

**OPINION NO. 2013-013**

**Syllabus:**

2013-013

1. Elected county appointing authorities are “county agencies” for purposes of R.C. 124.391.

2. R.C. 124.391 authorizes a board of county commissioners to establish different leave donation programs for individual county agencies.
3. Pursuant to R.C. 4117.10(A), the terms of a collective bargaining agreement authorizing a county employee to donate accrued but unused paid leave to another county employee prevail over conflicting rules of a leave donation program established by a board of county commissioners under R.C. 124.391.
4. A leave donation program established by a board of county commissioners under R.C. 124.391 may not permit a county employee to use donated leave to receive pay for an absence from work that occurred prior to the program's implementation.
5. An elected county appointing authority may establish a leave donation program for its employees and the program may be more, but not less, generous than the leave donation program established by the board of county commissioners under R.C. 124.391 when the appointing authority is required to participate in the board's program. (1987 Op. Att'y Gen. No. 87-029, overruled on the basis of statutory amendment.)
6. A board of county commissioners that establishes a leave donation program under R.C. 124.391 may determine whether an employee of a county agency may donate accrued but unused paid leave to an employee of another county agency.
7. An elected county appointing authority that establishes a leave donation program may permit an employee to donate accrued but unused paid leave to an employee of another county agency that has a leave donation program that permits the employee to accept and use the donated leave.

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**To: Dennis Watkins, Trumbull County Prosecuting Attorney, Warren, Ohio**

**By: Michael DeWine, Ohio Attorney General, April 29, 2013**

You have requested an opinion concerning the establishment and operation of leave donation programs by a county. In Trumbull County the board of county commissioners has established a leave donation program under R.C. 124.391. The commissioners and other elected county officers have raised questions about the application of the rules of the program to employees in the executive branch of county government who are appointed by the following elected county appointing authori-

ties: prosecuting attorney, sheriff, coroner, engineer, recorder, auditor, and treasurer.<sup>1</sup> Specifically, you ask:<sup>2</sup>

1. Are elected county appointing authorities “county agencies” for purposes of R.C. 124.391?
2. Does R.C. 124.391 authorize a board of county commissioners to establish different leave donation programs for individual county agencies?
3. Do the terms of a collective bargaining agreement authorizing a county employee to donate accrued but unused paid leave to another county employee prevail over conflicting rules of a leave donation program established by a board of county commissioners under R.C. 124.391?
4. May a leave donation program established by a board of county commissioners under R.C. 124.391 permit a county employee to use donated leave to receive pay for an absence from work that occurred prior to the program’s implementation?
5. May an elected county appointing authority establish a leave donation program, and, if so, may the program differ from the leave donation program established by the board of county commissioners under R.C. 124.391?
6. May an employee of a county agency donate accrued but unused paid leave to an employee of another county agency?

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<sup>1</sup> The statutes do not define the term “elected county appointing authority.” In the context of county employment, the term includes an elected officer having the power to appoint persons to, and remove persons from, positions in the civil service of the county. *See* R.C. 124.01(D) (for purposes of R.C. Chapter 124, which establishes the county civil service, an “appointing authority” includes an “officer . . . having the power of appointment to, or removal from, positions in any office, department, commission, board, or institution”).

In a noncharter county, a person is elected to hold the office of prosecuting attorney, sheriff, coroner, engineer, recorder, auditor, and treasurer. *See* R.C. 309.01; R.C. 311.01; R.C. 313.01; R.C. 315.01; R.C. 317.01; R.C. 319.01; R.C. 321.01. A person elected to hold one of these county offices has the power to appoint persons to, and remove persons from, positions in the county civil service, *see* R.C. 309.06; R.C. 313.05; R.C. 325.17; R.C. 325.27, and thus, is an elected county appointing authority. Therefore, the term “elected county appointing authority,” as used in this opinion, refers to the office of prosecuting attorney, sheriff, coroner, engineer, recorder, auditor, and treasurer.

<sup>2</sup> We have reordered and rephrased your questions for ease of discussion.

### **Authority of a Board of County Commissioners to Establish a Leave Donation Program**

A board of county commissioners may provide certain benefits to all county employees, including those appointed by elected county appointing authorities. *See, e.g.*, R.C. 124.39(C) (a board of county commissioners may adopt a policy allowing an employee to be paid for unused sick leave upon termination of employment other than retirement or permitting more than one payment to an employee); R.C. 305.171 (a board of county commissioners may procure and pay for the cost of various group insurance policies for county officers and employees); R.C. 305.172 (a board of county commissioners may establish and maintain a health savings account program for county officers and employees). *See generally* 2008 Op. Att’y Gen. No. 2008-012, at 2-137 n.1 (“[t]he General Assembly has granted boards of county commissioners authority to determine certain aspects of compensation for county employees”). Pursuant to R.C. 124.391, which authorizes the state and counties to establish leave donation programs, a board of county commissioners, as the legislative authority of a noncharter county, may permit a county employee to donate accrued but unused paid leave to another county employee:

(B) The director of administrative services may establish a program under which an employee paid directly by warrant of the director of budget and management may donate that employee’s accrued but unused paid leave<sup>3</sup> to another employee paid directly by warrant of the director of budget and management who has no accrued but unused paid leave and who has a critical need for it because of circumstances such as a serious illness or the serious illness of a member of the employee’s immediate family.

If the director of administrative services establishes a leave donation program under this division, the director shall adopt rules in accordance with [R.C. Chapter 119] to provide for the administration of the program.<sup>4</sup> These rules shall include, but not be limited to, provisions that identify the circumstances under which leave may be donated and that specify the amount, types, and value of leave that may be donated.

