OPINION NO. 2005-027

Syllabus:

R.C. 124.39(C) does not authorize a county appointing authority to adopt a sick leave accrual policy for its employees that excludes overtime hours worked and compensatory time used from a county employee's completed hours of service for which R.C. 124.38 entitles a county employee to accrue sick leave benefits at the rate of 4.6 hours for each completed eighty hours of service.

To: Ron O'Brien, Franklin County Prosecuting Attorney, Columbus, Ohio
By: Jim Petro, Attorney General, June 29, 2005

You have submitted an opinion request in which you ask: "May a county appointing authority, pursuant to R.C. 124.39(C)(3), adopt a policy providing for sick leave accrual based upon a formula that excludes overtime and compensatory time hours as set forth in R.C. 124.382(B)?" As we will explain, R.C. 124.39 does not authorize a county appointing authority to adopt a sick leave accrual policy that excludes overtime hours worked or compensatory time used from an employee's completed hours of service for purposes of R.C. 124.38.

In order to address your concerns, we must first consider the statutory scheme governing the accrual of sick leave benefits by county employees. The basic grant of sick leave benefits to county employees is set forth in R.C. 124.38, which states, in pertinent part:

> Each of the following shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay:
>
> (A) Employees in the various offices of the county, municipal, and civil service township service, other than superintendents and management employees, as defined in section 5126.20 of the Revised Code, of county boards of mental retardation and developmental disabilities....

Accordingly, R.C. 124.38(A) entitles a county employee to accrue 4.6 hours of sick leave with pay for each completed 80 hours of service.[1]

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[1] You have not asked about the power of a county appointing authority to alter its employees' sick leave benefits in the context of collective bargaining, and this opinion will not consider that possibility in answering your question. For the sake of completeness, however, we note that R.C. 4117.03(A)(4) authorizes county employees, among other public employees, to "[b]argain collectively with their public employers to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements." For purposes of R.C. 4117.03(A)(4), the term "wages" means "hourly rates of pay, salaries, or other forms of compensation for services rendered." R.C. 4117.01(M). Because sick leave benefits are a form of compensation, *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), the sick leave benefits to a which a county employee is entitled under R.C. 124.38 may be varied by the terms of a collective bargaining agreement. *Deeds v. City of Ironton*, 48 Ohio App. 3d 7, 548 N.E.2d 254 (Lawrence County 1988) (syllabus) (stating, in part, "[s]ince payment for sick leave affects wages and terms and conditions of employment, it is subject to collective bargaining between a public employer and its employees"). *See generally* 1998 Op. Att'y Gen. No. 98-028 (discussing the statutory scheme governing collective bargaining for public employees).

In addition, we must mention the last paragraph of R.C. 124.38, which states:

> Notwithstanding this section or any other section of the Revised Code, *any appointing authority of a county office*, department, commission, board, or body *may*, upon notification to the board of county commissioners, *establish alternative schedules of sick leave* for employees of the appointing authority for whom the state employment relations board has not established an appropriate bargaining unit pursuant to section 4117.06 of the Revised Code, provided that the alternative schedules are not inconsistent with the provisions of a collective bargaining agreement covering other employees of that appointing authority. (Emphasis added.)

This portion of R.C. 124.38 thus limits the power of a county appointing authority, in certain situations, to vary the sick leave benefits prescribed for county employees by R.C. 124.38(A).

As explained in 1999 Op. Att'y Gen. No. 99-039, in those situations in which only some of the appointing authority's employees are in a bargaining unit and only some of the appointing authority's employees are subject to a collective bargaining agreement, a county appointing authority may establish an alternative schedule of sick leave for those of its employees for whom the State Employment Relations Board (SERB) has not established an appropriate bargaining unit pursuant to R.C. 4117.06. In such a situation, in adopting an alternative schedule of sick

Pursuant to 2 Ohio Admin. Code 123:1-32-03(A):

> *All employees in the various offices of the counties*, except superintendents and management employees, as defined in [R.C. 5126.20], of county boards of mental retardation and developmental disabilities, and state colleges or universities, including part-time, seasonal, and intermittent, shall earn sick leave credit at the rate of four and six-tenths hours for each eighty hours of *completed service unless* the county agency has adopted policies for accumulation of sick leave in accordance with provisions of [R.C. 124.14(E),[2] R.C. 124.38, or R.C. 124.39]. Sick leave credit shall be prorated to the hours of completed service in each pay period. (Emphasis and footnote added.)

For purposes of rule 123:1-32-03, the term "completed service" means, in pertinent part, "*hours actually worked, including overtime*, and hours of sick leave, vacation leave, *compensatory time*, or personal leave used, but does not include time on disability separation, leave of absence without pay, the period an employee is receiving disability leave benefits, or layoff." 2 Ohio Admin. Code 123:1-47-01(A)(24) (emphasis added). Thus, pursuant to rule 123:1-32-03(A), the number of hours of sick leave a county employee accrues is based upon the number of hours the employee actually works, *including* overtime hours worked and compensatory time used. 1983 Op. Att'y Gen. No. 83-097 (syllabus, paragraph three) ("[t]he sick leave credit which accrues to a county employee pursuant to R.C. 124.38 is to be prorated to the employee's hours of completed service in each pay period in accordance with 1 Ohio Admin. Code 123:1-32-03(A) and 123:1-47-01(A)(24)").

