

**OPINION NO. 2008-004****Syllabus:**

2008-004

A county appointing authority that has both bargaining unit employees and non-bargaining unit employees has the power under R.C. 325.19(F), upon notification to the board of county commissioners, to adopt for its non-bargaining unit employees an alternative schedule entitling them to be paid for their accrued, unused vacation leave at times other than upon the employees' separation from service or death, where at least one collective bargaining agreement so entitles the appointing authority's bargaining unit employees. (1987 Op. Att'y Gen. No. 87-063, 1989 Op. Att'y Gen. No. 89-012, 1991 Op. Att'y Gen. No. 91-050, 1994 Op. Att'y Gen. No. 94-009, 1998 Op. Att'y Gen. No. 98-028, 1999 Op. Att'y Gen. No. 99-039, and 2005 Op. Att'y Gen. No. 2005-018, qualified and questioned.)

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**To: Julia R. Bates, Lucas County Prosecuting Attorney, Toledo, Ohio**

**By: Marc Dann, Attorney General, January 14, 2008**

You have requested an opinion whether a county appointing authority may pay non-bargaining unit employees for their accrued, unused vacation leave, at a time other than upon separation from service or death, if a collective bargaining agreement authorizes payments at such other time for the appointing authority's bargaining unit employees who are covered by the agreement. You have stated that an elected county officer has negotiated a collective bargaining agreement under

which his office's bargaining unit employees are entitled to be paid for up to forty hours of vacation leave each year,<sup>1</sup> and you wish to know whether the officer has the authority to adopt a policy providing this same benefit to the non-bargaining unit employees in his office.

### **Statutory Vacation Leave Benefits for County Employees**

County employees are entitled to paid vacation leave under R.C. 325.19. The rate at which an employee accrues vacation time depends upon the number of years he has served with the county, the state, and other political subdivisions of the state. R.C. 9.44; R.C. 325.19(A). An employee must take his vacation leave during the year in which it accrued and before the next anniversary date of his employment. R.C. 325.19(C). His appointing authority may, "in special and meritorious cases, permit such employee to accumulate and carry over the employee's vacation leave to the following year," although "[n]o vacation leave shall be carried over for more than three years." *Id.*<sup>2</sup>

An employee who separates from county service is entitled to receive pay-

<sup>1</sup> See R.C. 4117.03(A)(4) (public employees have the right 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"); R.C. 4117.10(A) ("[a]n agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement . . . [w]here no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees"); 1989 Op. Att'y Gen. No. 89-012 at 2-47 (vacation leave benefits are a matter subject to collective bargaining under R.C. Chapter 4117). See also R.C. 4117.05 (selection of an employee organization as the exclusive representative of all public employees in an appropriate collective bargaining unit); R.C. 4117.06 (determination of an appropriate collective bargaining unit).

<sup>2</sup> Division (C) of R.C. 325.19 reads in full:

Days specified as holidays in section 124.19 of the Revised Code shall not be charged to an employee's vacation leave. Vacation leave shall be taken by the employee during the year in which it accrued and prior to the next recurrence of the anniversary date of the employee's employment, provided that the appointing authority may, in special and meritorious cases, permit such employee to accumulate and carry over the employee's vacation leave to the following year. No vacation leave shall be carried over for more than three years. An employee is entitled to compensation, at the employee's current rate of pay, for the prorated portion of any earned but unused vacation leave for the current year to the employee's credit at time of separation, and in addition shall be compensated for any unused vacation leave accrued to the employee's credit, with the permission of the appoint-

ment, at his current rate of pay, “for the prorated portion of any earned but unused vacation leave for the current year to the employee’s credit at time of separation,” and may be paid, “with the permission of the appointing authority,” for any unused vacation leave he has accrued for the immediately preceding three years. R.C. 325.19(C). *See generally* 2005 Op. Att’y Gen. No. 2005-018 at 2-170 to 2-171 (enumerating employment actions that constitute a “separation” from service for purposes of R.C. 325.19). An appointing authority also must pay for earned but unused vacation leave upon an employee’s death. R.C. 325.19(E). R.C. 325.19 does not otherwise explicitly include other occasions upon which a county employee may be entitled to payment for unused vacation leave.

