

**OPINION NO. 80-080****Syllabus:**

A board of township trustees of a civil service township may expend township funds for injury leave pay to township policemen in excess of that authorized by R.C. 124.38, and may receive the partial reimbursement of any workers' compensation benefits received by the policemen, without contravening Ohio Const. art. VIII, §6.

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**To: Vincent E. Gilmartin, Mahoning County Pros. Atty., Youngstown, Ohio**  
**By: William J. Brown, Attorney General, November 26, 1980**

I have before me your request for my opinion on a contract provision providing service-connected injury leave to members of a township police department. Specifically, "Section 2-Injury Leave" of the contract entered into by the Boardman Township Trustees and the Fraternal Order of Police provides:

- a. All members shall be entitled to sixty (60) days of leave with pay for a service connected injury or disability sustained during the performance of his or her duties.
- b. Whenever a member is required to stop working because of a service connected injury or disability, he or she shall be paid for the remaining hours of that workday and such time shall not be charged to leave of any kind.
- c. If a member on injury leave is capable of performing light duties, the Township may reasonably require that member to return from injury leave and perform such light duties.
- d. Any member who avails himself of injury leave shall apply for and turn over to the Township any Workers' Compensation benefits he or she receives for the sixty (60) day injury leave period.

You question the propriety of expending public funds in accordance with the agreement, and, specifically, whether the above contract provision might be objectionable on the ground that it constitutes a loan of public funds. The provisions of Ohio Const. art. VIII, §6 would indeed be offended in the event the payment of injury leave pay constituted the lending of the credit of the township. Before addressing the constitutional issue, however, the statutory validity of the contract provision must be determined.

You have provided information that Boardman Township is a civil service township (pursuant to R.C. 124.40(B)), with a population of over ten thousand persons residing within the township and outside of any municipal corporation, and that it has established a police district (pursuant to R.C. 505.48-.55) employing more than ten full-time paid employees within its police department. Therefore, R.C. 505.49(B) is applicable to issues concerning township police personnel. R.C. 505.49(B) provides, in pertinent part:

Such township shall comply with the procedures for the employment, promotion, and discharge of police personnel provided by Chapter 124. of the Revised Code. . . . The board of township trustees shall determine the number of personnel required and establish salary schedules and conditions of employment not in conflict with Chapter 124. of the Revised Code.

It appears, then, that the injury leave contract provision at issue here is properly within the purview of the township trustees and is valid unless it conflicts with R.C. Chapter 124 or is otherwise contrary to law.

An analysis of R.C. Chapter 124 identifies R.C. 124.38 as the only source of potential conflict in that it constitutes a statutory entitlement to injury leave independent of the contract provision. "[E]ach employee in . . . civil service township service. . . 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. . . for absence due to. . . injury. . . ." R.C. 124.38.

Interpreting R.C. 124.38 as conferring a minimum benefit, the Ohio Supreme Court recently held that a board's power to fix compensation includes the power to provide sick leave credits in excess of the minimum level of R.C. 124.38. Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 33, \_\_\_ N.E. 2d \_\_\_ (1980) (per curiam). Therefore, the injury leave contract provision, which provides injury leave in excess of that provided by R.C. 124.38, is within the power of the board of township trustees to fix compensation under R.C. 505.49(B), and is not in conflict with R.C. 124.38.

The contract provision in question also requires that any member who receives injury leave pay apply for and turn over to the township any workers' compensation benefits he or she receives for the injury leave period. Accordingly, it must be considered within the statutory framework of R.C. Chapter 4123 which governs workers' compensation.

Under the provisions of R.C. Chapter 4123, a township employee is entitled to compensation for a service related injury. "Every employee [including township employee, R.C. 4123.01(A)(1)], who is injured. . . is entitled to receive. . . such compensation for loss sustained on account of such injury. . . ." R.C. 4123.54 (emphasis added). Although there is no statutory definition of "loss," the Supreme Court of Ohio interpreted the above-emphasized language (as it appeared in G.C. 1465-68) as requiring an actual loss of wages. State ex rel. Rubin v. Industrial Commission, 134 Ohio St. 12, 16, 15 N.E. 2d 541, 542 (1938). The employee in Rubin was denied compensation on the basis that his wages were continued during his period of disability.

