

OPINION NO. 78-002**Syllabus:**

Pursuant to R.C. 124.391, an appointing authority may neither promulgate a policy to provide cash payment for unused sick leave when an employee dies or resigns prior to retirement nor actually make such payment to the employee or his estate.

To: Lowell S. Petersen, Ottawa County Pros. Atty., Port Clinton, Ohio
By: William J. Brown, Attorney General, January 6, 1978

I have before me your request for my opinion which states as follows:

Revised Code Section 124.391 provides for cash payments to be made to an employee for unused sick leave accumulated during service, at the time of retirement, in accordance with the policy in effect by the appointing authority. That Section makes no specific reference to what happens to unused sick leave if an employee dies or resigns his job before "retirement" time.

I respectfully request your opinion whether or not an appointing authority has power to promulgate a policy providing cash payment for unused sick leave on death of an employee or when an employee resigns prior to retirement.

I also request your opinion whether or not "at the time of their retirement" as used in Revised Code Section 124.391 encompasses the situation where an employee dies or resigns prior to retirement.

R.C. 124.391 states in pertinent part as follows:

All employees covered by R.C. 124.38 of the Revised Code but not eligible for benefits under section 124.39 of the Revised Code, and those covered by section 3319.141 of the Revised Code, shall at the time of their retirement receive pay for all or part of their unused sick leave to the extent consistent with the policy of the appointing authority in effect.

An appointing authority may include in its policy a requirement that an employee have a minimum number of years service with the unit in order to be eligible for a payment of unused sick leave. (Emphasis added.)

It is apparent that the retirement of an employee constitutes a condition precedent to the receipt of payment for unused, accumulated sick leave. R.C. 124.391 does not authorize an appointing authority to vary such condition by means

of promulgating a policy pursuant to that section. Therefore, the question to be answered is whether death or early resignation constitutes "retirement" for the purpose of R.C. 124.391.

In 1974 Op. Att'y Gen. No. 74-044, I had occasion to discuss the meaning of "retirement" as used in R.C. 124.39, which concerns the payment of unused accumulated sick leave for state employees. In that opinion, I stated that:

Retirement specifically denotes the termination of employment after a number of years of service according to a formal procedure. To construe the statute as authorizing the payment of accumulated sick leave credit upon the mere termination of employment, would permit an unjustifiably broad application of the statute.

The use of the term "retirement" in R.C. 124.39 is in pari materia with its use in R.C. 124.391. It cannot be said that death or early resignation constitute ". . . the termination of employment after a number of years of service according to a formal procedure." Accordingly, I am constrained to say that the phrase "at the time of their retirement" as used in R.C. 124.391 does not encompass a situation wherein an employee dies or resigns prior to his retirement.

Therefore, it is my opinion, and you are so advised that, pursuant to R.C. 124.391, an appointing authority may neither promulgate a policy to provide cash payment for unused sick leave when an employee dies or resigns prior to retirement nor actually make such payment to the employee or his estate.