

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

2005 Op. Att'y Gen. No. 2005-018 was questioned by  
2008 Op. Att'y Gen. No. 2008-004.

2005 Op. Att'y Gen. No. 2005-018 was overruled in part  
and modified in part by 2009 Op. Att'y Gen. No. 2009-009.

**OPINION NO. 2005-018****Syllabus:**

1. At the time a Brown County Municipal Court assistant clerk is terminated from that position, she “separates” from service for purposes of R.C. 325.19, even though she is immediately hired by the judge of the Brown County Municipal Court as the court’s assignment commissioner. R.C. 325.19(C) requires the Brown County Clerk of Courts to pay the employee, at the time of separation, “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 ... for any unused vacation leave accrued to the employee’s credit, with the permission of the appointing authority, for the three years immediately preceding the last anniversary date of employment.” At the time this employee terminates her employment as the Brown County Municipal Court’s assignment commissioner in order to return to her former position as assistant clerk of that court, the employee “separates” from service for purposes of R.C. 325.19, and at such time must be paid, in accordance with the terms of R.C. 325.19(C), for unused vacation leave earned in her position as assignment commissioner.
2. R.C. 325.19 does not authorize a county employee, upon separation from service with a county appointing authority, to transfer unused vacation leave benefits to a position of employment with a different appointing authority.
3. The appointing authorities of a county employee who terminates her employment with one county appointing authority and becomes employed by a different county appointing authority may not vary the requirement of R.C. 325.19(C) that an employee be compensated for unused vacation leave as described therein at the time the employee separates from employment.
4. In the absence of an alternative policy adopted by a board of county

commissioners under R.C. 124.39(C) that permits a PERS retirant who is employed by the county to be paid for accumulated sick leave at the time the employee terminates her post-retirement county employment, R.C. 124.39 does not entitle such retirant to receive payment for unused sick leave upon termination of such post-retirement county employment, because such termination of employment is not a disability or service retirement under a state or municipal retirement system in this state.

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**To: Thomas F. Grennan, Brown County Prosecuting Attorney, Georgetown, Ohio**

**By: Jim Petro, Attorney General, April 29, 2005**

You have submitted an opinion request concerning payment to particular employees of the Brown County Clerk of Courts' office for specific fringe benefits accumulated in their employment by the Brown County Clerk of Courts, the judge of the Brown County Municipal Court, and the Brown County Auditor. Because a public employee's entitlement to certain fringe benefits depends upon the particular circumstances of his employment, we will separately address your concerns about each employee, based upon the scenarios you have described. It is our understanding that none of the employees about whom you ask are subject to collective bargaining agreements in the positions described.

**Employee #1**

You state that the Clerk of Courts of the Brown County Municipal Court, a position filled *ex officio* by the Brown County Clerk of Courts, *see* R.C. 1901.31(A)(2)(c), terminated the employment of a municipal court assistant clerk. The Brown County Municipal Court Judge immediately hired the former assistant clerk as the court's assignment commissioner. When the new Brown County Clerk of Courts assumed office, the employee ended her service as assignment commissioner, and resumed her former position, at the same salary, as a municipal court assistant clerk. According to a member of your staff, your concerns regarding this employee are as follows:

1. Given the unique circumstances, was there a separation of service from the Brown County Clerk's Office when this employee was terminated? Was there a separation from service when the employee resumed her position with the clerk's office?
2. May the employee transfer any or all of her accumulated vacation time? Does the accumulated vacation time have to be paid? How much vacation time must be paid?

