

OPINION NO. 88-091

Syllabus:

Full-time employees of a board of elections who are employed on a seasonal, temporary, or intermittent basis are entitled to receive sick leave benefits pursuant to the terms of R.C. 124.38.

To: Stephen M. Stern, Jefferson County Prosecuting Attorney, Steubenville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 27, 1988

You have requested my opinion whether full-time employees of a county board of elections who are employed on a seasonal, temporary, or intermittent basis are statutorily entitled to receive sick leave benefits. According to your letter, the board of county commissioners has established a personnel policy that permits the payment of sick leave benefits to only those county employees who are classified thereunder as full-time permanent employees.

Resolution of your question requires an examination of those provisions in R.C. Chapter 124 (department of administrative services; personnel) that address the provision of sick leave benefits to certain public employees. In particular, R.C. 124.38 states, in pertinent part, as follows:

Each employee in the various offices of the county, municipal, and civil service township service, each employee of any state college or university, 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. (Emphasis added.)

R.C. 124.38 further provides that when such 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." As used in R.C. Chapter 124, R.C. 124.01(F) defines an "[e]mployee," as "any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer."

R.C. 3501.06 establishes within each county of the state "a board of elections consisting of four qualified electors of the county, who shall be appointed by the secretary of state, as his representatives, to serve for the term of four years." R.C. 3501.14 authorizes a board of elections to appoint its employees, "prescribe their duties, and, by a vote of not less than three of its members, fix their compensation." R.C. 3501.14 further provides that board employees serve at the discretion of the board and may be removed summarily by a majority vote of the board's membership. See R.C. 124.11(A)(2) (employees of a board of elections are in the unclassified service); R.C. 3501.11(D) (a board of elections shall appoint and remove its employees). Further, R.C. 3501.14 specifically provides that, "[t]he board

may also employ additional employees, when necessary, for part time only at the prevailing rate of pay for such services."

In 1981 Op. Att'y Gen. No. 81-015, my predecessor addressed the question, *inter alia*, whether employees of a board of elections are entitled to receive sick leave benefits pursuant to the terms of R.C. 124.38. Answering this question in the affirmative, Op. No. 81-015 determined that for purposes of R.C. 124.38, board of elections personnel are "[e]mployee[s]," as defined in R.C. 124.01(F), who are employed "in the various offices of the county...service." Thus, Op. No. 81-015 states as follows at 2-56 and 2-57:

As used in R.C. Chapter 124, "employee" is defined as "any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer" (emphasis added). R.C. 124.01(F). Although board of elections employees are appointed by the board, rather than by an appointing officer, R.C. 3501.11(D) and R.C. 3501.14, both "boards" and "officers" are "appointing authorities" as defined by R.C. 124.01(D). I conclude, therefore, that those employed by a county board of elections are "employees" for purposes of R.C. 124.38.

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R.C. 3501.06 establishes a board of elections in each county of the state. While each board of elections derives its authority from the state itself, R.C. 3501.11, it is empowered to exercise that authority only within the county where situated, and its expenses are paid from appropriations by the board of commissioners of that county. R.C. 3501.17. Thus, although the members of the board of elections, and the employees thereof, are subject to dismissal by the Secretary of State, *see* R.C. 3501.16, in all other respects the board of elections, as an entity, is operated and funded like any other county office or board. *See, e.g.*, R.C. 309.09 (the prosecuting attorney of the county is designated as the legal adviser of the "board of elections, and all other county offices and boards"). *See also In Re Election of Council of Oak Harbor*, 68 Ohio L. Abs. 242, 244, 118 N.E.2d 692, 695 (C.P. Ottawa County 1953). *But see State ex rel. Columbus Blank Book Mfg. Co. v. Ayres*, 142 Ohio St. 216, 51 N.E.2d 636 (1943) (members of board of elections are not county officers).

In sum, even though the employees of the board of elections perform functions established by state law, there is no other legal or factual basis for distinguishing them from other county employees. This conclusion is supported also by the recent decision of the Ohio Supreme Court in *Ebert v. Stark County Board of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). The court there considered whether the employees of a county board of mental retardation were entitled to the benefits provided by R.C. 124.38. The court appears to have determined that those employed by county boards of mental retardation were employees in the various offices of the county service and, as such, were entitled to the benefits of R.C. 124.38. At the time of the *Ebert* decision, county boards of mental retardation functioned much like county boards of elections in that both types of boards were established in each county of the state, were funded through appropriations by the boards of county commissioners, and hired their own employees. R.C. Chapters 3501 and 5126. Unlike members of boards of mental retardation, a majority of whom were appointed by the county commissioners, members of boards of elections are appointed by the Secretary of State from qualified electors within the county. The service of the members of both boards is, however, to the county pursuant to state statute. I see no reason, therefore, to differentiate between the employment status of board of elections employees and board of mental retardation employees. I conclude, therefore, that county board of elections employees are "employees in the various offices of the county...service" and are thus entitled to the sick leave benefits provided by R.C. 124.38. (Footnotes omitted.)