(C) At the discretion of the appropriate legislative authority, a county may implement a leave donation program, as provided in this sec-

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<sup>3</sup> As used in R.C. 124.391, the term “paid leave” means “sick leave, personal leave, or vacation leave.” R.C. 124.391(A).

<sup>4</sup> The Director of Administrative Services has established the leave donation program described in R.C. 124.391(B) for certain state employees, and adopted and promulgated an administrative rule, 2 Ohio Admin. Code 123:1-46-05, that provides for the administration of the program.

tion, for all county agencies or for one or more designated agencies within the county.<sup>5</sup> (Footnotes added.)

R.C. 124.391 thus authorizes a board of county commissioners to establish a leave donation program that permits an employee of a county agency to donate accrued but unused sick leave, personal leave, or vacation leave to an employee who has no such leave and who has a critical need for it because of circumstances such as a serious illness or the serious illness of a member of the employee's immediate family.

#### **Meaning of the Term "County Agencies"**

Your first question asks whether elected county appointing authorities are "county agencies" for purposes of R.C. 124.391. The term "county agencies," as used in R.C. 124.391, has not been statutorily defined or acquired a particular meaning from the courts. For this reason, 2007 Op. Att'y Gen. No. 2007-041, at 2-411, which determined that the employees of a single-county board of mental retardation and developmental disabilities are eligible to participate in a sick leave bank donation program established by a board of county commissioners under R.C. 124.391, stated that the common meaning of the term "county agencies" is to be used when construing R.C. 124.391. *See generally* R.C. 1.42 (words that have not "acquired a technical or particular meaning, whether by legislative definition or otherwise," are to be given their common, ordinary meaning).

As summarized in 2007 Op. Att'y Gen. No. 2007-041, at 2-411, the common, ordinary meaning of the term "county agencies" includes subordinate departments of county government. The opinion explained further that the following factors are considered when determining whether entities are subordinate departments of county government: (1) whether the territory that comprises the entities is coextensive with the territorial limits of the county; (2) whether the county is responsible for the organization and supervision of the entities; and (3) whether the entities are funded by or through the county. 2007 Op. Att'y Gen. No. 2007-041, at 2-411. If an examination of these factors discloses, on balance, that elected county appointing authorities are subordinate departments of county government, then these appointing authorities are county agencies for purposes of R.C. 124.391. *See id.*

In each county, elected county appointing authorities are elected in county-wide elections and serve all the citizens of the county. *See* R.C. 309.01; R.C. 311.01; R.C. 313.01; R.C. 315.01; R.C. 317.01; R.C. 319.01; R.C. 321.01. Elected county appointing authorities are part of the organization of county government provided for by the General Assembly. *See* Ohio Const. art. X, § 1 ("[t]he general assembly shall provide by general law for the organization and government of counties"); Ohio Const. art. X, § 3 (every county charter "shall provide the form of govern-

<sup>5</sup> R.C. 124.391(C) states that a county may implement a leave donation program "as provided in this section." Accordingly, when construing R.C. 124.391(C) we must apply the definition and rule-making requirements set forth in R.C. 124.391(A) and (B).

ment of the county and shall determine which of its officers shall be elected and the manner of their election. It shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law”); R.C. Chapter 309 (creating the office of county prosecuting attorney); R.C. Chapter 311 (creating the office of county sheriff); R.C. Chapter 313 (creating the office of county coroner); R.C. Chapter 315 (creating the office of county engineer); R.C. Chapter 317 (creating the office of county recorder); R.C. Chapter 319 (creating the office of county auditor); R.C. Chapter 321 (creating the office of county treasurer). This means that the territory served by elected county appointing authorities is co-extensive with the territorial limits of the county and that the county has a role in the organization and supervision of these appointing authorities.

In addition, elected county appointing authorities are the elected officers of a county. *See* R.C. 309.01; R.C. 311.01; R.C. 313.01; R.C. 315.01; R.C. 317.01; R.C. 319.01; R.C. 321.01. *See generally State ex rel. Landis v. Bd. of Comm’rs of Butler Cnty.*, 95 Ohio St. 157, 159, 115 N.E. 919 (1917) (“[t]he usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him . . . . If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office,” even if the position is filled by appointment, rather than election). Pursuant to R.C. 307.01, a board of county commissioners is required to provide elected county officeholders with office space and equipment. Because elected county appointing authorities are county officeholders, a board of county commissioners is required to provide offices and equipment to elected county appointing authorities. *See* R.C. 307.01.

The board of county commissioners also is responsible for establishing the policies regarding elected county appointing authorities’ use of credit cards and procurement cards and acceptance of payments by financial transaction devices for county expenses. *See* R.C. 301.27-.29. And, the board is required to pay other expenses of elected county appointing authorities. *See* R.C. 309.06; R.C. 313.05; R.C. 325.17; R.C. 325.27. A county thus has a duty to fund the operations of elected county appointing authorities.

An examination of the factors used to determine whether entities are subordinate departments of county government and the characteristics of elected county appointing authorities discloses that these appointing authorities are part of county government. The territory that comprises these appointing authorities is coextensive with the territorial limits of the county. Also, the county has a role in organizing, supervising, and funding elected county appointing authorities. Therefore, on the basis of these factors, elected county appointing authorities are “county agencies” for purposes of R.C. 124.391.

#### **Authority of a Board of County Commissioners to Establish Different Leave Donation Programs**

Your second question asks whether R.C. 124.391 authorizes a board of county commissioners to establish different leave donation programs for individual

county agencies. R.C. 124.391 authorizes a board of county commissioners to establish a leave donation program “for all county agencies *or* for one or more designated agencies within the county.” (Emphasis added.) The use of the word “or” indicates that a board of county commissioners may establish one leave donation program that will apply to every county agency or, in the alternative, establish a program that applies only to a limited number of county agencies. *See generally Pizza v. Sunset Fireworks Co., Inc.*, 25 Ohio St. 3d 1, 4-5, 494 N.E.2d 1115 (1986) (the word “or” is used as a function word indicating an alternative between different or unlike things); *Merriam-Webster’s Collegiate Dictionary* 872 (11th ed. 2005) (the word “or” is “used as a function word to indicate an alternative”).