Like the employee in Rubin, the township policeman, under the contract provision, is to receive wages during the period for which application is made for workers' compensation. Unlike the employee in Rubin, however, the township policeman agrees to pay any workers' compensation received during the sixty day injury leave period to the employer township. The agreed statement of facts in Rubin specifically pointed out the absence of any such agreement. "If compensation is hereafter awarded and paid to the relator by the Commission, there has been and is no agreement on the part of the relator to pay any part of such compensation to his employer, and no part of it will be paid to the employer." Rubin, 134 Ohio St. at 14, 15 N.E. 2d at 541.

Although "[n]o agreement by an employee to waive his rights to [workers'] compensation. . . is valid," R.C. 4123.80, the Ohio Supreme Court, prior to its holding in Rubin, upheld an assignment of workmen's compensation benefits by an employee to his employer, to the extent of and "in consideration of his employer advancing him moneys to afford him immediate and necessary relief while such claim is pending before the Commission." Syllabus, State ex rel. Hunt & Dorman Manufacturing Co. v. Industrial Commission, 108 Ohio St. 139, 140 N.E. 621 (1923). In upholding the assignment in Hunt, the Court did not suggest, or even mention, that the employee's receipt of money might jeopardize or preclude his workmen's compensation claim. It appears then, that the Court's decision in Hunt constitutes an exception to the rule of Rubin, in the event that the employee's workers' compensation benefits are to be paid to the employer, in return for the employee's receipt of pay during the period of disability.

Under this contract term the township policeman specifically agrees to "apply for and turn over to the Township any Workers' Compensation benefits he or she receives for the sixty (60) day injury leave period." Although this language does not constitute an assignment in the technical sense of the term, see, e.g., Aetna Casualty & Surety Co. v. Hensgen, 22 Ohio St. 2d 83, 258 N.E. 2d 237 (1970)

("[w] here, for a valid consideration, a person agrees that another person is to be subrogated to certain rights, such other person is thereby substituted in the place of such person with respect to, and succeeds, to those rights and in effect thereby becomes an assignee of those rights"), the contract provision follows the animus of the decision in Hunt in that the workers' compensation benefits will inure to the employer and will not exceed the amount which the employer has paid the employee. R.C. 4123.56 (provides a maximum benefit level of seventy-two percent of an employee's full weekly wage for the first twelve weeks of temporary total disability).

I conclude, therefore, that injury leave pay, when it is conditioned upon the employer's receipt of any workers' compensation benefits to which the employee on injury leave is entitled, as in the contract provision presented herein, does not per se extinguish an employee's right to workers' compensation under R.C. 4123.54. In order to effectively implement the contract provision, however, compliance must be had with 5 Ohio Admin. Code 4123:5-20, in which the Ohio Bureau of Workers' Compensation has set forth the administrative procedure which must be followed in the event an employee pays regular wages to an employer during a period of disability:

4123-5-20 Payment of compensation when advancements are made during period of disability.

(A) It is hereby directed that the following instructions with reference to payment of compensation when employers pay regular wages or make advancements to claimants during their period of disability shall be followed by employees of the bureau:

(1) Whenever a claimant and the employer advise the bureau in writing that the wages were paid or the advancements were made solely for the purpose of assisting the claimants in obtaining necessary maintenance and care during a short period following an injury sustained or occupational disease contracted by the claimant in the course of and arising out of employment, particularly while a claim for compensation is being acted upon by the bureau, and it appears that the claimant and employer had mutually agreed that the employer was to be reimbursed, at least to the extent of any compensation paid to the claimant over the period in which the wages were paid or the advancements made, it is the order of the bureau that under such circumstances warrants in payment of compensation awarded over a short period closely following the date of such an injury or beginning of disability are to be mailed to the claimant in care of the employer with instructions that the warrants are to be endorsed personally by the claimant.

(2) The warrants to be sent in care of the employer are not to be in payment of compensation for disability in excess of a period of twelve weeks closely following the date of injury or beginning of disability, unless under special circumstances the bureau authorizes the sending of warrants in payment of compensation for disability beyond the twelve weeks in care of the employer.

(B) It is further directed that where a claimant is entitled to vacation with pay, payment of wages for a vacation period during the period of temporary total disability resulting from injury or occupational disease should not interfere with payment of compensation.

However, where claimants are paid their regular salary during the period of disability on any other basis, for example sick leave, payment of compensation for temporary total disability cannot be made so long as such regular salary or wages are paid, unless the claimant and the employer notify the Bureau in writing that such salary or sick leave was paid as an advancement.

