

Note from the Attorney General's Office:

1983 Op. Att'y Gen. No. 83-073 was qualified by
1990 Op. Att'y Gen. No. 90-074.

OPINION NO. 83-073**Syllabus:**

A county may pay a county employee for unused sick leave when such employee separates from employment, but does not retire, only if the board of county commissioners has adopted, pursuant to R.C. 124.39(C), a policy for making such payment or if the employee's appointing authority has adopted a policy authorizing such payment.

To: Peter R. Seibel, Defiance County Prosecuting Attorney, Defiance, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 2, 1983

I have before me your request for my opinion as to the authority of a county to make reimbursement for unused sick leave to an employee who separates from employment, but does not retire, where the county has not adopted a policy for the payment of unused sick leave for such an employee.¹ Specifically, you ask whether the employee is entitled to the amount provided by R.C. 124.384, or is entitled to no payment for unused sick leave.

R.C. 124.384 states the following:

Employees whose salary or wage are [sic] paid by warrant of the auditor of state and who have accumulated sick leave under the provisions of section 124.38 or 124.382 of the Revised Code, shall be paid for a percentage of their accumulated balances, upon separation for any reason including retirement, at their last base rate of pay at the rate of one hour of pay for every two hours of accumulated balances.

In order to be eligible for the payment authorized by this section, an employee shall have at least one year of state service. (Emphasis added.)

The above underscored language sets forth the coverage of R.C. 124.384. By its express terms, R.C. 124.384 applies only to "[e]mployees whose salary or wage [is] paid by warrant of the auditor of state and who have accumulated sick leave under the provisions of [R.C. 124.38 or 124.382]" (emphasis added). In order to come within this language, an individual must both be paid by warrant of the Auditor of

¹ I note that a county appointing authority may establish a policy for making payments for unused sick leave to its employees, provided that such policy provides benefits at least as great as any benefits to which such employees may otherwise be entitled. See 1981 Op. Att'y Gen. No. 81-015. It is my understanding that your question pertains to a situation in which no such policy has been adopted.

State and have accumulated sick leave under R.C. 124.38² or 124.382.³ It is true that county employees are included among the employees who accumulate sick leave under R.C. 124.38. This fact is not sufficient, however, to bring them within the language of R.C. 124.384 which limits its coverage to employees who are paid by warrant of the Auditor of State. Therefore, I conclude that R.C. 124.384 covers only those employees who, at the time of separation from employment, are both paid by warrant of the auditor of state and credited with unused sick leave under the provisions of R.C. 124.38 or R.C. 124.382. You have asked about county employees who are not paid by warrant of the Auditor of State. I conclude that such employees are not included within the coverage of R.C. 124.384.

Since R.C. 124.384 does not apply to the employees about whom you have inquired, I now turn to other law relevant to the payment of unused sick leave to county employees. I begin with R.C. 124.39(B), which states the following:

Except as provided in division (C) of this section, an employee of a political subdivision covered by section 124.38 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. (Emphasis added.)

As noted above, a county employee is "an employee of a political subdivision covered by section 124.38." County employees are therefore entitled to be paid for unused sick leave pursuant to R.C. 124.39(B), provided that they meet all of the requirements of that division. One such requirement is that the election to receive payment be made at the time of retirement from the political subdivision. Thus R.C. 124.39(B) applies to a county employee only where such employee retires from county service, and not where the employment is terminated by means other than retirement. See 1980 Op. Att'y Gen. No. 80-057 at 2-224 to 2-225.

I now turn to the exception mentioned in R.C. 124.39(B), to wit, R.C. 124.39(C). It states:

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.

² R.C. 124.38 now establishes minimum levels of sick leave benefits only for "[e]ach 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." See also Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). Prior to its amendment by Am. Sub. H.B. 694, 114th Gen. A. (1981) (eff. Nov. 15 1981) R.C. 124.38 also applied to "[e]ach employee whose salary or wage is paid in whole or in part by the state."

³ R.C. 124.382 establishes amounts of sick leave credit and rates of sick leave compensation for "all employees whose salary or wage is paid directly by warrant of the auditor of state." See 124.382(B).

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

My predecessor determined that "political subdivision" as used in R.C. 124.39(C) refers only to those political subdivisions covered by R.C. 124.38 or R.C. 3319.141. 1981 Op. Att'y Gen. No. 81-015 at 2-58. Since counties are covered by R.C. 124.38, counties are within the purview of R.C. 124.39(C). My predecessor also determined that R.C. 124.39(C) is a constricting statute in that it defines the parameters applicable to a political subdivision seeking to pay out unused sick leave in a manner other than that set forth in R.C. 124.39(B). 1981 Op. Att'y Gen. No. 81-052 at 2-204. Applying that conclusion to the question under consideration, I find that a county may modify the amount to which an employee is entitled under R.C. 124.39(B) only if such modification accords with R.C. 124.39(C). Under R.C. 124.39(C), in order for a county to make payments for unused sick leave to its employees upon termination of employment other than by retirement, it must adopt a policy for doing so. See Op. No. 80-057 at 2-225. Thus, I conclude that a county may make payments for unused sick leave to its employees who separate from employment, but do not retire, if it has, pursuant to R.C. 124.39(C), adopted a policy for making such payments. The board of county commissioners is the proper authority for promulgating such a policy. See 1978 Op. Att'y Gen. No. 78-057 at 2-140. In addition, various county officers and boards have general authority to fix the compensation of their employees. See, e.g., R.C. 325.19. As noted above, such authority allows the appointing officer or board to "adopt its own policy with regard to payment for unused sick leave for its employees, provided that [such] policy 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." Op. No. 81-015 at 2-59.

Therefore, it is my opinion, and you are so advised, that a county may pay a county employee for unused sick leave when such employee separates from employment, but does not retire, only if the board of county commissioners has adopted, pursuant to R.C. 124.39(C), a policy for making such payment or if the employee's appointing authority has adopted a policy authorizing such payment.