While R.C. 124.391 states that a board of county commissioners may establish a leave donation *program* that will apply only to a limited number of county agencies, nothing in the language of this statute or elsewhere in the Revised Code explicitly prohibits a board of county commissioners from establishing multiple leave donation *programs* that apply to different county agencies. Further, inasmuch as it is a codified rule of statutory construction that “[t]he singular includes the plural, and the plural includes the singular,” R.C. 1.43(A), the use of the singular form of the word “program” in R.C. 124.391 indicates that a board of county commissioners may establish multiple leave donation programs for the employees of multiple county agencies.

Because R.C. 124.391 does not suggest in clear and unequivocal language that the legislative tenets set forth in R.C. 1.43(A) do not apply when construing R.C. 124.391, these tenets must be observed when construing R.C. 124.391. *See generally State ex rel. Republic Steel Corp. v. Quinn*, 12 Ohio St. 3d 57, 59, 465 N.E.2d 413 (1984) (R.C. 1.43(A) applies when construing a statute unless the language of the statute or the context of related statutes clearly provides that R.C. 1.43(A) not apply); *Wingate v. Hordge*, 60 Ohio St. 2d 55, 58, 396 N.E.2d 770 (1979) (“[i]n the absence of clear language in R.C. 2131.10 to the contrary, or evidence which adequately demonstrates that such a construction is out of context with the remaining language of that statute or its related provisions, we conclude that ‘person’ and ‘beneficiary’ as used in R.C. 2131.10 should be construed pursuant to the legislative guidelines set forth in R.C. 1.43(A)”). Consequently, the singular form of the term “program,” as used in R.C. 124.391, includes the plural form. Accordingly, R.C. 124.391 authorizes a board of county commissioners to establish different leave donation programs for individual county agencies.<sup>6</sup>

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<sup>6</sup> When a board of county commissioners establishes a leave donation program that applies to all county agencies, the board is required to adopt rules to administer the program. *See* R.C. 124.391(B). This rule-making authority includes making distinctions among groups of employees with respect to the use of the program. *See* R.C. 124.391(B)-(C) (when a board of county commissioners adopts a leave donation program, the board may adopt rules that identify the circumstances under which leave may be donated).

### **Application of the Terms of a Collective Bargaining Agreement when a County Establishes a Leave Donation Program**

Your third question asks whether the terms of a collective bargaining agreement authorizing a county employee to donate accrued but unused paid leave to another county employee prevail over conflicting rules of a leave donation program established by a board of county commissioners under R.C. 124.391.<sup>7</sup> Pursuant to R.C. 4117.03(A)(4), “public employees,” as defined in R.C. 4117.01(C),<sup>8</sup> have the right to “[b]argain collectively with their public employers to determine wages,

No language in R.C. 124.391 requires a board of county commissioners to establish a leave donation program that applies uniformly to all county agencies participating in the program. Thus, the board, pursuant to its statutory authority to enact rules to administer the program, may adopt rules that make distinctions among employees of different county agencies with regard to the use of the program. *See generally* 2002 Op. Att’y Gen. No. 2002-026, at 2-176 (the language of R.C. 3375.40(L) does not require uniform provision of health care benefits); 1978 Op. Att’y Gen. No. 78-057, at 2-139 (“because of the absence of language in R.C. 124.39 either expressly or impliedly requiring a political subdivision to promulgate a uniform policy for the payment of accumulated, unused sick leave uniformly as to all offices, agencies and departments contained therein, I conclude that such policy need not be uniform”). A board of county commissioners must exercise reasonable discretion and have a rational basis for any differences in benefits it awards to county employees to avoid contravening constitutional protections afforded to county employees. *See* 2003 Op. Att’y Gen. No. 2003-019, at 2-154; 2002 Op. Att’y Gen. No. 2002-026, at 2-176; 1984 Op. Att’y Gen. No. 84-086, at 2-295 (modified on other grounds by 1990 Op. Att’y Gen. No. 90-064); 1981 Op. Att’y Gen. No. 81-082, at 2-323; 1978 Op. Att’y Gen. No. 78-057, at 2-139.

<sup>7</sup> The paid leave referred to in your question means sick leave, personal leave, and vacation leave. *See* R.C. 124.391(A). Your question therefore concerns a situation in which the terms of a collective bargaining agreement governing the donation of sick leave, personal leave, or vacation leave among employees conflict with the rules of a leave donation program established by a board of county commissioners under R.C. 124.391 that address the donation of sick leave, personal leave, or vacation leave among employees.

<sup>8</sup> R.C. 4117.01(C) defines the term “public employee,” as used in R.C. Chapter 4117, as including “any person holding a position by appointment or employment in the service of a public employer.” *See generally* R.C. 4117.01(B) (including a county within the definition of “public employer”). R.C. 4117.01(C) also excludes from the definition of “public employee” various categories of employees, *e.g.*, “[c]onfidential employees,” R.C. 4117.01(C)(6); “[m]anagement level employees,” R.C. 4117.01(C)(7); certain fiduciary employees, R.C. 4117.01(C)(9); and “[s]upervisors,” R.C. 4117.01(C)(10). *See generally* R.C. 4117.01(F) (defining “[s]upervisor,” as used in R.C. Chapter 4117); R.C. 4117.01(K) (defining “[c]onfidential employee,” as used in R.C. Chapter 4117); R.C. 4117.01(L) (defining “[m]anagement level employee,” as used in R.C. Chapter 4117).