#### **Alternative Schedules of Vacation Leave**

Division (F) of R.C. 325.19, however, authorizes a county appointing authority to establish, upon notification to the board of county commissioners, “alternative schedules of vacation leave and holidays for employees of the appointing authority for whom the state employment relations board has not established an appropriate bargaining unit pursuant to [R.C. 4117.06], as long as the alternative schedules are not inconsistent with the provisions of at least one collective bargaining agreement covering other employees of that appointing authority, if such an agreement exists.” Pursuant to division (F), therefore, a county appointing authority that has both bargaining unit and non-bargaining unit employees has the power to establish “alternative schedules” providing non-bargaining unit employees the same “vacation leave” enjoyed by the appointing authority’s bargaining unit employees under a collective bargaining agreement.

The overriding purpose served by the adoption of alternative schedules is to “allow[] for the equivalency of . . . benefits among an appointing authority’s employees that are in a bargaining unit and those that are not in a bargaining unit.” 1999 Op. Att’y Gen. No. 99-039 at 2-247. R.C. 325.19(F) was “intended simply to ensure that, within the office of a single county appointing authority, those employees who were not part of a bargaining unit could obtain . . . vacation leave, and holiday benefits equivalent to those obtained by bargaining unit employees either pursuant to a collective bargaining agreement or by statute, while assuring the non-bargaining unit employees the minimums otherwise specified by statute.” 1998 Op. Att’y Gen. No. 98-028 at 2-153. At the same time, however, R.C. 325.19(F) prevents an appointing authority from providing to non-bargaining unit employees greater vacation leave benefits than are provided in at least one collective bargaining agreement covering the appointing authority’s bargaining unit employees.

In light of R.C. 325.19(F) and the purpose it serves to “allow for the equivalency of benefits,” we conclude that an appointing authority that has both bargaining and non-bargaining unit employees may adopt, upon notification to the board of county commissioners, alternative schedules of vacation leave entitling non-bargaining unit employees to be paid for unused vacation leave at times other

ing authority, for the three years immediately preceding the last anniversary date of employment.

than upon their separation from service or death, where at least one collective bargaining agreement covering bargaining unit employees of the appointing authority includes that benefit.<sup>3</sup> In this instance, the county officer employs both bargaining unit and non-bargaining unit employees, and a collective bargaining agreement entitles bargaining unit employees in his office to be paid for up to forty hours of vacation leave each year. Therefore, the county officer has the authority under R.C. 325.19(F) to adopt an alternative schedule, upon notification to the board of county commissioners, entitling his non-bargaining unit employees to be paid for up to forty hours of vacation leave each year.

### Qualification of Earlier Opinions

Prior to the enactment of division (F) of R.C. 325.19 in 1989, opinions of this office concluded that appointing authorities had no authority to vary the terms of division (C) of R.C. 325.19, *see* note 2, *supra*.<sup>4</sup> And, those opinions discussing the power of appointing authorities to vary the terms of division (C) that have been issued since the enactment of division (F) have assumed implicitly that the appointing authority had no bargaining unit employees covered by a collective bargaining agreement providing the benefit at issue, and have not addressed division (F).<sup>5</sup> The conclusion we have reached in response to your question causes us to qualify these

<sup>3</sup> We emphasize, however, that if a collective bargaining agreement grants bargaining unit employees fewer vacation leave benefits than the minimum levels established by statute, an appointing authority may not similarly reduce the vacation leave benefits of non-bargaining unit employees. *See* 1998 Op. Att’y Gen. No. 98-028 (syllabus, paragraph 2) (an appointing authority may not provide under alternative schedules fewer 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”). For example, if a collective bargaining agreement provided that bargaining unit employees were entitled at no time to payment for unused vacation leave, such provision could not be applied to non-bargaining unit employees—they would still be entitled under R.C. 325.19(C) and (E) to be paid for unused vacation leave upon separation from service or death.