Your questions concern the treatment of the employee's unused vacation leave. In order to determine the manner in which this employee was entitled to accumulate, use, and be paid for vacation benefits as assistant clerk of the Brown County Municipal Court, and subsequently as assignment commissioner of that

court, we must examine the manner in which the Brown County Municipal Court is established and operates. As explained in 1990 Op. Att’y Gen. No. 90-110, the manner in which the operating costs, including the compensation of court personnel, are funded in the municipal courts throughout the state is not uniform. Instead, “municipal courts [appear to] have no universal identity within R.C. Chapter 124 as entities of the state or one of the other subdivisions listed in R.C. 124.01(A).” 1990 Op. Att’y Gen. No. 90-110 at 2-488. Concerning vacation leave benefits for municipal court employees, 1990 Op. Att’y Gen. No. 90-110 concluded in paragraph four of the syllabus that:

The various compensating authorities within a municipal court may prescribe vacation leave and holiday benefits as part of the compensation of the employees whose compensation they fix; such compensating authorities are given discretion to determine, upon examination of the operation of the municipal court served by such employees, whether its employees are county employees for purposes of the minimum vacation and holiday benefits prescribed by R.C. 325.19.

Your letter indicates that Brown County Municipal Court employees are treated as county employees, and are granted vacation leave benefits in accordance with R.C. 325.19. Based upon the county-wide jurisdiction of the court, the county commissioners’ payment of the court’s operating costs,<sup>1</sup> and the court’s origination as a county court,<sup>2</sup> it appears reasonable that Brown County Municipal Court employees are “county employees” for purposes of vacation leave.

R.C. 325.19(C) provides for payment of a county employee’s unused vacation leave, in pertinent part, as follows:

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 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

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<sup>1</sup> See generally R.C. 1901.02(B) (stating, in part, “[b]eginning February 9, 2003, the Brown county municipal court has jurisdiction within Brown county”); R.C. 1901.024(D) (the Brown County Board of Commissioners pays all of the operating costs of the municipal court); R.C. 1901.03(F) (the Brown County Municipal Court is a “county-operated municipal court”).

<sup>2</sup> Pursuant to Am. Sub. H. B. 530, 124th Gen. A. (2002) (eff., in pertinent part, Feb. 9, 2003), the General Assembly abolished the Brown County County Court, effective February 9, 2003, and established the Brown County Municipal Court as it is currently configured.

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 appointing authority, for the three years immediately preceding the last anniversary date of employment. (Emphasis added.)

In accordance with R.C. 325.19(C), therefore, a county employee is entitled to be paid "at time of separation" for earned, unused vacation leave accumulated during the current year and shall be paid for unused vacation leave accrued, with the appointing authority's permission, during the three years immediately preceding the employee's last anniversary date of employment.<sup>3</sup> As stated in 1991 Op. Att'y Gen. No. 91-050, the portion of R.C. 325.19(C) concerning payment for certain unused vacation leave imposes a mandatory duty upon an appointing authority to pay an employee for such leave at the time the employee separates from service. We concur with this conclusion.

You specifically ask whether the employee you describe "separated" from employment for purposes of R.C. 325.19 when the clerk of courts terminated her from her employment as assistant clerk of the Brown County Municipal Court. You state that, upon the employee's termination by the clerk of courts, the judge of the Brown County Municipal Court immediately hired the employee as the court's assignment commissioner. When the new clerk of courts assumed office, however, the employee left her position as assignment commissioner to return to her former position as assistant clerk of the Brown County Municipal Court.

The employment actions that constitute a "separation" for purposes of R.C. 325.19 include, among others, "leaving county employment to become employed by another county, 1983 Op. Att'y Gen. No. 83-074; leaving employment with one county appointing authority to become employed by a different appointing authority within the same county, 1981 Op. Att'y Gen. No. 81-001; and leaving county employment to serve as an officer of the county, 1980 Op. Att'y

<sup>3</sup> R.C. 325.19(F) states:

(F) 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 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], provided that the alternative schedules are not inconsistent with the provisions of a collective bargaining agreement covering other employees of that appointing authority.

You have not indicated that any of the relevant county appointing authorities have adopted such alternative schedules of vacation leave and holidays. This opinion will assume, therefore, that there are no such policies. *See generally* 1999 Op. Att'y Gen. No. 99-039 (concerning the adoption of alternative vacation leave schedules under R.C. 325.19(F)).