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.” See R.C. 4117.01(G); R.C. 4117.08(A); R.C. 4117.10(A). Most county employees are “public employees” for purposes of R.C. Chapter 4117, see note 8, *supra*, and thus, may bargain collectively with an elected county appointing authority to determine wages and other terms and conditions of employment. R.C. 4117.03(A)(4); see R.C. 4117.01(G); R.C. 4117.08(A); R.C. 4117.10(A).

The use and payment of paid leave are part of the wages and terms and conditions of public employment, and so paid leave benefits are an appropriate subject for collective bargaining. See R.C. 4117.01(M) (“wages,” as used in R.C. Chapter 4117, means “hourly rates of pay, salaries, or other forms of compensation for services rendered”); *Deeds v. City of Ironton*, 48 Ohio App. 3d 7, 548 N.E.2d 254 (Lawrence County 1988) (syllabus) (“[s]ince payment for sick leave affects wages and terms and conditions of employment, it is subject to collective bargaining between a public employer and its employees”); 2006 Op. Att’y Gen. No. 2006-026, at 2-227 (same as the previous parenthetical); 2005 Op. Att’y Gen. No. 2005-020, at 2-188 (“collective bargaining agreements may vary fringe benefits (such as sick leave or payment for unused sick leave) from the amounts provided by statute, increasing or decreasing the benefits granted to the employees”). Consequently, the terms of a collective bargaining agreement authorizing a county employee to donate accrued but unused paid leave to another county employee could conflict with the rules of a leave donation program established by a board of county commissioners under R.C. 124.391 that address the donation of accrued but unused paid leave among county employees.

R.C. 4117.10(A) sets forth the effect the terms of a collective bargaining agreement between an elected county appointing authority and its employees are to be accorded:

An 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 . . . . Where 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. (Emphasis added.)

In addition, R.C. 4117.10(A) describes further the laws that prevail, or in certain circumstances may prevail, over conflicting provisions in a collective bargaining agreement:

Laws pertaining to civil rights, affirmative action, unemployment compensation, workers’ compensation, the retirement of public employees, and residency requirements, the minimum educational requirements contained in the Revised Code pertaining to public education including the requirement of a certificate by the fiscal officer of a school district

pursuant to [R.C. 5705.41], the provisions of [R.C. 124.34(A)] governing the disciplining of officers and employees who have been convicted of a felony, and the minimum standards promulgated by the state board of education pursuant to [R.C. 3301.07(D)] *prevail over conflicting provisions of agreements between employee organizations and public employers*. The law pertaining to the leave of absence and compensation provided under [R.C. 5923.05 (permanent public employees' military leave)] prevails over any conflicting provisions of such agreements if the terms of the agreement contain benefits which are less than those contained in that section or the agreement contains no such terms and the public authority is the state or any agency, authority, commission, or board of the state or if the public authority is another entity listed in [R.C. 4117.01(B)] that elects to provide leave of absence and compensation as provided in [R.C. 5923.05]. The law pertaining to the leave established under [R.C. 5906.02] prevails over any conflicting provision of an agreement between an employee organization and public employer if the terms of the agreement contain benefits that are less than those contained in [R.C. 5906.02]. *Except for* [R.C. 306.08, R.C. 306.12, R.C. 306.35, and R.C. 4981.22] and arrangements entered into thereunder, and [R.C. 4981.21] as necessary to comply with section 13(c) of the "Urban Mass Transportation Act of 1964," 87 Stat. 295, 49 U.S.C.A. 1609(c), as amended, and arrangements entered into thereunder, *this chapter prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in this chapter or as otherwise specified by the general assembly.* (Emphasis added.)

R.C. 4117.10(A) provides that the terms of a collective bargaining agreement authorizing a county employee to donate accrued but unused paid leave to another county employee prevail over conflicting rules of a leave donation program established by a board of county commissioners under R.C. 124.391 unless the terms are in conflict with a state or local law pertaining to a specific exception listed in R.C. 4117.10(A). *See generally Streetsboro Educ. Ass'n v. Streetsboro City School Dist. Bd. of Educ.*, 68 Ohio St. 3d 288, 291, 626 N.E.2d 110 (1994) (“[w]hen a provision in a collective bargaining agreement addresses a subject also addressed by a state or local law, so that the two conflict, R.C. 4117.10(A) delineates whether the collective bargaining provision or the law prevails. To do this, R.C. 4117.10(A) specifies certain areas in which laws will prevail over conflicting provisions of collective bargaining agreements”); 2006 Op. Att’y Gen. No. 2006-026, at 2-226 to 2-227 (same as the previous parenthetical); 1984 Op. Att’y Gen. No. 84-086, at 2-298 n.4 (“with certain exceptions, where a public employer acts pursuant to R.C. Chapter 4117 in entering into a collective bargaining agreement, the public employer is not limited by laws which are in conflict with R.C. Chapter 4117”).

The use and payment of paid leave are not covered by a specific exception listed in R.C. 4117.10(A). *See generally* 1987 Op. Att’y Gen. No. 87-041, at 2-272 to 2-273 (provisions of state law constricting the board of education’s authority to compensate do not apply where the board has a collective bargaining agreement

that provides more generous fringe benefits “since the statutory restrictions on compensation are superseded by a collective bargaining agreement”). For this reason, pursuant to R.C. 4117.10(A), the terms of a collective bargaining agreement authorizing a county employee to donate accrued but unused paid leave to another county employee prevail over conflicting rules of a leave donation program established by a board of county commissioners under R.C. 124.391.