<sup>4</sup> *See, e.g.*, 1989 Op. Att’y Gen. No. 89-012; 1987 Op. Att’y Gen. No. 87-063.

The language authorizing a county appointing authority that has both bargaining and non-bargaining unit employees to establish for non-bargaining unit employees “alternative schedules” of vacation leave and holidays that match the benefits provided under a collective bargaining agreement covering bargaining unit employees was added to R.C. 325.19, as part of newly enacted division (F), in 1989. Am. Sub. S.B. 358, 117th Gen. A. (1988) (eff. March 17, 1989).

<sup>5</sup> *See, e.g.*, 1994 Op. Att’y Gen. No. 94-009; 1991 Op. Att’y Gen. No. 91-050. *Cf.* 2005 Op. Att’y Gen. No. 2005-018 at 2-170, n. 3 (opinion explicitly assumes that county appointing authorities have not adopted alternatives schedules of vacation leave and holidays).

opinions with respect to appointing authorities that employ both bargaining unit and non-bargaining unit employees. More importantly, however, division (F) has been amended recently to expand the power of county appointing authorities to provide vacation leave benefits to their employees, calling into doubt whether these opinions, and perhaps others,<sup>6</sup> continue to represent a correct statement of the law.

Specifically, division (F) of R.C. 325.19 was amended in 2007 by Sub. H.B. 187, 126th Gen. A. (2006) (eff. July 1, 2007) to grant an appointing authority the power to establish, where no collective bargaining agreement exists, “an alternative schedule of vacation leave and holidays for its employees that does not diminish the vacation leave and holiday benefits granted by this section,” upon notification to the board of county commissioners. Because your question relates to an appointing authority with both non-bargaining unit employees and bargaining unit employees covered by a collective bargaining agreement, we need not further consider the import of Sub. H.B. 187 at this time, but recognize that we will need to fully reconsider these earlier opinions given an appropriate set of facts.<sup>7</sup>

### **Conclusion**

Based on the foregoing, it is my opinion, and you are hereby advised, that a county appointing authority that has both bargaining unit employees and non-bargaining unit employees has the power under R.C. 325.19(F), upon notification to the board of county commissioners, to adopt for its non-bargaining unit employees an alternative schedule entitling them to be paid for their accrued, unused vacation leave at times other than upon the employees’ separation from service or death, where at least one collective bargaining agreement so entitles the appointing authority’s bargaining unit employees. (1987 Op. Att’y Gen. No. 87-063, 1989 Op. Att’y Gen. No. 89-012, 1991 Op. Att’y Gen. No. 91-050, 1994 Op. Att’y Gen. No. 94-009, 1998 Op. Att’y Gen. No. 98-028, 1999 Op. Att’y Gen. No. 99-039, and 2005 Op. Att’y Gen. No. 2005-018, qualified and questioned.)

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<sup>6</sup> See, e.g., 1999 Op. Att’y Gen. No. 99-039; 1998 Op. Att’y Gen. No. 98-028.

<sup>7</sup> R.C. 124.38, which governs the sick leave of county employees, was also amended by Am. Sub. S.B. 358 in 1989 and Sub. H.B. 187 in 2007 to authorize county appointing authorities to establish alternative schedules of sick leave under the same circumstances as they may establish alternative schedules of vacation leave and holidays under R.C. 325.19(F). Therefore, sick leave opinions such as 2005 Op. Att’y Gen. No. 2005-020, 2000 Op. Att’y Gen. No. 2000-020, 1993 Op. Att’y Gen. No. 93-027, and 1990 Op. Att’y Gen. No. 90-074 may also need to be re-examined under an appropriate set of facts.