OPINION NO. 79-036

Syllabus:

1. A state employee, previously employed by a private non-profit corporation which had a contract with a county mental health and retardation board for the provision of mental health and mental retardation services and facilities, is not entitled to a credit for such previous employment for purposes of computing vacation leave pursuant to the provisions of R.C. 9.44.

2. A state employee, previously employed by a private non-profit corporation which had a contract with a county mental health and retardation board for the provision of mental health and mental retardation services and facilities is not entitled to a credit for sick leave accumulated during the time of such previous employment pursuant to the provisions of R.C. 124.38.

To: Timothy B. Moritz, M.D., Director, Ohio Dept. of Mental Health and Mental Retardation, Columbus, Ohio
By: William J. Brown, Attorney General, July 23, 1979

I have received your request for my opinion concerning the status of four employees of Dayton Children's Psychiatric Hospital, a state institution, who were previously employed by the Child Guidance Center, a private agency which had a contract with the Montgomery County Mental Health and Mental Retardation Board, hereafter called the "648" Board, for the provision of mental health and mental retardation services and facilities.

Your letter indicates that, at the time of their employment with the Child Guidance Center, these four persons provided a large portion of their professional

services by working with patients of Dayton Children's Psychiatric Hospital. As a result, up to 90% of their time was spent at the hospital. These employees were housed in the same building as employees of the hospital, and were under the direction of the superintendent of the hospital. In 1978, the Child Guidance Center ceased operations and the employees in question were subsequently employed by the hospital, performing substantially the same duties as when they were employees of the Child Guidance Center. Based upon these facts, you inquire as to whether these employees are entitled to service credit for the time spent as employees of the Child Guidance Center for purposes of computing their vacation leave and crediting their sick leave as state employees of Dayton Children's Psychiatric Hospital.

With respect to your question concerning computation of vacation leave, R.C. 9.44, set forth below, is the pertinent statutory provision. It provides:

> A person employed, other than as an elective officer, by the state or any political subdivision of the state earning vacation credits currently, is entitled to have his prior service with any of these employers counted as service with the state or any political subdivision of the state, for the purpose of computing the amount of his vacation leave. The anniversary date of his employment for the purpose of computing the amount of his vacation leave, unless deferred pursuant to the appropriate law, ordinance or regulation, is the anniversary date of such prior service.

R.C. 9.44 applies to the employees in question, since they are employed by the state and are earning vacation credits currently. The issue then is whether their prior employment with the Child Guidance Center may be characterized as "prior service with the state or any political subdivision of the state" as that term is used in R.C. 9.44.

R.C. 340.03(E) authorizes "648" Boards to enter into contracts with state hospitals, other public agencies, and with private or voluntary hospitals and other private or voluntary non-profit agencies for the provision of mental health and mental retardation services and facilities.

It is my understanding from information provided by your office that the Child Guidance Center was a properly formed and incorporated non-profit corporation, pursuant to the requirements of R.C. Chapter 1702. The Center had its own charter, board of directors, and executive director. It was the executive director who was responsible for the hiring and firing of the employees of the Center. Based upon these facts, it would appear clear that the Center was a separate, lawful, and viable non-profit Ohio corporation with all the attributes thereof.

Thus, it would appear that the employees in question were not employees of the "648" Board; rather, they were employees of a private, non-profit corporation, directly hired and paid by such corporation. Simply because they were employed by an agency which had a contract with a "648" Board did not make them employees of the "648" Board, even though their salary may have been paid in whole or in part from funds derived from the contractual relationship of the private agency with the "648" Board. See generally 1977 Op. Att'y Gen. No. 77-048. They were employed by, and in the service of, the private agency, not the state or any political subdivision of the state.

It is true that R.C. 340.03(H) gives a "648" Board the power to approve salary schedules for employees of a contract agency. This provision, however, only varies the general rule that methods and rates of compensation used by a private entity for its employees are incidents of the employer-employee relationship, and that such an organization need not have statutory authorization in order to fix compensation for its employees. See 1977 Op. Att'y Gen. No. 77-048. The right to approve salary schedules does not change the fundamental employer-employee relationship between the private contract agency and its employees.

Nor is it determinative that the employees worked at Dayton Children's Psychiatric Hospital under the direction of the superintendent of the hospital. The instant situation is not governed by the "right of control" test used in many instances to determine whether a person is an employee or an independent contractor. See generally 1976 Op. Att'y Gen. No. 76-040. For the "right of control" test to be relevant, there must have existed, at the least, a direct contractual relationship between the individuals and the "648" Board. In this case, there was no such relationship.