5 Ohio Admin. Code 4123:5-20. The notice requirement contained in paragraph (A)(1) of the rule is of particular importance since the contract provision presented herein does not expressly include a notice provision. Thus, assuming compliance with the administrative rule, the employer township is entitled to have any benefits payable to an employee on injury leave forwarded to the township with instructions that the warrant is to be endorsed by the employee claimant to the township employer.

It remains to be determined whether the contract provision violates the constitutional prohibition against the lending of the credit of the township. Ohio Const. art. VIII, §6 ("[n]o laws shall be passed authorizing any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association. . ." (emphasis added)).

At the outset, I note that the fact that individual policemen receive the benefit of the contract provision does not remove it from the scope of the constitutional prohibition. Markley v. Village of Mineral City, 58 Ohio St. 430, 438, 51 N.E. 28, 30 (1898) (extends the reach of Ohio Const. art. VIII, §6 to individuals, as well as the constitutionally defined classes of any "company, corporation, or association"). In order to fall within the scope of Ohio Const. art. VIII, §6, however, the payment of injury leave pay, pursuant to an agreement which also provides for partial reimbursement to the township in the event the employee is entitled to workers' compensation benefits, must constitute the lending of the credit of the township.

The Ohio Supreme Court defined the word "credit" in State ex rel. Saxbe v. Brand, 176 Ohio St. 44, 197 N.E. 2d 328 (1964). Although the court's consideration of "credit" was in the context of Ohio Const. art. VIII, §4 ("[t]he credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever"), it is equally applicable to Ohio Const. art. VIII, §6. See, e.g., State ex rel. Eichenberger v. Neff, 42 Ohio App. 2d 69, 75, 330 N.E. 2d 454, 458 (Franklin County 1974); 1971 Op. Att'y Gen. No. 044. The court in Saxbe held that "[t]he word 'credit'. . . includes within its meaning (1) a loan of money and (2) the ability to borrow, i.e., the ability to acquire something tangible in exchange for a promise to pay for it." Furthermore, inherent in any definition of the word "loan" is the promise to repay the amount of money borrowed. See, e.g., Black's Law Dictionary 1085 (rev. 4th ed. 1968); Webster's New World Dictionary 829 (2d college ed. 1978); National Bank of Paulding v. Fidelity and Casualty Co., 71 Ohio L. Abs. 553, 57 Ohio Op. 483, 131 F. Supp. 121 (S.D. Ohio 1954); Springgate v. Daneman, 32 Ohio App. 279, 283, 167 N.E. 908, 909 (Hamilton County 1929) (extension of credit to purchaser who assigned wages to secure balance of payment due did not constitute a loan).

Under the contract provision at issue here, the township is obligated to pay the employee on injury leave, notwithstanding any subsequent reimbursement through the employee's workers' compensation. The township employee does not promise to repay injury leave pay; he or she promises only to turn over any workers' compensation benefits which may be received. If no such benefits are received, the employee need make no payment. Indeed, even if the maximum level of workers' compensation benefits were received and turned over to the township, the amount of such benefits would be insufficient to fully reimburse the township for an employee's injury leave pay. R.C. 4123.56.

Based on the definition of "credit" pronounced in Saxbe, I conclude that injury

leave pay is not a loan and that the township is not lending its credit to a township policeman under the terms of the injury leave contract provision. Furthermore, as required by Ohio Const. art. VIII, §§4,6, in providing injury leave incident to employment, the township is expending funds for a public purpose. See, e.g., State ex rel. Dickman v. Defenbacher, 164 Ohio St. 142, 128 N.E. 2d 59 (1955); Leaverton v. Kerns, 104 Ohio St. 550, 136 N.E. 217 (1922); McGuire v. Cincinnati, 22 Ohio Op. 334, 40 N.E. 2d 435 (1941); 1971 Op. Att'y Gen. No. 044. Injury leave pay, then, like sick leave or vacation pay, constitutes an authorized expenditure of township funds.

Therefore, it is my opinion, and you are advised, that a board of township trustees of a civil service township may expend township funds for injury leave pay to township policemen in excess of that authorized by R.C. 124.38, and may receive the partial reimbursement of any workers' compensation benefits received by the policemen, without contravening Ohio Const. art. VIII, §6.