

**Note from the Attorney General's Office:**

1984 Op. Att'y Gen. No. 84-061 was qualified by  
1990 Op. Att'y Gen. No. 90-074.

## OPINION NO. 84-061

**Syllabus:**

Whether or not the board of county commissioners has acted pursuant to R.C. 124.39(C) to vary the policy set forth in R.C. 124.39(B) for the payment of accumulated, unused sick leave, a county appointing authority, such as the county auditor or county treasurer, may adopt a sick leave payment policy for his employees, provided that the policy affords his employees benefits equal to or greater than any sick leave payment benefits to which such employees are entitled by R.C. 124.39(B) or by action of the county commissioners, pursuant to R.C. 124.39(C).

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**To: Keith A. Shearer, Wayne County Prosecuting Attorney, Wooster, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, October 18, 1984**

I have before me your opinion request in which you ask whether a county officer, such as the county auditor or county treasurer, may adopt his own policy with regard to payment of accrued but unused sick leave, allowing payment to an employee upon termination of employment other than retirement, even though the board of county commissioners has adopted a sick leave payment policy in accordance with R.C. 124.39(C).

In order to answer your question it is first necessary to examine the statutory powers of the officers about whom you ask. R.C. 325.17 authorizes various officers, including the county auditor and county treasurer, to appoint and employ necessary deputies, assistants, clerks, bookkeepers, or other employees and to fix such employees' compensation. As part of a county officer's power to compensate his employees, he may grant his employees various fringe benefits. Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). See generally State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976) (for purposes of Ohio Const. art. II, §20, fringe benefits, although not strictly a part of salary, are part of compensation). An appointing authority's power to fix his employees' compensation is, however, subject to any statutory restrictions upon such power. See generally 1981 Op. Att'y Gen. No. 81-052.

You specifically ask about the adoption of a sick leave payment policy by individual county appointing authorities. As noted in your letter, R.C. 124.39 provides an accrued sick leave payment policy for, among others, county employees. R.C. 124.39 states, in pertinent part:

As used in this section, "retirement" means disability or service retirement under any state or municipal retirement system in this state.

....

(B) Except as provided in division (C) of this section, an

employee of a political subdivision covered by section 124.38<sup>11</sup> or 3319.141 of the Revised Code may elect, at the time of retirement from active service with the political subdivision, and with ten or more years of service with the state, any political subdivisions, or any combination thereof, to be paid in cash for one-fourth the value of his accrued but unused sick leave credit. The payment shall be based on the employee's rate of pay at the time of retirement and eliminates all sick leave credit accrued but unused by the employee at the time payment is made. An employee may receive one or more payments under this division, but the aggregate value of accrued but unused sick leave credit that is paid shall not exceed, for all payments, the value of thirty days of accrued but unused sick leave.

(C) A political subdivision may adopt a policy allowing an employee to receive payment for more than one-fourth the value of his unused sick leave or for more than the aggregate value of thirty days of his unused sick leave, or allowing the number of years of service to be less than ten. The political subdivision may also adopt a policy permitting an employee to receive payment upon a termination of employment other than retirement or permitting more than one payment to any employee.

A political subdivision may adopt policies similar to the provisions contained in sections 124.382 to 124.386 of the Revised Code. (Footnote added.)

As employees of a political subdivision covered by R.C. 124.38, county employees with the requisite service time may elect to be paid for their accumulated, unused sick leave upon retirement in accordance with the provisions of R.C. 124.39(B). R.C. 124.39(C) also authorizes a board of county commissioners to vary the sick leave payment policy set forth in division (B) of that section in the manner set forth in R.C. 124.39(C). 1978 Op. Att'y Gen. No. 78-057 (syllabus, paragraph two). See 1983 Op. Att'y Gen. No. 83-073.

You question whether the fact that the legislature has specifically authorized a county to vary the statutory method contained in R.C. 124.39(B) for the payment of accumulated, unused sick leave constricts the power of individual county appointing authorities also to vary the payment policy set forth in R.C. 124.39(B). For the reasons set forth below, however, I believe that R.C. 124.39(C) does not restrict the power of an individual county officer to provide, as part of his employees' compensation, a sick leave payment policy which is more liberal than the policies set forth in R.C. 124.39(B) and (C).

Concerning the extent to which an appointing authority may compensate its employees, Op. No. 81-052 states at 2-202:

Once the requisite authority to compensate has been established, any statutory provisions pertinent to the provision of the particular fringe benefit in issue by the public employer to its employees must be identified. . . . [I]f the particular fringe benefit is the subject of any statutory provision applicable to the public employer or its employees, further consideration is required. If an applicable statute constitutes a minimum statutory entitlement to a particular benefit, the public employer may, pursuant to its power to compensate and in the absence of any statute constricting its action in the particular case, choose to provide such benefit in excess of the minimum statutory entitlement. If an applicable statute limits the general authority of the public employer to compensate its employees with the particular fringe benefit in question, it must, of course, be viewed as a restriction upon the employer's authority to grant the particular benefit. (Emphasis added.)

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<sup>1</sup> R.C. 124.38 provides sick leave benefits for 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]."

As set forth above, the fringe benefit about which you ask, the payment of accumulated, unused sick leave, is provided for by statute in R.C. 124.39. Further, pursuant to R.C. 124.39(C), a county may vary the payment policy established by R.C. 124.39(B). Since R.C. 124.39(C) authorizes political subdivisions to enlarge the benefit set forth in R.C. 124.39(B), it is clear that the sick leave payment policy set forth in R.C. 124.39(B) is merely a minimum benefit. 1981 Op. Att'y Gen. No. 81-015. It is, therefore, necessary to determine the manner in which the provisions of R.C. 124.39(B) may be varied.

First I turn to the scope of the county commissioners' authority to act pursuant to R.C. 124.39(C). Pursuant to R.C. 124.39(C), a board of county commissioners may adopt a policy varying the policy set forth in R.C. 124.39(B), but the scope of the board's authority is limited to the variations set forth in that division. See generally State ex rel. Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (county commissioners have only those powers expressly granted by statute or necessarily implied therefrom). R.C. 124.39(C) does not, however, authorize the county commissioners to set a maximum sick leave payment policy applicable to all county employees. Rather, as concluded in Op. No. 81-015, footnote six, "any policy adopted pursuant to the provisions of R.C. 124.39(C) for employees in the various offices of the county service sets minimum benefits to which employees of a county board of elections are entitled as employees in the county service." Op. No. 81-015 then concluded at 2-59, that although R.C. 124.39(C) authorizes a county to vary the policy set forth in R.C. 124.39(B), a policy so adopted by the county does not limit the authority of a county appointing authority to adopt its own policy concerning the payment for accumulated, unused sick leave, "provided that the . . . policy [so established] provides benefits at least as great as any benefits to which such employees may otherwise be entitled either by statute or by action of the county commissioners." (Footnote omitted.) Accord Op. No. 83-073. I concur with the conclusion reached by my predecessor.

It is, therefore, my opinion, and you are advised, that whether or not the board of county commissioners has acted pursuant to R.C. 124.39(C) to vary the policy set forth in R.C. 124.39(B) for the payment of accumulated, unused sick leave, a county appointing authority, such as the county auditor or county treasurer, may adopt a sick leave payment policy for his employees, provided that the policy affords his employees benefits equal to or greater than any sick leave payment benefits to which such employees are entitled by R.C. 124.39(B) or by action of the county commissioners, pursuant to R.C. 124.39(C).