**Use of Donated Leave to Receive Pay for an Absence from Work that Occurred Prior to a Leave Donation Program’s Implementation**

Your fourth question asks whether a leave donation program established by a board of county commissioners under R.C. 124.391 may permit a county employee to use donated leave to receive pay for an absence from work that occurred prior to the program’s implementation. R.C. 124.391 authorizes a board of county commissioners to adopt rules to administer its leave donation program. Under this authority, a board may adopt rules that set forth the specific circumstances in which a county employee may use donated leave.

However, a board of county commissioners’ authority to adopt rules to administer its leave donation program is not unlimited. As a creature of statute, a board of county commissioners has “only those powers and duties conferred by the General Assembly.” 2008 Op. Att’y Gen. No. 2008-012, at 2-136; *accord Geauga Cnty. Bd. of Comm’rs v. Munn Road Sand & Gravel*, 67 Ohio St. 3d 579, 582, 621 N.E.2d 696 (1993). A board of county commissioners may not adopt a rule that permits a county employee to use donated leave to receive pay for an absence from work that occurred prior to a leave donation program’s implementation unless the rule has a reasonable relation to the legislative purpose evidenced by R.C. 124.391. *Cf. Ohio Acad. of Nursing Homes, Inc. v. Barry*, 56 Ohio St. 3d 120, 127, 564 N.E.2d 686 (1990) (“administrative agency rules, just as statutes, must have a reasonable relation to a proper legislative purpose”); *Vargas v. State Med. Bd. of Ohio*, 2012-Ohio-2735, 972 N.E.2d 1076, ¶13 (Franklin County June 19, 2012) (under R.C. 4731.05, the state medical board “is vested with power to adopt rules to carry out the purposes of R.C. Chapter 4731. The purpose of such rule-making authority is ‘to facilitate the administrative agency’s placing into effect the policy declared by the General Assembly in the statutes to be administered by the agency’” (citation omitted) (quoting *Carroll v. Dep’t of Admin. Servs.*, 10 Ohio App. 3d 108, 110, 460 N.E.2d 704 (Franklin County 1983))); *Smith v. State Med. Bd. of Ohio*, 2012-Ohio-2472, 971 N.E.2d 487, ¶24 (Franklin County June 5, 2012) (same as the previous parenthetical). *See generally* 2003 Op. Att’y Gen. No. 2003-008, at 2-51 (“although the ability of a county board or officer to carry out a certain activity may be implied from one of the powers expressly granted to it, the exercise of that implied power is subject to any limiting or constricting statutory language or scheme that would curtail, inhibit, or extinguish it”).

R.C. 124.391 authorizes leave donation programs that permit a county employee to donate accrued but unused paid leave to another employee who has no such leave and who has a critical need for it because of circumstances such as a serious illness or the serious illness of a member of the employee’s immediate

family. *See* 2 Ohio Admin. Code 123:1-46-05 (the intent of the leave donation program adopted by the Director of Administrative Services under R.C. 124.391 “is to allow employees to voluntarily provide assistance to their co-workers who are in critical need of leave due to the serious illness or injury of the employee or a member of the employee’s immediate family”). The language of the statute indicates further that an employee may use donated leave to receive pay during an absence from work. Thus, the purpose of a leave donation program established pursuant to R.C. 124.391 is to permit a county employee to use donated leave so that he may continue to receive pay when he is absent from work because of circumstances such as a serious illness or the serious illness of a member of the employee’s immediate family.

Neither R.C. 124.391 nor another statute evinces a legislative intent that a leave donation program be used to provide compensation to an employee who took unpaid leave before the program’s implementation. *See generally* rule 123:1-46-05(C) (the leave donation program adopted by the Director of Administrative Services “shall be administered on a pay period by pay period basis”). Instead, the use of the word “critical” in R.C. 124.391 is used to describe the time when an employee may receive donated leave. This suggests that the donated leave is to be given and used at the time that an employee has an urgent or dire need to take a leave of absence from work. *See Roget’s 21st Century Thesaurus in Dictionary Form* 191 (3rd ed. 2005) (common synonyms for the word “critical” are “crucial . . . desperate . . . dire . . . pressing . . . urgent”). For this reason, a leave donation program is to be applied prospectively to permit (1) donations of accrued but unused paid leave after the program takes effect and (2) the use of donated leave for absences from work that occur after the program takes effect. *See generally* 1986 Op. Att’y Gen. No. 86-027, at 2-145 (“the wording of R.C. 124.39(C) appears to contemplate a prospective application of [a] policy [authorizing cash payments for unused sick leave upon the death of an employee] to terminations of employment of persons who were employees at the time or after the policy came into effect”).

If a board of county commissioners adopts a rule permitting a county employee to use donated leave to receive pay for an absence from work that occurred prior to a leave donation program’s implementation, the rule will permit the employee to use donated leave to receive pay in situations not provided for in R.C. 124.391. Because a leave donation program may not be used for a purpose not intended by the General Assembly or reasonably related to the legislative purpose evidenced by R.C. 124.391, a board of county commissioners may not adopt a rule permitting a county employee to use donated leave to receive pay for an absence from work that occurred prior to the program’s implementation. *See generally* *Vargas v. State Med. Bd. of Ohio*, 2012-Ohio-2735, at ¶13 (“administrative rules may not add to or subtract from a legislative enactment”); *Smith v. State Med. Bd. of Ohio*, 2012-Ohio-2472, at ¶24 (same as the previous parenthetical). Accordingly, a leave donation program established by a board of county commissioners under R.C. 124.391 may not permit a county employee to use donated leave to receive pay for

an absence from work that occurred prior to the program's implementation.<sup>9</sup> See generally 1986 Op. Att'y Gen. No. 86-027 (syllabus, paragraph 2) (“[a]lthough a policy may be adopted pursuant to R.C. 124.39(C) or R.C. 329.02 providing for the payment for accumulated but unused sick leave upon the death of an employee of a county department of human services, a board of county commissioners may not apply such policy retroactively to make payments for such unused sick leave to the estate of an employee, who died prior to adoption of the policy”).

