

February 25, 2019

The Honorable Joel Blue
Guernsey County Prosecuting Attorney
627 Wheeling Avenue
Cambridge, Ohio 43725

SYLLABUS:

2019-007

1. Pursuant to Section 9.44(C) of the Ohio Revised Code, an employee of an Ohio court of common pleas who has previously retired in accordance with the provisions of a retirement plan offered by the state, and who is employed by the court of common pleas on or after June 24, 1987, shall not have service earned with the state, any political subdivision of the state, or a regional council of government prior to retirement counted for the purpose of computing vacation leave, unless the court of common pleas has adopted an alternative schedule of vacation leave that supersedes R.C. 9.44(C).
2. Pursuant to Section 124.38(C) of the Ohio Revised Code, an employee of an Ohio court of common pleas who has previously retired in accordance with the provisions of a retirement plan offered by the state is entitled to receive credit for sick leave benefits that the employee accrued but did not use post-retirement while working for an Ohio municipal corporation, provided that employment with the court of common pleas takes place within ten years of the date on which the employee was last terminated from public service.



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OPINION NO. 2019-007

The Honorable Joel Blue
Guernsey County Prosecuting Attorney
627 Wheeling Avenue
Cambridge, Ohio 43725

Dear Prosecutor Blue:

You have requested an opinion related to the appropriate allowances of vacation and sick leave benefits to be afforded to certain employees of the Guernsey County Court of Common Pleas (the “Court”), each of whom previously retired from public service with another public body. Information that was submitted with your request indicates that the Court recently hired three employees. Two of the newly-hired employees, prior to their appointment to positions with the Court, had retired from employment with the City of Cambridge. At the time of their retirement from employment with the city, both of these employees were paid for their accrued but unused sick leave. The third employee had retired from a position with the Guernsey County Sheriff’s Office and also received payment for accrued but unused sick leave at the time of retirement. You indicate that after retirement from the County Sheriff’s Office, this employee was employed by the City of Cambridge and accrued additional sick leave. It is our understanding that this employee did not receive payment from the city for his or her accumulated sick leave and is now seeking to be permitted to use this sick leave in conjunction with service to the Court. It is our assumption that in your letter you utilize the words “retire” and “retirement” to indicate that each of the employees to which you refer left government service and retired under one of the State of Ohio’s public pension plans.¹

In the context of these facts, you pose the following questions:

¹ Section 124.39(B) of the Ohio Revised Code provides that “an employee of a political subdivision covered by section 124.38 ... 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 the employee’s accrued but unused sick leave credit” up to a limit of “the value of thirty days of accrued but unused sick leave.” For purposes of R.C. 124.39, “retirement” means disability or service retirement under any state or municipal retirement system in this state.” R.C. 124.39.

1. Are employees of a court of common pleas who previously retired under a retirement plan offered by the state entitled to pre-retirement service credit for the purpose of computing their vacation leave accrual under R.C. 9.44 and R.C. 325.19?
2. Is an employee of a court of common pleas who previously retired under a retirement plan offered by the state, and who received payment for accrued but unused sick leave at the time of retirement, entitled to receive credit for sick leave benefits that accrued post-retirement while working for a city?

A county officer, board, or other agency that has the statutory power to employ has the concomitant authority to fix its employees' compensation, including fringe benefits such as paid vacation and sick leave. See *Ebert v. Stark Cnty. Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 33, 406 N.E.2d 1098 (1980); *Cataland v. Cahill*, 13 Ohio App. 3d 113, 468 N.E.2d 388 (Franklin County 1984) (syllabus); 2009 Op. Att'y Gen. No. 2009-009, at 2-61. In *Cataland*, 13 Ohio App. 3d at 114, the court held that "[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." An appointing authority's power to establish a particular fringe benefit may, however, be limited by statute.² As summarized in 1981 Op. Att'y Gen. No. 81-052, at 2-202, "the authority to provide fringe benefits flows directly from the authority to set compensation and is circumscribed only by apposite statutory authority which either ensures a minimum benefit entitlement or otherwise constricts the employer's authority vis a vis a particular fringe benefit." A court of common pleas, therefore, may grant its employees vacation and sick leave benefits, subject only to statutory minimum entitlements and other statutory limitations, if any.

Employees of a court of common pleas accrue vacation leave benefits in accordance with the provisions of R.C. 325.19. 1987 Op. Att'y Gen. No. 87-063, at 2-386 to 2-387 (modified in part by 2009 Op. Att'y Gen. No. 2009-009 and questioned on other grounds by 2008 Op. Att'y Gen. No. 2008-004). Subsection (A) of R.C. 325.19 sets the amount of annual vacation leave to which an employee is entitled under a graduated system based on the number of years the employee has served with the county or another political subdivision of the state. County employees who accrue vacation leave under R.C. 325.19 are entitled to annually accrue more vacation leave after one, eight, fifteen, and twenty-five years of service with the county or any political subdivision of the state. R.C. 325.19(A)(1).