Gen. No. 80-057.” 1994 Op. Att’y Gen. No. 94-009 at 2-38. Even if an employee changes appointing authorities within the same county, such change in employment constitutes a “separation” for purposes of R.C. 325.19. 1981 Op. Att’y Gen. No. 81-001 (syllabus, paragraph one) (“[w]hen an individual leaves employment with one appointing authority of a county to become employed immediately by another appointing authority of that county, such a change in employment constitutes a ‘separation’ for purposes of R.C. 325.19. Upon such separation, the employee is entitled to payment by the first appointing authority for vacation leave accumulated but unused during the period of employment with that appointing authority”).

In applying these principles to the situation involving Employee #1, we begin by noting that an assistant clerk of the Brown County Municipal Court is appointed by the Brown County Clerk of Courts. R.C. 1901.31(A)(2)(c) (authorizing the Brown County Clerk of Courts to appoint, among others, “assistant clerks as the judge of the court determines are necessary, all of whom shall receive the compensation that the legislative authority prescribes”).<sup>4</sup> The Brown County Municipal Court’s assignment commissioner, however, is appointed by the judge of that court, although it is the Brown County Board of Commissioners that fixes the compensation for that position. R.C. 1901.33 (authorizing the judge of a municipal court to appoint, among others, an assignment commissioner). Because the clerk of courts and the judge of the municipal court are separate appointing authorities, *see* R.C. 124.01(D) (defining “appointing authority”), the employee you describe “separated” from her employment for purposes of R.C. 325.19 first when she left her position as assistant clerk of the Brown County Municipal Court to become the court’s assignment commissioner, and again when she left her position as assignment commissioner to return to her position as assistant clerk of the Brown County Municipal Court.

You also ask whether this employee could “transfer” her accumulated vacation leave from one position to another. As set forth above, R.C. 325.19(C) requires that an appointing authority pay an employee at the time of separation for any unused vacation leave within the limits described in R.C. 325.19(C). Neither R.C. 325.19 nor any other statute authorizes an employee to “transfer” unused vacation leave to a position in the employ of a different appointing authority. *Cf.* R.C. 124.38 (entitling an employee to be credited with limited unused sick leave benefits at the time of reemployment within a period of ten years and to transfer a limited amount of accumulated sick leave benefits to certain other positions of public employment).<sup>5</sup> We conclude, therefore, that R.C. 325.19 does not authorize an

<sup>4</sup> The “legislative authority” of the Brown County Municipal Court is the Brown County Board of Commissioners. *See* R.C. 1901.03(B).

<sup>5</sup> R.C. 124.38 states, in pertinent part:

The previously accumulated sick leave of an employee who has been separated from the public service shall be placed to the employee’s credit upon the employee’s re-employment in the public service, provided that such re-employment takes place within ten years of the date on which

individual who terminates her employment as assistant clerk of the Brown County Municipal Court and who immediately thereafter commences employment as that court's assignment commissioner to transfer her unused vacation leave benefits earned as assistant clerk to her position as assignment commissioner, because the two positions are under different appointing authorities. Similarly, when the individual terminates her employment as assignment commissioner to return to her former position as assistant clerk, R.C. 325.19 does not authorize her to transfer any vacation leave earned as assignment commissioner to her position as assistant clerk.

In addition, you ask whether the employee may, by agreement between the current clerk of courts and the municipal court judge, transfer her unused vacation leave from her employment as assistant clerk to her position as assignment commissioner, and back to her position as assistant clerk. No express statutory provision empowers an appointing authority to vary the vacation leave payment provisions of R.C. 325.19(C). The question whether appointing authorities have implied authority, as part of the power to fix their employees' compensation, to alter the vacation leave payment provisions of R.C. 325.19(C) was addressed in 1991 Op. Att'y Gen. No. 91-050 at 2-259, in part, as follows:

County appointing authorities have the power to fix their employees' compensation, including fringe benefits, to the extent such power is not constricted by applicable statutory provisions. *See, e.g.*, 1987 Op. Att'y Gen. No. 87-018 (county sheriff's authority to provide fringe benefits for his employees). *See generally* 1981 Op. Att'y Gen. No. 81-052 (discussing the extent to which an appointing authority's power to compensate may be restricted by statute). Thus, a county appointing authority may, to some extent, vary the provisions of R.C. 325.19 for that appointing authority's employees. *Cataland v. Cahill*, 13 Ohio App. 3d 113, 468 N.E.2d 388 (Franklin County 1984) (concluding that R.C. 325.19 provides only a minimum number of hours of vacation leave for county employees which may be increased by the appointing authority pursuant to his power to prescribe compensation). As stated in 1987 Op. Att'y Gen. No. 87-063 at 2-388, however: "Although an appointing authority may grant vacation leave to employees beyond the minimum number of vacation leave hours to which an employee is entitled under the statute, *R.C. 325.19 limits, among other things, the instances in which an employee may receive payment for such unused leave*" (emphasis added).

.... R.C. 325.19(C) establishes only one method of disposition of those vacation leave benefits remaining to a county employee's credit at the time he separates from employment. R.C. 325.19(C) thus provides

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the employee was last terminated from public service. An employee who transfers from one public agency to another shall be credited with the unused balance of the employee's accumulated sick leave up to the maximum of the sick leave accumulation permitted in the public agency to which the employee transfers.

that, in such a situation, the appointing authority shall compensate (*i.e.*, pay) the employee for his unused vacation leave. Having prescribed this method, the General Assembly has restricted county appointing authorities in the disposition of an employee's unused vacation leave at the time of separation. Thus, it is beyond the power of individual county appointing authorities to vary the provisions of R.C. 325.19(C) that require a county appointing authority to pay an employee at the time of separation for unused vacation leave the employee was permitted to accumulate while in the appointing authority's employ.

1991 Op. Att'y Gen. No. 91-050 thus concluded that the vacation leave payment provisions contained in R.C. 325.19(C) are not subject to change by a county appointing authority as part of its power to fix the compensation of its employees.

In this regard, we note that, although the Brown County Clerk of Courts has authority under R.C. 1901.31(A)(2)(c) to appoint an assistant clerk of courts, it is the Brown County Board of Commissioners that has the power to fix the assistant clerk's compensation. Similarly, although the Brown County Municipal Court's assignment commissioner is appointed by the judge of that court, it is the Brown County Board of Commissioners that has the power to fix the assignment commissioner's compensation. *See* R.C. 1901.33. Thus, even if individual appointing authorities, in the exercise of their power to prescribe their employees' compensation, could vary the vacation leave payment requirement of R.C. 325.19(C), neither the judge of the Brown County Municipal Court nor the Brown County Clerk of Courts has authority to fix the compensation of the two positions held by the individual you describe.

We conclude, therefore, that the Brown County Clerk of Courts and the judge of the Brown County Municipal Court, as the appointing authorities of Employee #1, may not vary for their employees the requirement of R.C. 325.19(C) that an employee be compensated for unused vacation leave as described therein at the time the employee separates from employment with either appointing authority.

With respect to Employee #1, therefore, we find that, at the time a Brown County Municipal Court assistant clerk is terminated from that position, she has "separated" from service for purposes of R.C. 325.19, even though she is immediately hired by the judge of the Brown County Municipal Court, a separate appointing authority, as the court's assignment commissioner. R.C. 325.19(C) requires the Brown County Clerk of Courts to pay the employee, at time of separation, "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 ... for any unused vacation leave accrued to the employee's credit, with the permission of the appointing authority, for the three years immediately preceding the last anniversary date of employment." Similarly, upon the employee's termination of her employment as the Brown County Municipal Court's assignment commissioner in order to return to her former position as assistant clerk of that court, the employee has "separated" from service for purposes of R.C. 325.19, and at such time must be paid, in accordance with the terms of R.C. 325.19(C), for unused vacation leave earned in her position



as assignment commissioner. R.C. 325.19 does not authorize a county employee, upon separation from service with a county appointing authority, to transfer unused vacation leave benefits to a position of employment with a different appointing authority. In addition, the Brown County Clerk of Courts and the Brown County Municipal Court judge, as the appointing authorities of this employee, may not vary the requirement of R.C. 325.19(C) that an employee be compensated for unused vacation leave as described therein at the time the employee separates from employment with either appointing authority.