#### **Authority of an Elected County Appointing Authority to Establish a Leave Donation Program**

Your fifth question asks whether an elected county appointing authority may establish a leave donation program, and, if so, may the program differ from the leave donation program established by the board of county commissioners under R.C. 124.391. An elected county appointing authority has the statutory power to appoint employees and fix their compensation.<sup>10</sup> See R.C. 309.06; R.C. 313.05; R.C. 325.17; R.C. 325.27. Under Ohio law, this power “includes the authority to establish both salary and fringe benefits, such as medical insurance, life insurance, and paid leave, in the absence of any statute that constricts such authority, and so long as such benefits are in excess of any minimum levels established by statute.” 2007 Op. Att'y Gen. No. 2007-012, at 2-103; accord *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 33, 406 N.E.2d 1098 (1980); 2007 Op. Att'y Gen. No. 2007-010, at 2-70; 2005 Op. Att'y Gen. No. 2005-020, at 2-188; 1981 Op. Att'y Gen. No. 81-052, at 2-202.

As explained in 1981 Op. Att'y Gen. No. 81-052, at 2-202:

[T]he 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 . . . . The statutory scheme covering the public employer and its employees must be reviewed in order to establish the distinct authority of the public employer to compensate. Once the requisite authority to compensate has been established, any statutory provisions pertinent to the provision of the particular

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<sup>9</sup> If a county employee's absence from work begins prior to a leave donation program's implementation and continues after the program's implementation, the employee may use donated leave to receive pay for time taken off from work on or after the day of the program's implementation. The employee may not, however, use donated leave to receive pay for time taken off from work before the day the program is implemented.

<sup>10</sup> In the absence of statutory authority to fix the compensation of an employee, the authority of an elected county appointing authority to appoint an employee includes the power to fix that employee's compensation. 1981 Op. Att'y Gen. No. 81-052, at 2-202 n.3.

fringe benefit in issue by the public employer to its employees must be identified. If the particular fringe benefit is not the subject of any statutory provisions applicable to the public employer or its employees, the fringe benefit in question is a permissible exercise of the public employer's authority to compensate its employees. On the other hand, if the particular fringe benefit is the subject of any statutory provision applicable to the public employer or its employees, further consideration is required. If an applicable statute constitutes a minimum statutory entitlement to a particular benefit, the public employer may, pursuant to its power to compensate and in the absence of any statute constricting its action in the particular case, choose to provide such benefit in excess of the minimum statutory entitlement. If an applicable statute limits the general authority of the public employer to compensate its employees with the particular fringe benefit in question, it must, of course, be viewed as a restriction upon the employer's authority to grant the particular benefit. (Footnote omitted.)

1981 Op. Att'y Gen. No. 81-052 sets out the proper analysis for determining whether an elected county appointing authority may provide fringe benefits to its employees. Under this analysis, the authority of an elected county appointing authority "to grant fringe benefits pursuant to its power to employ extends only to types of benefits that induce an employee to accept employment or continue employment" with the appointing authority. 1995 Op. Att'y Gen. No. 95-027, at 2-135; *accord Madden v. Bower*, 20 Ohio St. 2d 135, 137-38, 254 N.E.2d 357 (1969); 2011 Op. Att'y Gen. No. 2011-015, at 2-145; 2003 Op. Att'y Gen. No. 2003-019, at 2-154; 1982 Op. Att'y Gen. No. 82-006, at 2-16 to 2-17. Indeed, "[i]f a benefit does not serve such a purpose, it cannot be considered a fringe benefit and does not come within the public entity's authority to employ and set compensation." 1995 Op. Att'y Gen. No. 95-027, at 2-135; *accord Madden v. Bower*, 20 Ohio St. 2d at 137-38.

In your particular situation, a leave donation program that enables an employee to donate accrued unused paid leave to another employee who is in need of leave time qualifies as a "fringe benefit," as that term is commonly used. Under such a program, an employee may use donated leave to receive pay for an absence due to a serious illness or the serious illness of a member of the employee's immediate family. The program thus provides paid leave to an employee who has no accrued but unused paid leave and who has a critical need for it because of circumstances such as a serious illness or the serious illness of a member of the employee's immediate family.

Prior opinions of the Attorney General have determined that granting paid leave to employees serves to induce a person to accept employment or continue employment with an elected county appointing authority and, consequently, is a fringe benefit. *See* 2011 Op. Att'y Gen. No. 2011-046, at 2-367; 2009 Op. Att'y Gen. No. 2009-009, at 2-61; 2007 Op. Att'y Gen. No. 2007-012, at 2-103; 2005 Op. Att'y Gen. No. 2005-020, at 2-188; 1984 Op. Att'y Gen. No. 84-076, at 2-249.

Insofar as a leave donation program provides a means by which an elected county appointing authority may permit an employee to acquire and use paid leave when the employee does not have accrued but unused paid leave, the program constitutes a fringe benefit. Accordingly, an elected county appointing authority is authorized to establish, as a fringe benefit, a leave donation program that permits an employee to acquire and use donated paid leave when the employee does not have accrued but unused paid leave, provided (1) no statute restricts that authority and (2) the benefit provided under the program is in excess of that provided by statute. *See* 2007 Op. Att’y Gen. No. 2007-012, at 2-103; 2005 Op. Att’y Gen. No. 2005-020, at 2-188; 1981 Op. Att’y Gen. No. 81-052, at 2-202.

