess some discretion with respect to the adoption of a policy providing for the payment of accumulated sick leave credit, the 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.

In conclusion, therefore, R.C. 124.39, as amended, authorizes a state university to make a payment for accumulated sick leave to an employee upon retirement. Such a payment may not, however, be made at the time of an employee's resignation from a state university prior to retirement.

Please note, however, that an employee who has resigned will not lose the benefits of his accumulated sick leave if he is re-employed in the public service within 10 years of the date of his resignation. R.C. 124.38.

Your final question concerns the payment to unclassified employees of a state university during periods of short term

military service. R.C. 5923.05, which provides that all public officers and employees in the military service shall be entitled to a leave of absence, reads as follows:

"All officers and employees of the state or the political subdivision thereof who are members of the Ohio national guard, the Ohio defense corps, the Ohio naval militia, or members of other reserve components of armed forces of the United States are entitled to leave of absence from their respective duties without loss of pay for such time as they are in the military service on field training or active duty for periods not to exceed thirty-one days in any one calendar year."

It is clear that state university employees are included within the purview of R.C. 5923.05.

The benefits conferred upon all state employees by this Section clearly preclude any attempt on the part of a state university to reduce the employee's regular salary during such leave. In concluding that the amount paid to an employee for his military service can have no bearing upon the amount of payments made to the same employee by the state, my predecessor stated in the syllabus of Opinion No. 1468, Opinions of the Attorney General for 1960, as follows:

"An employee of the state or one of its political subdivisions is entitled under Section 5923.05, Revised Code, to leave of absence for military service without any loss of pay from his employer for a period of not more than 31 days in any one calendar year, regardless of the fact that such employee may be paid for his military service; and the provisions of said section take precedence over any conflicting provisions of a municipal corporation, charter or otherwise."

There has been no change in the pertinent provisions which would justify a result contrary to the one set forth in Opinion No. 1468, supra.

It is clear, therefore, that an employee of a state university is entitled, pursuant to R.C. 5923.05, to a leave of absence for military service without any loss of pay from his employer for a period of not more than 31 days in any calendar year, regardless of the fact that such employee may also be paid for his military service.

In specific answer to your questions, it is my opinion and you are so advised, that:

1. A pregnant employee may, pursuant to R.C. 124.38, be granted sick leave for any incapacitation due to pregnancy, whether such incapacitation occurs during the pregnancy or subsequent to the birth of a child and for any illness, whether or not such illness is related to the pregnancy. In addition an employee may be granted sick leave for any illness that occurs among members of his immediate family, whether or not such illness is related to pregnancy.

2. A state university is without power, pursuant to R.C. 9.90, to pay insurance premiums for individuals or the families of individuals who are no longer employed by the university.

3. R.C. 124.39, as amended, authorizes a state university to make a payment for accumulated sick leave credit to an employee upon retirement. Such a payment may not, however, be made at the time of an employee's resignation from a state university prior to retirement.

4. An employee of a state university is entitled, pursuant to R.C. 5923.05, to a leave of absence for military service without any loss of pay from his employer for a period of not more than 31 days in any calendar year, regardless of the fact that such employee may also be paid for his military service. (Opinion No. 1468, Opinions of the Attorney General for 1960, approved and followed)