

OPINION NO. 83-085**Syllabus:**

1. A charter city may, by charter provision or by ordinance, establish a sick leave policy for its employees, including employees of the police and fire departments, and thereby grant to such employees less sick leave than provided for by R.C. 124.38. A noncharter city may enact an ordinance establishing a sick leave policy for its employees, including employees of the police and fire departments, and thereby grant such employees less sick leave than provided for in R.C. 124.38. (1963 Op. Att'y Gen. No. 500, p. 506, modified.)
2. A sick leave policy validly adopted by a charter or noncharter city may exclude overtime hours or straight time in excess of eighty hours per pay period from the hours for which its employees accumulate sick leave benefits.
3. The sick leave benefits of R.C. 124.38 extend to part-time municipal employees in the absence of a municipal provision to the contrary.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 2, 1983

I have before me your opinion request concerning sick leave benefits for city employees. You specifically ask:

1. May a charter/noncharter city accumulate sick leave at a rate less than 4.6 hours of service for its police and fire department employees?
2. May a charter/noncharter city exclude overtime hours or straight time, in excess of 80 hours a pay period, from the accumulation of sick leave for its employees?
3. Does Section 124.38 of the Revised Code apply to part time employees of a charter/noncharter city?

Your first question asks about the rate at which police and fire department employees of a charter or noncharter city are entitled to accumulate sick leave. R.C. 124.38, which establishes sick leave benefits for certain public employees, states, in part:

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 [R.C. 3319.141], shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay. (Emphasis added.)

Thus, your first question appears to be whether R.C. 124.38 entitles employees of the police or fire departments of a charter or noncharter city to accumulate sick leave at the rate set forth in that statute or whether a municipality may establish its own policy pursuant to which such employees accumulate sick leave at a lesser rate.

In Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980) (per curiam), the Supreme Court discussed the benefit conferred upon employees of a county board of mental retardation by R.C. 124.38. The court stated: "R.C. 124.38 neither establishes nor limits the power of a political subdivision. Rather, it ensures that the employees of such offices will receive at least a minimum sick leave benefit or entitlement." 63 Ohio St. at 32, 406 N.E.2d at 1099-1100. Although the facts in Ebert involved only certain county employees, the court spoke in general terms and made no distinction between the possible application of R.C. 124.38 to employees of municipalities and its application to employees of other political subdivisions.¹ In fact, the court in Ebert cited the case of State ex rel. Randel v. Scott, 95 Ohio App. 197, 118 N.E.2d 426 (Summit County 1952), which concluded that a municipal police officer is entitled to the sick leave benefits provided by G.C. 486-17c (currently, in pertinent part, at R.C. 124.38) and that such sick leave benefits could not be reduced by the employing municipality. The Ebert court stated that the court in Randel "intimated the view that the statutory formula established a minimum benefit and did not constrain the employing unit from increasing its sick leave compensation." 63 Ohio St. 2d at 33, 406 N.E.2d at 1100. Ebert does not, however, specifically address the application of R.C. 124.38 to municipal employees. Thus, the question remains as to the extent to which a municipality may vary the sick leave benefits conferred upon municipal employees by R.C. 124.38.

In 1963 Op. Att'y Gen. No. 500, p. 506, one of my predecessors addressed the question of sick leave for municipal employees. The opinion cited R.C. 143.29 (currently, in pertinent part, at R.C. 124.38), but questioned the applicability of that section in light of the home rule powers of municipalities. 1963 Op. No. 500 discussed the case of State ex rel. Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958), which concerns the authority of a charter city to establish by charter certain requirements for the appointment of a city police officer where such requirements are in conflict with those of a state statute. The court concluded that the appointment of city police officers is a power of local self-government for purposes of Ohio Const. art. XVIII, §§3 and 7, and that the charter provision, therefore, prevailed over the state statute. Based upon Canada, 1963 Op. No. 500 concluded, at 509, that: "a city or village which has adopted a charter may, by its charter or by ordinance pursuant to charter power, provide sick leave benefits either greater or less than those provided in [R.C. 143.29] for all or any of its employees including policemen and firemen."

1963 Op. No. 500 then discussed the authority of a noncharter city to vary the sick leave benefits established by R.C. 143.29 (currently, in pertinent part, at R.C. 124.38) for its employees. The opinion cited State ex rel. Petit v. Wagner, 170 Ohio St. 297, 164 N.E.2d 574 (1960), which concluded that a noncharter city had no authority under Ohio Const. art. XVIII, §3 to prescribe by ordinance a method for the selection of a chief of police which method is at variance with a state statute.

¹ At the time Ebert was decided, R.C. 124.38 provided 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]." 1974 Ohio Laws 693 (Am. H.B. 513, eff. Aug. 9, 1974).