The case of Huss v. State Personnel Board of Review, Unreported Case No. 74AP-470 (Ct. App. Franklin Co., March 11, 1975), supports the conclusion that an employee of a private agency which is under contract with a "648" Board is not an employee of a political subdivision. In Huss, the Appellant was an employee of the Southwest Community Mental Health Center, a private agency which had a contract with a "648" Board to provide services. Southwest was a properly incorporated non-profit corporation which, through its executive director, directly hired and dismissed its own employees, just as in the instant situation. The Appellant was dismissed from her employment by the executive director, and subsequently appealed to the State Personnel Board of Review contending that she was a classified civil service employee under R.C. Chapter 124, Ohio's civil service law. The Board of Review dismissed her appeal for lack of jurisdiction, finding that she was privately employed by the contract agency and as such was not subject to the provisions of R.C. Chapter 124, because she was not a civil service employee.

The case was then appealed to the Court of Common Pleas which affirmed the findings of the Board of Review. The Court of Appeals affirmed the lower Court's decision and concluded that the Appellant was an employee of a private contract agency, and was not an "employee" for purposes of R.C. Chapter 124. Judge Whiteside, in his concurring opinion at pages 531-532, dispensed with the Appellant's contentions as follows:

> Appellant contends that the evidence indicates that she was, in reality, an employee of the Franklin County Board of Mental Health and Retardation. This contention is predicated in part upon the contract between Southwest and the board, entered into pursuant to R.C. 340.03(E) and in part upon the control exercised by the board over employment of and the salary schedules for employees of Southwest, pursuant to R.C. 340.03(H). Neither of these factors would constitute appellant an employee of the board rather than Southwest. (Emphasis added.)

In 1967 Op. Att'y Gen. No. 67-104, my predecessor held that employees of a "648" Board or employees of facilities operated by them are both "public employees" within the meaning of R.C. Chapter 145, and form part of the "state service" as defined in R.C. Chapter 143 (now R.C. Chapter 124). This opinion, however, dealt only with persons directly employed by the "648" Board, either working for the Board or at a facility operated by the Board. (R.C. 340.03(J) authorizes a "648" Board to directly operate a mental health or mental retardation facility in the event that a needed service cannot be provided by an existing public or private agency, until such time as this responsibility can be assumed by another agency.) The instant situation, however, is clearly distinguishable from the one presented in that opinion. In the instant case, the persons in question were employed directly by the Child Guidance Center. They were employees of that private agency and not of the "648" Board. In 1967 Op. Att'y Gen. No. 67-104, the individuals in question were employees of the "648" Board, directly employed by the Board. As such, that opinion is not controlling over the questions presented herein.

It is, therefore, my opinion that the previous employment of the state employees in question with the Child Guidance Center does not constitute "prior service with the state or any political subdivision of state" as that phrase is used in R.C. 9.44. The employees are not, therefore, entitled to a credit for such employment for purposes of computing their vacation leave.

With respect to your question concerning credit for sick leave, R.C. 124.83

provides, in pertinent part:

> 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, municipal, and civil service township 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. . . . An employee who transfers from one public agency to another shall be credited with the unused balance of his accumulative sick up to the maximum of the sick leave accumulation permitted in the public agency to which the employee transfers. (Emphasis added.)

This provision necessarily implies that the person in question be an "employee" of a "public agency" both before and after the transfer. The term "public agency" has been interpreted narrowly. In 1954 Op. Att'y Gen. No. 3643, p. 128, one of my predecessors concluded that, for purposes of R.C. 143.29 (now R.C. 124.38 with revisions not relevant to the instant discussion), the term "public agency" included only those agencies specifically named in the statute. See also 1960 Op. Att'y Gen. No. 1302, p. 298. The Child Guidance Center could not be said to constitute a "public agency" even under a liberal interpretation, and most certainly could not meet the more stringent interpretation developed by my predecessors. In addition, Huss v. State Personnel Board of Review, supra, held that individuals working for a private contract agency were not "employees" as defined in R.C. 124.01, which provides definitions for R.C. Chapter 124. I must, therefore, conclude that the employees under discussion are not entitled under R.C. 124.38 to any credit for sick leave accumulated during the time they were employed by the Child Guidance Center.

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

1. A state employee, previously employed by a private non-profit corporation which had a contract with a county mental health and retardation board for the provision of mental health and mental retardation services and facilities, is not entitled to a credit for such previous employment for purposes of computing vacation leave pursuant to the provisions of R.C. 9.44.

2. A state employee, previously employed by a private non-profit corporation which had a contract with a county mental health and retardation board for the provision of mental health and mental retardation services and facilities is not entitled to a credit for sick leave accumulated during the time of such previous employment pursuant to the provisions of R.C. 124.38.