Except as provided in R.C. 124.391, no other statute governs the establishment and implementation of leave donation programs at the county level of government. Pursuant to R.C. 124.391, a board of county commissioners “may implement a leave donation program” that applies to the employees of an elected county appointing authority. The use of the word “may” in describing the authority of a board of county commissioners to implement a leave donation program indicates that a board has discretion whether to provide such a program since no other language in R.C. 124.391 or elsewhere in the Revised Code “evidences a clear and unequivocal [legislative] intent to the contrary.” *State v. Golphin*, 81 Ohio St. 3d 543, 546, 692 N.E.2d 608 (1998). *See generally Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph 1) (“[i]n statutory construction, the word ‘may’ shall be construed as permissive and the word ‘shall’ shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage”). In other words, R.C. 124.391 does not require a board of county commissioners to implement a leave donation program that applies to the employees of an elected county appointing authority.

In addition, R.C. 124.391 does not expressly prohibit an elected county appointing authority from establishing a leave donation program as a fringe benefit for its employees. In past opinions, we have identified specific language in the Revised Code that constricts the authority of an appointing authority to provide a particular fringe benefit.<sup>11</sup> *See, e.g.*, 2009 Op. Att’y Gen. No. 2009-009, at 2-64 to 2-67 (insofar as R.C. 9.44(C) expressly bars employees from including the service they earned prior to retirement in computing their vacation leave, a county appointing authority

<sup>11</sup> Prior Attorney General opinions have stated that “[b]y specifying the particular reasons for which an employee may use sick leave, R.C. 124.38 constricts the authority of [an elected county appointing authority] to fix its employees’ sick leave benefits as part of their compensation.” 2006 Op. Att’y Gen. No. 2006-026, at 2-223. For this reason, 1987 Op. Att’y Gen. No. 87-029 concluded that insofar as the donation of sick leave is not an authorized use of sick leave prescribed by R.C. 124.38, an elected county appointing authority may not establish a sick leave donation program that permits an employee to donate accrued but unused sick leave to another employee. *See generally* R.C. 124.38(C) (sick leave may be used for “personal illness, pregnancy, injury, exposure to contagious disease that could be

may not include such service when computing the vacation leave of employees whose compensation it fixes); 1981 Op. Att’y Gen. No. 81-052, at 2-204 to 2-205 (a board of education may not expend public moneys to provide cash payments to teaching employees for unused sick leave at the end of a school year because R.C. 124.38 establishes when an employee may convert unused sick leave into cash payments and R.C. 3319.141 requires that unused sick leave be cumulative). Unlike those opinions, there is no specific language in R.C. 124.391 or elsewhere in the Revised Code that constricts the authority of an elected county appointing authority to establish a leave donation program.

Absent constricting language in the Revised Code, an elected county appointing authority may establish a leave donation program for its employees as a fringe benefit. Further, the establishment of a leave donation program under R.C. 124.391 by a board of county commissioners that applies to the employees of an elected county appointing authority is not a restriction on the appointing authority’s power to grant more benefits under its own leave donation program than are granted by the board of county commissioners under R.C. 124.391. Under its power to provide fringe benefits to its employees, an elected county appointing authority may grant its employees more than the minimum benefits authorized by a board of county commissioners pursuant to R.C. 124.391. *See* 2007 Op. Att’y Gen. No. 2007-012, at 2-103; 2005 Op. Att’y Gen. No. 2005-020, at 2-188; 1981 Op. Att’y Gen. No. 81-052, at 2-202. An elected county appointing authority may not, however, reduce the benefits provided by the board of county commissioners pursuant to R.C. 124.391, as the board has established a minimum benefit entitlement for the employees of the county agencies that are part of the program. *See* 2007 Op. Att’y Gen. No. 2007-012, at 2-103; 2005 Op. Att’y Gen. No. 2005-020, at 2-188; 1981

communicated to other employees, and illness, injury, or death in the employee’s immediate family’’).

In 1995, however, the General Assembly enacted R.C. 124.391 to permit a county employee to donate accrued but unused sick leave to another employee if the board of county commissioners establishes a leave donation program. *See* 1995-1996 Ohio Laws, Part V, 8516, 8573 (Am. Sub. S.B. 99, eff. Oct. 25, 1995). The enactment of this statute removed R.C. 124.38 as a prohibition against a county employee donating accrued but unused sick leave to another employee when so permitted by a board of county commissioners under R.C. 124.391. We further believe that R.C. 124.391 removed R.C. 124.38 as a prohibition against a county employee donating accrued but unused sick leave to another employee when an elected county appointing authority adopts a program permitting such donations. It would be illogical to conclude that the General Assembly intended R.C. 124.38 as a restriction on the leave donation programs of elected county appointing authorities but not on a leave donation program established by a board of county commissioners under R.C. 124.391. Thus, in light of the enactment of R.C. 124.391, it is not appropriate to construe R.C. 124.38 as constricting the power of an elected county appointing authority to permit its employees to donate accrued but unused sick leave to another employee. Thus, we overrule 1987 Op. Att’y Gen. No. 87-029 on the basis of statutory amendment.

Op. Att’y Gen. No. 81-052, at 2-202. Therefore, an elected county appointing authority may establish a leave donation program for its employees and the program may be more, but not less, generous than the leave donation program established by the board of county commissioners under R.C. 124.391 when the appointing authority is required to participate in the board’s program.<sup>12</sup>

#### **Transfer of Accrued but Unused Paid Leave between County Agencies**

Your final question asks whether an employee of a county agency may donate accrued but unused paid leave to an employee of another county agency. We first address whether an employee of a county agency may donate accrued but unused paid leave to an employee of another county agency when the board of county commissioners has established a leave donation program under R.C. 124.391. No provision in R.C. 124.391 or elsewhere in the Revised Code addresses the ability of a county employee to donate accrued but unused paid leave to an employee who works in a different county agency.