Revised Code Section 9.44(A) expands the types of prior public service that are to be included in determining an employee's longevity for the purpose of computing the employee's annual vacation leave entitlement. It provides:

² The term "appointing authority" is defined by R.C. 124.01(D) as "the officer, commission, board, or body having the power of appointment to, or removal from, positions in any office, department, commission, board, or institution."

Except as otherwise provided in this section, a person employed, other than as an elective officer, by the state or any political subdivision of the state, earning vacation credits currently, is entitled to have the employee's prior service with any of these employers counted as service with the state or any political subdivision of the state, for the purpose of computing the amount of the employee's vacation leave.

R.C. 9.44(A) (emphasis added). Subsection (C) of R.C. 9.44 indicates, however, that:

An employee who has retired in accordance with the provisions of any retirement plan offered by the state³ and who is employed by the state or any political subdivision of the state on or after June 24, 1987, shall not have prior service with the state, any political subdivision of the state, or a regional council of government established in accordance with [R.C. Chapter 167] counted for the purpose of computing vacation leave. (Footnote added.)

Revised Code Section 9.44(C), therefore, establishes an exception to the general allowance of prior service credit under R.C. 9.44(A) so that "an employee who is hired or rehired by the county after retiring under a plan offered by the State may not have included in the years used to compute his vacation leave the service he earned with the county, another political subdivision, or the State prior to retirement." 2009 Op. Att'y Gen. No. 2009-009, at 2-64.

We note that R.C. 325.19(F) authorizes a county appointing authority, in certain circumstances, to adopt an alternative schedule of vacation leave that supersedes the general allowance under R.C. 325.19(A) and the limitation on prior service credit set out in R.C. 9.44(C). *See* 2009 Op. Att'y Gen. No. 2009-009 (syllabus, paragraphs 2 and 4). We are unaware of any alternative schedule of vacation leave that has been adopted by the Court and, for purposes of this opinion, assume that no such alternative schedule of vacation leave exists.⁴

In response to your first question, it is our opinion and you are advised that an employee of the Guernsey County Court Common Pleas who has retired in accordance with a retirement plan offered by the state, and who, thereafter, is employed by the court of common pleas on or after June 24, 1987, "shall not have prior service with the state, any political subdivision of the state, or a

³ Retirement plans offered by the state include the Public Employees Retirement System (R.C. Chapter 145), the Ohio Police and Fire Pension Fund (R.C. Chapter 742), the State Teachers Retirement System (R.C. Chapter 3307), the School Employees Retirement System (R.C. Chapter 3309), and the State Highway Patrol Retirement System (R.C. Chapter 5505).

⁴ The vacation leave provisions of Sections 9.44 and 325.19 of the Ohio Revised Code may be superseded by the terms of a collective bargaining agreement negotiated by and between a public employer and a collective bargaining unit under R.C. Chapter 4117. *See* 2009 Op. Att'y Gen. No. 2009-009, at 2-68 n.14. Revised Code Section 4117.01(C)(8), however, excludes from the definition of the term "public employee," for purposes of R.C. Chapter 4117, officers and employees of a court.

regional council of government ... counted for the purpose of computing vacation leave[,]” unless the court has adopted an alternative schedule of vacation leave that supersedes R.C. 9.44(C).

Your second question concerns a Court employee who retired from the Guernsey County Sheriff’s Office and thereafter worked briefly for the City of Cambridge. We understand that the employee received payment for the employee’s accrued but unused sick leave at the time of retirement from the county sheriff’s office. Section 124.39(B) of the Ohio Revised Code provides that, under certain circumstances, a county employee may elect at the time of retirement to be paid in cash for one-fourth the value of the employee’s accrued but unused sick leave. This payment, however, “eliminates all sick leave credit accrued but unused by the employee at the time payment is made.” R.C. 124.39(B). As explained in 2000 Op. Att’y Gen. No. 2000-020, at 2-121, “although a county employee who retires from county service may choose to be paid for unused sick leave credit under the conditions set forth in R.C. 124.39(B), such payment eliminates all of the employee’s sick leave credit, even though the employee is paid for only one-fourth of his unused hours.” After this particular employee’s retirement, however, and in relation to employment with the City of Cambridge, the employee accrued additional sick leave that was unused as of the date of separation from the city. You ask whether the employee is entitled to use such sick leave in his employment with the Court.