#### **Employee #2**

You state that an employee of the county auditor's office terminated her employment with the county auditor and has begun working for the Brown County Clerk of Courts. The employee accumulated vacation time during her employment with the county auditor and would like to maintain her unused vacation leave balance for use in her new employment with the clerk of courts. Again, however, as discussed in reference to Employee #1, R.C. 325.19 does not authorize an employee to "transfer" unused vacation leave to a position in the employ of a different county appointing authority. In addition, the appointing authorities of this employee have no power to vary the requirement of R.C. 325.19(C) that an employee be compensated for unused vacation leave as described therein at the time the employee separates from employment, whether or not she becomes employed immediately thereafter by another county appointing authority. In answer to your question about Employee #2, we conclude that, at the time an employee terminates her employment with a county appointing authority, R.C. 325.19 requires that she be paid for her unused vacation leave in accordance with the terms of division (C) of that statute, whether or not she is subsequently hired by another county appointing authority. The employee's former and current county appointing authorities may not permit the employee to transfer her accumulated vacation leave from her previous county employment to her employment with a different county appointing authority.

Based upon information provided by one of your assistants, we understand that you are no longer concerned with the situation of the employee you describe as Employee #3. We turn, therefore, to your questions about Employee #4.

#### **Employee #4**

You state that Employee #4 retired some years ago from her employment with the Brown County Clerk of Courts in order to retire under the Public Employees Retirement System (PERS), R.C. Chapter 145. After her retirement, she was reemployed by the clerk of courts until a new clerk of courts terminated her employment. At the time her post-retirement employment was terminated, the employee was "73 years old and would be eligible for retirement." You ask whether this employee was entitled to be paid for unused sick leave at the time her post-retirement county employment ended.

Payment for unused sick leave of employees who accrue sick leave under R.C. 124.38 is governed by 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.

....

(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.

(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. (Emphasis added.)

You have stated that the board of county commissioners has not adopted a policy under R.C. 124.39(C) that permits a county employee to be paid for accumulated sick leave upon a termination of employment other than retirement. Thus, whether Employee #4 was entitled to receive payment for her accumulated sick leave at the time the new clerk of courts terminated her post-retirement county employment depends upon whether such termination constitutes a "retirement from active service with the" county for purposes of R.C. 124.39(B).<sup>6</sup>

R.C. 145.38, which addresses situations in which a person who has retired under PERS becomes employed in a position that is subject to PERS, states, in pertinent part:

(A) As used in this section and sections 145.381 and 145.384 of the Revised Code:

(1) "PERS retirant" means a former member of the public employees retirement system who is receiving one of the following:

(a) Age and service retirement benefits under section 145.32, 145.33, 145.331, 145.34, or 145.46 of the Revised Code;

(b) Age and service retirement benefits paid by the public employees retirement system under section 145.37 of the Revised Code;

<sup>6</sup> Because Employee #4 has retired under PERS, we assume that she possesses at least ten years of service credit, a prerequisite to eligibility for payment for unused sick leave under R.C. 124.39(B).

(c) Any benefit paid under a PERS defined contribution plan.

....

(B)(1) Subject to this section and section 145.381 of the Revised Code, a PERS retirant or other system retirant may be employed by a public employer. If so employed, the PERS retirant or other system retirant shall contribute to the public employees retirement system in accordance with section 145.47 of the Revised Code, and the employer shall make contributions in accordance with section 145.48 of the Revised Code.

....

(4)(a) A PERS retirant who has received a retirement allowance for less than two months when employment subject to this section commences shall forfeit the retirement allowance for any month the PERS retirant is employed prior to the expiration of the two-month period. Service and contributions for that period shall not be included in calculation of any benefits payable to the PERS retirant and those contributions shall be refunded on the retirant's death or termination of the employment.

....

(D)(1) Except as provided in division (C) of this section, a PERS retirant or other system retirant subject to this section *is not a member* of the public employees retirement system, and, except as specified in this section does not have any of the rights, privileges, or obligations of membership. Except as specified in division (D)(2) of this section, the retirant is not eligible to receive health, medical, hospital, or surgical benefits under section 145.58 of the Revised Code for employment subject to this section. (Emphasis added.)