Nevertheless, R.C. 124.391 provides that, if a leave donation program is established by a board of county commissioners, the board must adopt rules for the administration of the program including, but not limited to, “provisions that identify the circumstances under which leave may be donated and that specify the amount, types, and value of leave that may be donated.” This grant of rule-making authority to a board of county commissioners confers upon the board the discretion to determine the circumstances in which a county employee may donate accrued but unused paid leave to another employee under a leave donation program established pursuant to R.C. 124.391. This includes determining whether to permit a county employee to donate accrued but unused paid leave to an employee of another county agency. *See generally* rule 123:1-46-05 (with respect to the state leave donation program established under R.C. 124.391, the Director of Administrative Services has determined that an employee may not donate accrued but unused paid leave to an employee who does not report to the same agency). Accordingly, a board of county commissioners that establishes a leave donation program under R.C. 124.391 may determine whether an employee of a county agency may donate accrued but unused paid leave to an employee of another county agency.

Additionally, as explained above, an elected county appointing authority may establish a leave donation program. No statute directs the manner in which an elected county appointing authority is to implement its leave donation program. In the absence of such guidance, an elected county appointing authority may, in the reasonable exercise of its discretion, determine that it is reasonable to permit its employees to donate accrued but unused paid leave to employees of another county

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<sup>12</sup> If a board of county commissioners establishes a leave donation program under R.C. 124.391 that does not apply to an elected county appointing authority, the appointing authority may establish a leave donation program for its employees that is more or less generous than the leave donation program established by the board of county commissioners under R.C. 124.391.

agency.<sup>13</sup> See generally *State ex rel. Attorney General v. Morris*, 63 Ohio St. 496, 512, 59 N.E. 226 (1900) (if it should be found that certain things are authorized to be done by public officials, “and no statute can be found prescribing the exact mode of performing that duty or thing, the presumption would be that the general assembly intended that it might be performed in a reasonable manner, not in conflict with any law of the state”).

However, except as provided in R.C. 124.391, the power of a county appointing authority to provide a leave donation program as a fringe benefit extends only to the employees of the appointing authority. See *Ebert v. Stark Cnty. Bd. of Mental Retardation*, 63 Ohio St. 2d at 33; 2007 Op. Att’y Gen. No. 2007-012, at 2-103; 2007 Op. Att’y Gen. No. 2007-010, at 2-70; 2005 Op. Att’y Gen. No. 2005-020, at 2-188; 1981 Op. Att’y Gen. No. 81-052, at 2-202. As R.C. 124.391 does not authorize an elected county appointing authority to establish a leave donation program that applies to employees of another county agency, an elected county appointing authority may not establish such a program.

This means that an elected county appointing authority may not permit the employees of another county agency to accept and use donated leave. Instead, these employees may accept and use donated leave only if (1) the board of county commissioners has authorized them to do so pursuant to R.C. 124.391 or (2) their appointing authority permits them to accept and use donated leave as a fringe benefit. For this reason, an elected county appointing authority that establishes a leave donation program may not permit an employee to donate accrued but unused paid leave to an employee of another county agency unless the county agency has a leave donation program that permits the employee to accept and use the donated leave. Accordingly, an elected county appointing authority that establishes a leave donation program may permit an employee to donate accrued but unused paid leave

<sup>13</sup> If a board of county commissioners has established a leave donation program under R.C. 124.391 that permits the employees of an elected county appointing authority to donate accrued but unused paid leave to employees of another county agency, the appointing authority may not prohibit or limit the ability of its employees to do so. As previously discussed, an elected county appointing authority may grant its employees more than the minimum benefits authorized by the board of county commissioners pursuant to R.C. 124.391 but may not reduce the benefits provided by the board. See 1981 Op. Att’y Gen. No. 81-052, at 2-202.

Also, if a board of county commissioners has established a leave donation program under R.C. 124.391 that prohibits the employees of an elected county appointing authority from donating accrued but unused paid leave to employees of another county agency, the appointing authority may nonetheless permit its employees to make such donations in the situations described later in this opinion. This authority, as explained above, is derived from the power of an elected county appointing authority to establish a leave donation program for its employees that is more generous than the leave donation program established by the board of county commissioners under R.C. 124.391. See 1981 Op. Att’y Gen. No. 81-052, at 2-202.

to an employee of another county agency that has a leave donation program that permits the employee to accept and use the donated leave.

### **Conclusions**

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

1. Elected county appointing authorities are “county agencies” for purposes of R.C. 124.391.
2. R.C. 124.391 authorizes a board of county commissioners to establish different leave donation programs for individual county agencies.
3. Pursuant to R.C. 4117.10(A), the terms of a collective bargaining agreement authorizing a county employee to donate accrued but unused paid leave to another county employee prevail over conflicting rules of a leave donation program established by a board of county commissioners under R.C. 124.391.
4. A leave donation program established by a board of county commissioners under R.C. 124.391 may not permit a county employee to use donated leave to receive pay for an absence from work that occurred prior to the program’s implementation.
5. An elected county appointing authority may establish a leave donation program for its employees and the program may be more, but not less, generous than the leave donation program established by the board of county commissioners under R.C. 124.391 when the appointing authority is required to participate in the board’s program. (1987 Op. Att’y Gen. No. 87-029, overruled on the basis of statutory amendment.)
6. A board of county commissioners that establishes a leave donation program under R.C. 124.391 may determine whether an employee of a county agency may donate accrued but unused paid leave to an employee of another county agency.
7. An elected county appointing authority that establishes a leave donation program may permit an employee to donate accrued but unused paid leave to an employee of another county agency that has a leave donation program that permits the employee to accept and use the donated leave.