Section 124.38 of the Ohio Revised Code establishes a general scheme for the provision of sick leave benefits for employees of various public entities, including counties and municipalities. It provides, in part, that “[e]mployees in the various offices of the county [and] municipal ... service” are “entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay[.]” R.C. 124.38(A). We are of the opinion that employees of a court of common pleas are in the county service for purposes of R.C. 124.38, and, therefore, are entitled to sick leave benefits in accordance with the provisions of that statute. See *Davenport v. Montgomery Cnty.*, 109 Ohio St. 3d 135, 2006-Ohio-2034, 846 N.E.2d 504 (applying R.C. 124.38 and R.C. 124.39 in analyzing the sick leave benefits of an employee of the Montgomery County Court of Common Pleas); 1987 Op. Att’y Gen. No. 87-063, at 2-386 to 2-387 (modified in part by 2009 Op. Att’y Gen. No. 2009-009 and questioned on other grounds by 2008 Op. Att’y Gen. No. 2008-004) (concluding that “common pleas court employees are considered to be in the county service, and thus entitled to vacation benefits as county employees pursuant to R.C. 325.19”).

Under certain circumstances, Section 124.38(C) of the Ohio Revised Code entitles a newly-hired employee to be credited with unused sick leave benefits the employee previously accumulated during a prior period of public employment. The section provides that “[a]n 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.” R.C. 124.38(C) (emphasis added). The phrase “public agency,” as used in R.C. 124.38, has been considered in a number of prior opinions of Ohio Attorneys General and has been consistently interpreted as including those public agencies whose employees accumulate sick leave benefits under that statute. See, e.g., 1994 Op. Att’y Gen. No. 94-078, at 2-390 to 2-391; 1992 Op. Att’y Gen. No. 92-079, at 2-328; 1985 Op. Att’y Gen. No. 85-075, at 2-294; 1981 Op. Att’y Gen. No. 81-062, at 2-253 to 2-254. In view of the fact that employees of a municipal corporation and employees of a court of common pleas accrue vacation leave under R.C. 124.38, an

individual who transfers from the employ of a municipal corporation to the employ of a court of common pleas has transferred from “one public agency to another” for purposes of R.C. 124.38(C). An individual who makes such a transfer is entitled to be credited by his or her new employer with the unused balance of the employee’s accumulated sick leave up to the maximum amount of the sick leave accumulation permitted by the new employer. Nothing in R.C. 124.38(C) bars the application of its transfer provisions to employees who have previously retired under a state pension plan and been rehired.

From the facts presented to us, it is unclear whether the employee in question transferred directly from employment with the city to that with the Court, or if there was some break between the two periods of employment. Revised Code Section 124.38(C) provides, however, that:

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 the re-employment takes place within ten years of the date on which the employee was last terminated from public service. This ten-year period shall be tolled for any period during which the employee holds elective public office, whether by election or by appointment. (Emphasis added.)

The references in R.C. 124.38(C) to separation from and re-employment in the “public service” have been interpreted to refer to service with public agencies listed in the section, including counties and municipalities. 1994 Op. Att’y Gen. No. 94-078, at 2-391 to 2-392; 1992 Op. Att’y Gen. No. 92-079, at 2-329. A person who has previously separated from service with a municipality prior to becoming employed by a court of common pleas has, therefore, become re-employed “in the public service” for purposes of R.C. 124.38(C) and is entitled to be credited with previously accumulated sick leave, provided that the re-employment takes place within ten years of the date on which the employee was last terminated from public service. Nothing in R.C. 124.38(C) precludes the application of these crediting provisions to employees who have previously retired in accordance with the provisions of a retirement plan offered by the state and who have thereafter accepted subsequent public employment in a manner consistent with that section.⁵

⁵ We note that the last paragraph of R.C. 124.38(C) authorizes a county appointing authority, upon notification to the board of county commissioners, to establish alternative schedules of sick leave for its employees. For purposes of this opinion, we assume that the court of common pleas has not adopted an alternative schedule of sick leave. We note also that any alternative schedule of sick leave adopted by a county appointing authority pursuant to R.C. 124.38(C) must not be inconsistent with the provisions of at least one collective bargaining agreement covering other employees of the appointing authority, or, if no such collective bargaining agreement exists, must not diminish the sick leave benefits granted by R.C. 124.38.

Conclusions

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

1. Pursuant to Section 9.44(C) of the Ohio Revised Code, an employee of an Ohio court of common pleas who has previously retired in accordance with the provisions of a retirement plan offered by the state, and who is employed by the court of common pleas on or after June 24, 1987, shall not have service earned with the state, any political subdivision of the state, or a regional council of government prior to retirement counted for the purpose of computing vacation leave, unless the court of common pleas has adopted an alternative schedule of vacation leave that supersedes R.C. 9.44(C).
2. Pursuant to Section 124.38(C) of the Ohio Revised Code, an employee of an Ohio court of common pleas who has previously retired in accordance with the provisions of a retirement plan offered by the state is entitled to receive credit for sick leave benefits that the employee accrued but did not use post-retirement while working for an Ohio municipal corporation, provided that employment with the court of common pleas takes place within ten years of the date on which the employee was last terminated from public service.

Respectfully,



DAVE YOST
Ohio Attorney General