For the period of post-retirement county employment, R.C. 145.384 entitles a PERS retirant to elect to receive a monthly annuity or a single lump sum payment, based upon the contributions made by the employee and the employer during that time.

The significance of R.C. 145.38's exclusion of a PERS retirant from membership in PERS is that only "members" of PERS are eligible to retire under an age and service or disability retirement.<sup>7</sup> 2003 Op. Att'y Gen. No. 2003-038. *See generally* R.C. 145.01(B) (excluding from the term "member" for purposes of

<sup>7</sup> PERS provides several types of disability and service retirement for its members. *See, e.g.*, R.C. 145.01(O) (defining "age and service retirement" as meaning "retirement as provided in sections 145.32, 145.33, 145.331, 145.34, 145.37, and 145.46 of the Revised Code"); R.C. 145.01(N)(1) (defining "disability retirement" as meaning "retirement as provided in section 145.36 of the Revised Code"). *See* 2003 Op. Att'y Gen. No. 2003-038 (syllabus, paragraph 2) (determining that, although disability retirement and disability allowance under R.C. Chapter 145 are distinct benefits, "the term 'disability retirement,' as used in R.C. 124.39,

R.C. Chapter 145, various public employees, including those who are excluded from membership by R.C. 145.38).<sup>8</sup> Accordingly, during Employee #4's post-retirement county employment, she was not a "member" of PERS. Because Employee #4 was not a "member" of PERS during her post-retirement county employment, she was not eligible at the time of the termination of that employment to take age and service retirement or disability retirement under R.C. Chapter 145. In addition, because she was not eligible to "retire" from PERS at the time her post-retirement county employment ended, she was not entitled by R.C. 124.39(B) to receive payment for her accumulated sick leave. *See* 2003 Op. Att'y Gen. No. 2003-038 at 2-318 to 2-319 ("when a county employee, who previously took service retirement under STRS, terminates his county employment, he cannot, as a matter of law, retire under PERS, regardless of his age or the duration of his county service. Because he does not retire, he is not entitled at the time he terminates county employment to elect payment for his unused sick leave credit"); 1994 Op. Att'y Gen. No. 94-009 at 2-38 (county employee who retired from PERS and elected not to receive payment for sick leave, and who three days later re-entered county service, will not have another opportunity to receive a cash payment under R.C. 124.39).<sup>9</sup>

In answer to your question, in the absence of an alternative policy adopted includes both disability retirement and a disability allowance provided under the State Teachers Retirement System, the Public Employees Retirement System, or the School Employees Retirement System"). *See generally* R.C. 145.361(eligibility of PERS members for disability allowance).

<sup>8</sup> We understand that Employee #4 retired in February 1993. At that time, R.C. 145.01(B) also excluded from the term "member," with certain exceptions, "a public employee excluded or exempted from membership in the retirement system by section 145.03, 145.031, 145.032, 145.033, 145.034, 145.035, or 145.38 of the Revised Code." 1991-1992 Ohio Laws, Part II, 2016 (Am. S.B. 346, eff. July 29, 1992) (emphasis added).

<sup>9</sup> In the recent case of *Davenport v. Montgomery County*, 2004-Ohio-6781, 2004 Ohio App. Lexis 6343 (Montgomery County Dec. 3, 2004), the Montgomery County Court of Appeals decided that, pursuant to the sick leave payment policy adopted by the Montgomery County Board of Commissioners for county employees, as well as the sick leave payment policy adopted by the Montgomery County Court of Common Pleas for court employees, a court employee who terminated her county employment prior to becoming eligible for retirement under PERS will be entitled, at the time of her retirement under PERS, to receive payment for her accumulated sick leave. The *Davenport* court summarized the local sick leave payment policies, as follows:

[T]he policy adopted by the Montgomery County Board of Commissioners provides that "upon \* \* \* service retirement of employees with ten (10) or more years service with Montgomery County \* \* \*, sick leave may be converted into a cash payment[.]" Similarly, the policy instituted by the Montgomery County Common Pleas

by the board of county commissioners under R.C. 124.39(C) that permits a PERS retirant who is employed by the county to be paid for accumulated sick leave at the time the employee terminates her post-retirement county employment, R.C. 124.39 does not entitle such retirant to receive payment for unused sick leave upon termination of such post-retirement county employment, because such termination of employment is not a disability or service retirement under a state or municipal retirement system in this state.