The nature of sick leave benefits granted by R.C. 124.38 was examined in *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), in which the court was asked whether a county employee, pursuant to

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leave, "a county appointing authority may not provide less of such benefits than the minimums otherwise established by statute, and, if such schedules increase the benefits otherwise provided by statute, the schedules may not be inconsistent with the provisions of a collective bargaining agreement covering other employees of that appointing authority." 1998 Op. Att'y Gen. No. 98-028 (syllabus, paragraph two). *See* 1999 Op. Att'y Gen. No. 99-039 (syllabus). In contrast, "[a] county appointing authority that has the power to fix the compensation of its employees, none of whom are in a collective bargaining unit for purposes of R.C. Chapter 4117, may grant such employees vacation and holiday leave or sick leave in excess of the minimum number of hours to which they are entitled by R.C. 325.19(A) and R.C. 124.38. In granting such additional leave, the appointing authority is not limited by the provisions in R.C. 325.19(F) or R.C. 124.38 concerning the adoption of alternative schedules of vacation and holiday leave or sick leave." *Id.*

[2] *See generally* R.C. 124.14(E) (county commissioners' authority to fix the compensation, including sick leave benefits, of employees of the county's department of job and family services). The authority of a county appointing authority to vary its employees' rate of sick leave accrual under R.C. 124.38 and R.C. 124.39 are addressed elsewhere in this opinion.

a policy adopted by the appointing authority, was entitled to receive sick leave benefits in excess of those established by R.C. 124.38. The *Ebert* court began its analysis by examining the language of R.C. 124.38, and determined that "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. 2d at 32.

The *Ebert* court then examined of the powers of the appointing authority over its employees to determine whether the appointing authority had the power to increase its employees' sick leave benefits. As explained by the *Ebert* court:

> Since we interpret R.C. 124.38 as conferring a minimum benefit upon the board's employees, it is necessary to look elsewhere to determine the extent of the board's authority to provide increased sick leave benefits. The express powers and duties of the county board of mental retardation are set forth in R.C. 5126.03(C), which authorizes the board to "[e]mploy such personnel and provide such services, facilities, transportation, and equipment as are necessary." In order for the power to employ to have any significance, it must, of necessity, include the power to fix the compensation of such employees. It should be obvious that sick leave credits, just as other fringe benefits, are forms of compensation. There being no provision in R.C. Chapter 5126 which would constrict the board's power to provide sick leave credits in excess of the minimum level of R.C. 124.38, this court finds that the board's adoption of its pre-1975 sick leave policy was a lawful exercise of its authority.

63 Ohio St. 2d at 33.

Because R.C. 124.38 establishes a minimum sick leave benefit for county employees, it limits the manner in which a county appointing authority may exercise its power to compensate its employees with respect to sick leave benefits. *See Cataland v. Cahill*, 13 Ohio App. 3d 113, 468 N.E.2d 388 (Franklin County 1984) (syllabus) ("[s]ick leave and vacation leave prescribed by statute are minimums only and, where the appointing authority is authorized to establish compensation of employees, either sick-leave or vacation-leave benefits in addition to the minimums prescribed by statute may be granted as part of compensation"). Thus, a county appointing authority with the power to fix its employees' compensation may grant its employees sick leave benefits *in excess of* those authorized by R.C. 124.38, subject to any statutory restrictions on the granting of that benefit. *Ebert v. Stark County Bd. of Mental Retardation*; *Cataland v. Cahill*. *See* 1981 Op. Att'y Gen. No. 81-052.

Unlike the situation in *Ebert*, however, the county appointing authority about whom you ask wishes to decrease the number of sick leave hours an employee may earn by excluding overtime hours worked and compensatory time used from an employee's completed hours of service, the hours for which R.C. 124.38 entitles an employee to accrue sick leave benefits. You specifically ask whether a county appointing authority, pursuant to R.C. 124.39(C)(3), may adopt a policy

providing for the accrual of sick leave benefits without regard to the employees' hours of overtime and compensatory time "as set forth in R.C. 124.382."[3]

Let us examine R.C. 124.39, which 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.
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> ....
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> (B) Except as provided in division (C) of this section, an employee of a political subdivision covered by [R.C. 124.38 or R.C. 3319.141] 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 the employee's 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.
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> (C) *A political subdivision may adopt a policy allowing an employee to receive payment* for more than one-fourth the value of the employee's unused sick leave or for more than the aggregate value of thirty days of the employee's 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.
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> Notwithstanding [R.C. 325.17] or any other section of the Revised Code authorizing any appointing authority of a county office, department, commission, or board to set compensation, any modification of the right provided by division (B) of this section, and any policy adopted under division (C) of this section, shall only apply to a county office, department, commission, or board if it is adopted in one of the following ways:
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> (1) By resolution of the board of county commissioners for any office, department, commission, or board that receives at least one-half of its funding from the county general revenue fund;

[3] R.C. 124.382(B) establishes sick leave benefits for certain employees paid directly by warrant of the Auditor of State, as follows: "Each full-time permanent and part-time permanent employee whose salary or wage is paid directly by warrant of the auditor of state shall be credited with sick leave of three and one-tenth hours for each completed eighty hours of service, *excluding overtime hours worked.*" (Emphasis added.) R.C. 124.382(B) does not apply, however, to county employees.