I concur in the reasoning and conclusions of Op. No. 81-015 on this point. Thus,

board of elections employees are, as a general matter, entitled to receive sick leave benefits pursuant to the terms of R.C. 124.38.

You have specifically asked, however, about the receipt of such benefits by full-time employees of a board of elections who are employed on a seasonal, temporary, or intermittent basis. I note initially that there is nothing in R.C. 124.38 to suggest that the receipt of benefits thereunder is limited to those public employees who are employed or classified as full-time employees. *See, e.g.*, Op. No. 81-015 at 2-59 and 2-60 ("the language of R.C. 124.38 does not permit a distinction between part-time and full time employees. Had the General Assembly intended such a distinction, those statutory provisions pertaining to sick leave would contain the express distinction of coverage, as between part-time and full time employees, contained in...R.C. 325.19 regarding vacation time for county employees"); 1976 Op. Att'y Gen. No. 76-001 (syllabus, paragraph three) ("[s]ick leave credit for both part-time and full-time county employees is to be computed pursuant to R.C. 124.38, on the basis of hours worked"). Rather, the sick leave benefits prescribed by R.C. 124.38 are made available to full-time and part-time employees alike. *Cf., e.g.*, R.C. 124.13 (providing vacation leave benefits to "[e]ach full-time state employee...after service of one year with the state, or any political subdivision of the state"); R.C. 325.19(A) (providing vacation leave benefits to "[e]ach full-time employee in the several offices and departments of the county service"); R.C. 325.19(B) (providing that a board of county commissioners "may, by resolution, grant vacation leave with full pay to part-time county employees").

It is, moreover, also apparent that the language of R.C. 124.38 does not permit a distinction between those persons who are employed on a permanent basis, and those persons who are employed on a seasonal, temporary, or intermittent basis. Again, as in the case of full-time and part-time employees, there is nothing in R.C. 124.38 to indicate that the receipt of sick leave benefits is limited to permanent employees, or is otherwise qualified with respect to seasonal, temporary, or intermittent employees.¹ Rather, as pertains to your question, R.C. 124.38 states unambiguously, and without further qualification, that, "[e]ach employee in the various offices of the county...service" shall be entitled to the sick leave benefits prescribed therein. (Emphasis added.) Accordingly, full-time employees of a board of elections who are employed on a seasonal, temporary, or intermittent basis are entitled to receive sick leave benefits pursuant to the terms of R.C. 124.38.

Finally, I note that, in this instance, the board of county commissioners does not possess the authority to alter or modify in any respect the sick leave benefits to which board of elections employees are entitled under R.C. 124.38. In this regard, it has been determined that the power of an appointing authority to employ and fix the compensation of its employees necessarily includes the power to permit sick leave and other fringe benefits as forms of compensation, subject to any constricting statutory authority. *Ebert v. Stark County Board of Mental Retardation*, 63 Ohio St. 2d 31, 33, 406 N.E.2d 1098, 1100 (1980) (per curiam) ("[i]n order for the power to employ to have any significance, it must, of necessity, include the power to fix the compensation of such employees. It should be obvious that sick leave credits, just as other fringe benefits, are forms of compensation"); 1987 Op. Att'y Gen. No. 87-029; 1986 Op. Att'y Gen. No. 86-027; 1981 Op. Att'y Gen. No. 81-052. *See generally State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 629 (1976) (for purposes of Ohio Const. art. II, §20, fringe benefits, although not strictly a part of salary, are part of compensation). Further, it has been stated that the provisions of R.C. 124.38, *inter alia*, merely establish minimum sick leave benefits to which employees are entitled, and do not otherwise limit the power of an appointing authority to adopt its own policy with regard to the payment of sick leave benefits to its employees, so long as such benefits are at least as great as those to which the employees are entitled by statute. *Ebert v. Stark County Board of Mental Retardation; Cataland v. Cahill*, 13 Ohio App. 3d 113, 114, 468 N.E.2d 388, 390 (Franklin County 1984) ("[s]ick leave and vacation leave prescribed by statute are minimums only and, where the appointing authority is authorized to establish

¹ There is, in fact, no provision in R.C. Chapter 124 of which I am aware that characterizes an employee as "permanent," "seasonal," "temporary," or "intermittent" for any purpose.

compensation of employees, either sick-leave or vacation-leave benefits in addition to the minimums prescribed by statute may be granted as part of compensation"); Op. No. 81-015. Thus, pursuant to its power as appointing authority to set the compensation of its employees, *see* R.C. 3501.14, a board of elections may adopt its own policy with respect to the payment of sick leave benefits to its employees, provided any such policy guarantees those employees the minimum amount of sick leave benefits to which they are entitled under R.C. 124.38.

On the other hand, a board of county commissioners is not authorized to appoint, or set the compensation of, board of elections employees. Because the board of county commissioners does not possess such authority, it may not alter or modify the sick leave benefits to which board of elections employees are entitled under R.C. 124.38. Op. No. 81-015 at 2-60 n. 7.

It is, therefore, my opinion, and you are advised that full-time employees of a board of elections who are employed on a seasonal, temporary, or intermittent basis are entitled to receive sick leave benefits pursuant to the terms of R.C. 124.38.