

OPINION NO. 77-032**Syllabus:**

Pursuant to R.C. 124.39, sick leave of faculty members of state universities accrued before and after June 29, 1974 up to the date of retirement must be used in the computation of the amount of payment for sick leave due upon retirement.

To: The Board of Trustees, Miami University, Oxford, Ohio
By: William J. Brown, Attorney General, June 7, 1977

I have before me your request for my opinion on the following questions:

- "1. Is R.C. 124.391 applicable to faculty members of state universities who have retired subsequent to the effective date of the Act, June 29, 1974?
- "2. If it is determined that a faculty member who has retired subsequent to June 29, 1974, is he entitled to be paid one-fourth of his accumulated sick leave, should sick leave accumulated after June 29, 1974, be used for computational purposes or may sick leave accumulated prior to June 29, 1974, up to 120 days, be used to compute the amount of sick leave due upon retirement?"

The first sentence of R.C. 124.391 specifies the applicability of that section, stating the following:

"All employees covered by section 124.38 of the Revised Code but not eligible for benefits under section 124.39 of the Revised Code, and those covered by section 3319.141 of the Revised Code, shall at the time of their retirement receive pay for all or part of their unused sick leave to the extent consistent with the policy of the appointing authority in effect."

Since R.C. 3319.141 deals with sick leave for persons employed by a board of education, that section does not make R.C. 124.391 applicable to faculty members of a state university. But if two other conditions are met, then R.C. 124.391 does apply to faculty members of a state university. The two other conditions set out in the first sentence of R.C. 124.391 are that (1) the employee be covered by 124.38 of the Revised Code, and (2) that the employee is not eligible for benefits under 124.39 of the Revised Code.

In my Opinion No. 74-022, the following is stated:

"Moreover, my predecessor, in Opinion No. 6579, Opinions of the Attorney General for 1965, stated in the second paragraph of the syllabus that, 'Employment in the service of a state university is state service within the meaning of chapter 143, Revised Code [now R.C. Chapter 124]'. Thus the unclassified employees described in R.C. 124.11(A) (7) are clearly entitled to paid sick leave pursuant to R.C. 124.38."

The unclassified employees listed in R.C. 124.11(A) (7) include university instructors and teachers. Therefore, faculty members of a state university are covered by R.C. 124.38.

The next step is to determine whether or not R.C. 124.39 applies to faculty members of a state university. The first sentence of R.C. 124.39 indicates that a state employee must be paid directly by warrant of the auditor of state for R.C. 124.39 to be applicable to a state employee. As discussed in 1974 Op. Att'y. Gen. No. 74-022, state university employees are not paid by direct warrant of the state auditor. Therefore, R.C. 124.39 does not apply to faculty members of a state university.

Since faculty members of a state university are covered by R.C. 124.38 and since R.C. 124.39 does not apply to such faculty members, the answer to your first question is that such faculty members are covered by R.C. 124.391 in determining their rights to cash payments for unused sick leave upon retirement. The fact that the

faculty member retires subsequent to the date of the Act is of no consequence.

Your second question is answered by the following pertinent part of R.C. 124.391:

"If no such policy is in effect at such time, each employee with ten or more years of service, with the state or any of its political subdivisions shall receive payment based on the employee's rate of pay at retirement for one-fourth of the employee's accrued but unused sick leave at retirement up to a maximum accrual of one hundred twenty days."

(Emphasis added)

Therefore, if it is determined that the retiring employee is entitled to payment for one-fourth of his sick leave up to one hundred twenty days, then the employee is entitled to have all of his accrued but unused sick leave at the time of his retirement used in the calculation.

In specific answer to your second question, it is my opinion and you are so advised that pursuant to R.C. 124.39, sick leave of faculty members of state universities accrued before and after June 29, 1974 up to the date of retirement must be used in the computation of the amount of payment for sick leave due upon retirement.