

OPINION NO. 2013-033**Syllabus:**

2013-033

The definition of “immediate family” set out in 2A Ohio Admin. Code 123:1-47-01(A)(39) does not apply when determining the eligibility of a county employee to use sick leave under R.C. 124.38. (1977 Op. Att’y Gen. No. 77-015, syllabus, paragraph 1, overruled on the basis of statutory amendments.)

To: Daniel R. Lutz, Wayne County Prosecuting Attorney, Wooster, Ohio

By: Michael DeWine, Ohio Attorney General, October 9, 2013

You have requested an opinion about the application of administrative rules adopted and promulgated by the Director of Administrative Services to county employees. Specifically, you ask:

1. Does the definition of “immediate family” set out in 2A Ohio Admin. Code 123:1-47-01(A)(39) apply when determining the eligibility of a county employee to use sick leave under R.C. 124.38?
2. If the definition of “immediate family” set out in rule 123:1-47-01(A)(39) applies to county employees, does Article XV, § 11 of the Ohio Constitution prevent a county from using this definition when determining the eligibility of a county employee to use sick leave under R.C. 124.38?
3. If the definition of “immediate family” set out in rule 123:1-47-01(A)(39) applies when determining the eligibility of a county employee to use sick leave under R.C. 124.38, what evidence may a county use to determine whether a person is a “significant other” of a county employee?

R.C. 124.38 permits a county employee to accrue sick leave and prescribes when the employee may use it:¹

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 . . . other than superintendents and management employees, as defined in [R.C. 5126.20], of county boards of developmental disabilities;

¹ Because your questions concern the use of sick leave accrued under R.C. 124.38, this opinion will not consider the use of sick leave accrued under the terms of a collective bargaining agreement or a policy adopted by a county. *See* R.C. 124.14(G); R.C. 4117.03; R.C. 4117.08; R.C. 4117.10.

Employees may use sick leave, upon approval of the responsible administrative officer of the employing unit, for absence due to personal illness, pregnancy, injury, exposure to contagious disease that could be communicated to other employees, and illness, injury, or death in the employee's immediate family. (Emphasis added.)

Pursuant to R.C. 124.38, a county employee may use his sick leave for an absence due to an illness, injury, or death in the employee's immediate family. Neither this statute nor any other defines the term "immediate family" for purposes of R.C. 124.38. However, the Director of Administrative Services may adopt and promulgate administrative rules under R.C. 124.09 and R.C. 124.20 to implement the provisions of R.C. Chapter 124 governing the employment of persons in the civil service.² See 1997 Op. Att'y Gen. No. 97-059 (syllabus, paragraph 1); 1977 Op. Att'y Gen. No. 77-015 (syllabus, paragraph 1).

R.C. 124.09 states, in part:

The director of administrative services shall do all of the following:

(A) Prescribe, amend, and enforce administrative rules for the purpose of carrying out the functions, powers, and duties vested in and imposed upon the director by [R.C. Chapter 124]. Except in the case of rules adopted pursuant to [R.C. 124.14], the prescription, amendment, and enforcement of rules under this division are subject to approval, disapproval, or modification by the state personnel board of review.

And, R.C. 124.20 provides further:

The director of administrative services, with the approval of the state personnel board of review, shall adopt rules:

(A) For appointment, promotions, transfers, layoffs, suspensions, reductions, reinstatements, and removals in and examinations and registrations for offices and positions in the civil service of the state . . .

(B) For maintaining and keeping records of the efficiency of officers and employees in the civil service of the state in accordance with [R.C. 124.01-.64].

In accordance with this rule-making authority, the Director of Administrative Services has adopted 2A Ohio Admin. Code Chapters 123:1-1 to 123:1-47.³ For purposes of these chapters, the Director of Administrative Services has defined

² The "civil service" for purposes of R.C. Chapter 124 "includes all offices and positions of trust or employment in the service of the state and in the service of the counties, cities, city health districts, general health districts, and city school districts of the state." R.C. 124.01(A).

³ Administrative rules pertaining to sick leave are set forth in 2A Ohio Admin. Code Chapter 123:1-32.

in rule 123:1-47-01(A) certain words and phrases, including the phrase “immediate family.”

Rule 123:1-47-01(A)(39) defines the phrase “immediate family” to mean

an employee’s spouse or significant other (“significant other” as used in this definition means one who stands in place of a spouse and who resides with the employee), parents, children, grandparents, siblings, grandchildren, brother-in-law, sister-in-law, daughter-in-law, son-in-law, mother-in-law, father-in-law, step-parents, step-children, step-siblings, or a legal guardian or other person who stands in the place of a parent (in loco parentis).