> (2) By order of any appointing authority of a county office, department, commission, or board that receives less than one-half of its funding from the county general revenue fund. Such office, department, commission, or board shall provide written notice to the board of county commissioners of such order.
>
> (3) As part of a collective bargaining agreement.
>
> A *political subdivision* may adopt policies similar to the provisions contained in [R.C. 124.382-.386].[4] (Emphasis and footnote added.)

Thus, R.C. 124.39(C),[5] in part, authorizes a "political subdivision" to make certain variations in the sick leave payment provisions described in R.C. 124.39(B).

As explained in 1990 Op. Att'y Gen. No. 90-074 at 2-320: "R.C. 124.39(C) now limits the manner in which a payment for unused sick leave policy may be adopted, other than through a collective bargaining agreement, for employees of individual county appointing authorities." Any other policy governing payment for unused sick leave must be adopted "(1) By resolution of the board of county commissioners for any office, department, commission, or board that receives at least one-half of its funding from the county general revenue fund; (2) By order of any appointing authority of a county office, department, commission, or board that receives less than one-half of its funding from the county general revenue fund. Such office, department, commission, or board shall provide written notice to the board of county commissioners of such order." R.C. 124.39(C). The subject of these policies, however, is payment for an employee's unused sick leave, not the accrual of sick leave benefits. *See* 2005 Op. Att'y Gen. No. 2005-020, slip op. at 7 ("R.C. 124.39 addresses benefits that are related to, but different from, the sick leave benefits addressed in R.C. 124.38. While R.C. 124.38 governs the provision of and payment for sick leave, R.C. 124.39 establishes procedures for paying employees, in certain circumstances, for sick leave that has been accrued but not used").

As mentioned in your request, R.C. 124.39 also authorizes a political subdivision to "adopt policies similar to" those in R.C. 124.382-.386. R.C. 124.39(C). Examination of R.C. 124.382-.386 reveals that only R.C. 124.382 addresses the accrual of sick leave benefits, and excludes overtime hours worked by an employee from the employee's completed hours of service for which sick leave

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[4] R.C. 124.382 (see note 3, *supra*); R.C. 124.383 (options with respect to sick leave credit remaining at end of year for those full-time and part-time employees who accrue sick leave under R.C. 124.382(B)); R.C. 124.384 (payment options for accumulated sick leave of certain state employees); R.C. 124.385 (disability leave benefits for certain state employees); R.C. 124.386 (personal leave benefits for certain state employees).

[5] Your opinion request specifically refers to R.C. 124.39(C)(3). I am assuming that your reference is to the portion of R.C. 124.39 that authorizes a "political subdivision" to adopt policies similar to those in R.C. 124.382-.386.

benefits are granted. *See generally* note three, *supra*. The sick leave accrual method established by R.C. 124.382 does not, however, exclude from an employee's completed hours of service any compensatory hours used by the employee. Thus, although R.C. 124.39(C) authorizes a political subdivision to adopt a sick leave accrual policy like that set forth in R.C. 124.382, and thereby exclude overtime hours worked from an employee's completed hours of service for which an employee accrues sick leave benefits, it does not authorize a political subdivision to adopt a sick leave accrual policy that excludes compensatory hours used from the completed hours of service for which an employee accrues sick leave benefits.

With respect to the operation of R.C. 124.39(C), we note that R.C. 124.39(C) authorizes a "political subdivision," but not individual "appointing authorities," to adopt policies similar to those set forth in R.C. 124.382-.386. *State ex rel. Myers v. Portage County*, 80 Ohio App. 3d 584, 609 N.E.2d 1333 (Portage County 1992). The authority R.C. 124.39(C) vests in the county as a political subdivision must be exercised by the board of county commissioners, not by individual county appointing authorities. As explained in 1978 Op. Att'y Gen. No. 78-057 at 2-139 to 2-140: "A political subdivision acts through natural persons designated by statute. In the case of a county, its board of county commissioners is vested with the authority to do whatever the county, as a quasi-corporate entity, might do if capable of rational action, except in respect to matters the cognizance of which is vested in some other officer or person." *See* 2000 Op. Att'y Gen. No. 2000-020 at 2-121 n.2. Thus, R.C. 124.39(C) authorizes a county's board of commissioners, not county appointing authorities, to adopt policies similar to the provisions contained in R.C. 124.382-.386.

Based upon the foregoing, it is my opinion, and you are hereby advised that, R.C. 124.39(C) does not authorize a county appointing authority to adopt a sick leave accrual policy for its employees that excludes overtime hours worked and compensatory time used from a county employee's completed hours of service for which R.C. 124.38 entitles a county employee to accrue sick leave benefits at the rate of 4.6 hours for each completed eighty hours of service.