Relying on Petit, 1963 Op. No. 500 concluded, at 510, that, "a non-charter municipality is . . . without authority to provide by ordinance for sick leave benefits for its employees which are at variance with the benefits provided in" R.C. 143.29 (currently, in pertinent part, at R.C. 124.38). Thus, 1963 Op. No. 500 concluded that although a charter city could, pursuant to Ohio Const. art. XVIII, §7, vary the sick leave benefits conferred upon the city's employees, a noncharter city had no such authority.

Recently, however, in the case of Northern Ohio Patrolmen's Benevolent Association v. City of Parma, 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980), the Supreme Court addressed the powers of a noncharter city to compensate its employees. At issue in Parma was the authority of a noncharter city to enforce an ordinance which was in direct conflict with a state statute concerning the compensation of municipal employees while on military leave of absence. R.C. 5923.05 provided that the city pay each employee on military leave of absence his full salary for a certain number of days per year, regardless of the amount the military paid such employee. The ordinance, however, provided that the city would pay an employee on military leave of absence only the difference between the employee's city salary and any monetary compensation from the military.

Concerning the authority of a charter municipality, Parma states: "It is axiomatic that an ordinance, similar to the one at bar, if enacted by a chartered municipality, would prevail over the state law irrespective of any conflict." 61 Ohio St. 2d at 378, 402 N.E.2d at 521-22. The court in Parma then concluded that a municipality's authority to enact an ordinance which is at variance with state law in matters of substantive local self-government derives from Ohio Const. art. XVIII, §3, and is not dependent upon the adoption of a charter under Ohio Const. art. XVIII, §7. The court stated further that since compensation of municipal employees is a matter of substantive local self-government, the city had the authority to enact an ordinance providing less military leave compensation than provided for by statute.

Like the payment to employees for military leaves of absence, the granting of sick leave benefits is a form of compensation. Ebert. Thus, although the court in Ebert, after its decision in Parma, stated generally that R.C. 124.38 provides a minimum benefit for employees of various political subdivisions, I believe that Ebert must be read in conjunction with the principle set forth in Parma that, pursuant to Ohio Const. art. XVIII, §3, a noncharter city may enact an ordinance which is at variance with a state statute concerning the compensation of municipal employees.

In answer to your first question, a charter city may, by charter provision or by ordinance, establish a sick leave policy for its employees, including employees of the police and fire departments, which policy grants less sick leave than provided for by R.C. 124.38. Similarly, a noncharter city may enact an ordinance establishing a sick leave policy for its employees, including employees of the police and fire departments, where such policy grants less sick leave than provided for by R.C. 124.38.

Your second question asks whether a charter or noncharter city may exclude overtime hours or straight time in excess of eighty hours per pay period from the accumulation of sick leave for its employees. As stated in answer to your first question, the establishment of a sick leave policy for municipal employees is purely a matter of substantive local self-government, which a charter or noncharter city may establish in its discretion. I am aware of no reason why such policy could not exclude overtime hours or straight time in excess of eighty hours per pay period from the hours for which its employees may accumulate sick leave.

Your final question asks whether R.C. 124.38 applies to part-time employees of a charter or noncharter city. R.C. 143.29 (currently, in pertinent part, at R.C. 124.38) formerly provided sick leave benefits for, among others, "each full-time employee in the various offices of the . . . municipal service. . ." (emphasis added). 1965 Ohio Laws 129 (Am. H.B. 937, eff. July 22, 1965). This statute was, however, amended in 1967-1968 Ohio Laws, Part I, 164 (Am. Sub. H.B. 93, eff. May

17, 1967) to provide sick leave benefits for various public employees, including "each employee in the various offices of the . . . municipal service." Since the General Assembly specifically deleted the qualification that an employee be "full-time" in order to qualify for the sick leave benefits of that statute, the legislature clearly demonstrated its intention that a municipal employee need not be full-time in order to qualify for sick leave benefits under that statute. Since the qualifying term, "full-time," does not currently modify the word "employee" in R.C. 124.38, I must conclude that no such limitation may be implied. See Dougherty v. Torrence, 2 Ohio St. 3d 69, 442 N.E.2d 1295 (1982) (in interpreting the language of a statute, one should give effect to the words used and not insert words not used). Thus, in the absence of a municipal provision to the contrary, part-time municipal employees are entitled to the sick leave benefits of R.C. 124.38.

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

1. A charter city may, by charter provision or by ordinance, establish a sick leave policy for its employees, including employees of the police and fire departments, and thereby grant to such employees less sick leave than provided for by R.C. 124.38. A noncharter city may enact an ordinance establishing a sick leave policy for its employees, including employees of the police and fire departments, and thereby grant such employees less sick leave than provided for by R.C. 124.38. (1963 Op. Atty Gen. No. 500, p. 506, modified.)
2. A sick leave policy validly adopted by a charter or noncharter city may exclude overtime hours or straight time in excess of eighty hours per pay period from the hours for which its employees accumulate sick leave benefits.
3. The sick leave benefits of R.C. 124.38 extend to part-time municipal employees in the absence of a municipal provision to the contrary.