Rule 123:1-47-01(A)(39) thus defines the phrase “immediate family” for the administrative rules used to implement the provisions of R.C. Chapter 124. Because county employees may accrue and use sick leave in accordance with the provisions of R.C. 124.38, your first question is whether the definition of “immediate family” set out in rule 123:1-47-01(A)(39) applies when determining the eligibility of a county employee to use sick leave under R.C. 124.38.

The first syllabus paragraph of 1977 Op. Att’y Gen. No. 77-015 states that a county is required to comply with the administrative rules adopted by the Director of Administrative Services pursuant to R.C. 124.09 and R.C. 124.20. *See generally* 1997 Op. Att’y Gen. No. 97-059 (syllabus, paragraph 1) (“[p]ursuant to R.C. 124.09, R.C. 124.20, and R.C. 124.34, the Director of Administrative Services has authority to adopt rules providing for the involuntary disability separation of county employees”). In reaching this conclusion, the opinion reasoned as follows:

It is clear then that the General Assembly in providing for the civil service of the state and counties has charged the Director of Administrative Services to adopt reasonable administrative rules necessary to enforce those provisions. To the extent then that such rules are applicable to county appointing authorities compliance with the rules is mandatory. (Citations omitted.)

1977 Op. Att’y Gen. No. 77-015 at 2-48.

However, since the issuance of 1977 Op. Att’y Gen. No. 77-015, changes to various statutes in R.C. Chapter 124 and the administrative rules used to implement those statutes indicate that a county is no longer required to comply with the administrative rules adopted and promulgated under R.C. 124.09 and R.C. 124.20. When 1977 Op. Att’y Gen. No. 77-015 was issued, R.C. 124.20 read, in part, as follows:

The director of administrative services with the approval of the state personnel board of review, shall put into effect rules:

(A) For the classification of officers, positions, and employments, in the civil service of the state and *the several counties* thereof;

(B) For appointment, promotions, transfers, layoffs, suspensions, reductions, reinstatements, and removals therein and examinations and registrations therefor[.] (Emphasis added.)

1973 Ohio Laws, Part I, 533, 610 (Am. S.B. 174, eff. Dec. 4, 1973).

The language of R.C. 124.20 requiring the Director of Administrative Services to adopt and promulgate administrative rules to implement various provisions of R.C. Chapter 124 governing the employment of persons in the county civil service was deleted from R.C. 124.20 on July 1, 2007. 2005-2006 Ohio Laws, Part V, 8880, 8919 (Sub. H.B. 187, eff. Mar. 30, 2007, with certain sections effective on other dates); *see* Sub. H.B. 187, § 7 (uncodified) (the amendments to R.C. 124.20 “take effect on July 1, 2007”). As currently written, R.C. 124.20 requires the Director of Administrative Services to adopt and promulgate administrative rules “[f]or appointment, promotions, transfers, layoffs, suspensions, reductions, reinstatements, and removals in and examinations and registrations for offices and positions in the civil *service of the state.*” (Emphasis added.) The phrase “service of the state,” as used in R.C. 124.20, “includes all offices and positions of trust or employment with the government of the state[,]” but not “offices and positions of trust or employment with . . . counties.” R.C. 124.01(K). Hence, R.C. 124.20 no longer requires the Director of Administrative Services to adopt and promulgate administrative rules to implement various provisions of R.C. Chapter 124 governing the employment of persons in the county civil service.

That the General Assembly did not intend for a county to comply with the administrative rules implementing R.C. Chapter 124 is also demonstrated by the language of R.C. 124.06. This statute provides:

No person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted, or reduced as an officer or employee in the civil service, in any manner or by any means other than those prescribed in [R.C. Chapter 124], and *the rules of the director of administrative services for positions in the service of the state* or the municipal or civil service township civil service commission within their respective jurisdictions. (Emphasis added.)

Like R.C. 124.20, the language of R.C. 124.06 now limits the application of administrative rules adopted and promulgated by the Director of Administrative Services to officers and employees in the “service of the state.” *See* Am. Sub. H.B. 187, 129th Gen. A. (2012) (eff. June 11, 2012, with certain sections effective on other dates) (adding the phrase “for positions in the service of the state” to R.C. 124.06). As the term “service of the state” does not include county officers and employees for purposes of R.C. 124.06, *see* R.C. 124.01(K), it follows that the Director of Administrative Services may not adopt and promulgate administrative rules to implement R.C. Chapter 124 with respect to county officers and employees. Therefore, R.C. 124.06 and R.C. 124.20 evince a legislative intent that the administrative rules adopted and promulgated by the Director of Administrative Services to implement R.C. Chapter 124 do not apply to county officers and employees.