### Conclusions

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. At the time a Brown County Municipal Court assistant clerk is terminated from that position, she “separates” from service for purposes of R.C. 325.19, even though she is immediately hired by the judge of the Brown County Municipal Court as the court’s as-

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Court states that “if an employee is retiring at age 55 or over with at least ten (10) years of Ohio Public Service credit under the Public Employees Retirement System \* \* \*, he/she is entitled to cash payment for accumulated sick leave[.]”

2004 Ohio App. Lexis 6343 at ¶ 41. The *Davenport* court stated that the employee who terminated her service with the Montgomery County Court of Common Pleas after twenty-five years of service, but prior to attaining age fifty-five, will become eligible to retire under R.C. 145.32 when she reaches age fifty-five. The court reasoned that, because the county commissioners’ policy authorizes payment “upon service retirement,” the employee will be eligible for payment when she becomes eligible to retire under R.C. 145.32. With respect to the court’s sick leave payment policy, the *Davenport* court states that, “[w]hen [the employee] reaches age fifty-five, she will be retiring with at least ten years of service credit under PERS. Therefore, under the terms of the Montgomery County Common Pleas Court policy, she will be entitled to a cash payment for her accumulated sick leave at that time.” *Id.* at ¶ 33.

In reaching this conclusion, the *Davenport* court was not persuaded by the county’s reliance on 1991 Op. Att’y Gen. No. 91-026, which concluded that a public employee subject to R.C. 124.39 who terminates her public employment prior to commencement of her service retirement does not become entitled under R.C. 124.39 to receive payment for her accumulated sick leave when she commences her retirement. The court acknowledged the difference in the terms of R.C. 124.39(B) and the local sick leave payment policies, *i.e.*, neither local sick leave payment policy “requires an individuals to be ‘in active service’ at the time of retirement,” *id.* at ¶ 40, and stressed that in the 1991 opinion, “the Ohio Attorney General was interpreting R.C. § 124.39(B) rather than the sick leave conversion policies established by the Montgomery County Board of Commissioners and the Montgomery County Common Pleas Court.” *Id.* at ¶ 38. Thus, the *Davenport* court’s discussion of 1991 Op. Att’y Gen. No. 91-026 does not compel us to overrule that opinion’s interpretation of the operation of R.C. 124.39.

signment commissioner. R.C. 325.19(C) requires the Brown County Clerk of Courts to pay the employee, at the time of separation, “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 ... for any unused vacation leave accrued to the employee’s credit, with the permission of the appointing authority, for the three years immediately preceding the last anniversary date of employment.” At the time this employee terminates her employment as the Brown County Municipal Court’s assignment commissioner in order to return to her former position as assistant clerk of that court, the employee “separates” from service for purposes of R.C. 325.19, and at such time must be paid, in accordance with the terms of R.C. 325.19(C), for unused vacation leave earned in her position as assignment commissioner.

2. R.C. 325.19 does not authorize a county employee, upon separation from service with a county appointing authority, to transfer unused vacation leave benefits to a position of employment with a different appointing authority.
3. The appointing authorities of a county employee who terminates her employment with one county appointing authority and becomes employed by a different county appointing authority may not vary the requirement of R.C. 325.19(C) that an employee be compensated for unused vacation leave as described therein at the time the employee separates from employment.
4. In the absence of an alternative policy adopted by a board of county commissioners under R.C. 124.39(C) that permits a PERS retirant who is employed by the county to be paid for accumulated sick leave at the time the employee terminates her post-retirement county employment, R.C. 124.39 does not entitle such retirant to receive payment for unused sick leave upon termination of such post-retirement county employment, because such termination of employment is not a disability or service retirement under a state or municipal retirement system in this state.