Additional support for this conclusion may be gleaned from recent changes to the administrative rules used to implement R.C. Chapter 124. *See generally* R.C. 1.49(F) (when a statute is ambiguous a court in determining the intent of the General Assembly may consider “[t]he administrative construction of the statute”); *Leon v. Ohio Bd. of Psychology*, 63 Ohio St. 3d 683, 687, 590 N.E.2d 1223 (1992) (“courts must accord due deference to the State Board of Psychology in its interpretation of R.C. Chapter 4732 and the relevant provisions of the Ohio Administrative Code, given that the General Assembly has deemed it to be the proper forum to determine licensure matters concerning psychologists”). Prior to November 18, 2012, 2A Ohio Admin. Code 123:1-32-03(A), which concerns the earning of sick leave credit under R.C. 124.38, applied to “[a]ll employees in the various offices of counties, except superintendents and management employees, as defined in [R.C. 5126.20], of county boards of mental retardation and developmental disabilities.” 1995-1996 Ohio Monthly Record, vol. 2, at p. 1431 (eff. Feb. 4, 1996). After November 18, 2012, the rule no longer applies to employees in the county civil service. 2012-2013 Ohio Monthly Record, pamphlet 4, at p. 2-535 (eff. Nov. 18, 2012).⁴

The Director of Administrative Services has also repealed the administrative rules requiring a county to comply with the rules adopted by the Director and exempting a county from the application of the rules adopted by the Director.⁵ *Id.* at p. 2-526. The Director of Administrative Services thus has amended or repealed the administrative rules governing the implementation of R.C. Chapter 124 to indicate that the rules no longer apply to officers and employees in the county civil service.

In light of the aforementioned changes to various statutes in R.C. Chapter 124 and the administrative rules used to implement those statutes, we overrule 1977 Op. Att’y Gen. No. 77-015 to the extent that it determined that a county is required to comply with the administrative rules adopted and promulgated by the Director of

⁴ 2A Ohio Admin. Code 123:1-32-03(A), as reprinted in 2012-2013 Ohio Monthly Record, pamphlet 4, at p. 2-535 (eff. Nov. 18, 2012), provides in part that “[a]ll employees in the various offices of 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.”

⁵ Former 2A Ohio Admin. Code 123:1-1-07 read as follows:

Each board of county commissioners and elected official, board, agency, or appointing authority of a county shall be covered by these rules governing personnel practices unless the board, elected official, agency, or appointing authority adopts other rules in accordance with [R.C. Chapters 124 and 325].

1991-1992 Ohio Monthly Record, vol. 1, at p. 684 (eff. Dec. 15, 1991). And, former 2A Ohio Admin. Code 123:1-2-01 set forth the instances when a county was not required to comply with the rules adopted by the Director of Administrative Services for officers and employees in the county civil service. 2006-2007 Ohio Monthly Record, vol. 2, at p. 4006 (eff. July 1, 2007).

Administrative Services to implement R.C. Chapter 124. Because these rules do not apply to officers and employees in the county civil service, the definition of “immediate family” set out in rule 123:1-47-01(A)(39) does not apply when determining the eligibility of a county employee to use sick leave under R.C. 124.38.

You have also asked us to consider whether Article XV, § 11 of the Ohio Constitution prevents a county from using rule 123:1-47-01(A)(39)’s definition of “immediate family” when determining the eligibility of a county employee to use sick leave under R.C. 124.38 and, if not, what evidence may a county use to determine whether a person is a “significant other” of a county employee. Insofar as we have determined that the definition of “immediate family” set out in rule 123:1-47-01(A)(39) does not apply when determining the eligibility of a county employee to use sick leave under R.C. 124.38, it is unnecessary for us to answer your remaining questions.

In conclusion, it is my opinion, and you are hereby advised that the definition of “immediate family” set out in 2A Ohio Admin. Code 123:1-47-01(A)(39) does not apply when determining the eligibility of a county employee to use sick leave under R.C. 124.38. (1977 Op. Att’y Gen. No. 77-015, syllabus, paragraph 1, overruled on the basis of statutory amendments.)