

Note from the Attorney General's Office:

1981 Op. Att'y Gen. No. 81-015 was qualified by
1990 Op. Att'y Gen. No. 90-074.

OPINION NO. 81-015**Syllabus:**

1. The employees of county boards of elections are employed in offices of the county service and are thus within the purview of the provisions of R.C. 124.38 and R.C. 124.39(B) regarding sick leave; such sections establish minimum benefits to which board of elections employees are entitled.
2. Only the political subdivisions named in R.C. 124.39(B) are authorized to act pursuant to R.C. 124.39(C).
3. The board of county commissioners may, pursuant to R.C. 124.39(C), promulgate a policy for the payment of accumulated unused sick leave to employees of a county board of elections, allowing a larger payment for unused sick leave than set forth in R.C. 124.39(B), allowing a lesser number of years service before payment may be made than set forth in R.C. 124.39(B), permitting more than one payment per employee, or permitting payment upon termination other than retirement.
4. The board of elections may adopt its own policy with regard to payment for sick leave for its employees, provided that the board's policy provides benefits at least as great as any benefits to which such employees may otherwise be entitled.
5. The board of elections may not require a greater number of hours of service than stated in R.C. 124.38 to qualify its employees for paid sick leave.

To: Anthony J. Celebrezze, Jr., Secretary of State, Columbus, Ohio
By: William J. Brown, Attorney General, March 25, 1981

I have before me your request for my opinion concerning the following questions:

1. Are employees of the county boards of elections entitled to paid sick leave under R.C. 124.38?
2. If employees of the county boards of elections are entitled to paid sick leave, does R.C. 124.39 authorize county commissioners or the board of elections to adopt a policy relative to cash payment for accumulated sick leave upon retirement of employees of the county boards of elections?
3. If R.C. 124.38 and R.C. 124.39 do allow an employee to accumulate sick leave, does R.C. 3501.14 allow the several county boards of elections to fix the amount of hours of service that will entitle an employee to sick leave with pay?

In regard to your first inquiry, a determination must be made as to the applicability of the provisions of R.C. 124.38 to the employees of a county board of elections. R.C. 124.38 states, in pertinent part, as follows:

Each employee, whose salary or wage is paid in whole or in part by the state, each employee in the various offices of the county, municipal, and civil service township service, and each employee of any board of education for whom sick leave is not provided by section 3319.141 of the Revised Code, shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay.

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Three categories of employees are included within R.C. 124.38: those whose salaries or wages are paid in whole or part by the state; those in the "various offices" of the county, municipal and civil service township service; and certain employees of boards of education. Because the employees of a county board of elections are obviously not employees of a board of education, I need only consider whether such employees fit within either of the first two categories.

As used in R.C. Chapter 124, "employee" is defined as "any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer" (emphasis added). R.C. 124.01(F). Although board of elections employees are appointed by the board, rather than by an appointing officer, R.C. 3501.11(D) and R.C. 3501.14, both "boards" and "officers" are "appointing authorities" as defined by R.C. 124.01(D). I conclude, therefore, that those employed by a county board of elections are "employees" for purposes of R.C. 124.38. See Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980) (county board of mental retardation employees, who are "employed" by the "board," see R.C. 5126.05, Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980), formerly at R.C. 5126.03 (Am. Sub. H.B. 900, 113th Gen. A. (1980) (eff. May 22, 1980)), were determined to be "employees" entitled to the benefits of R.C. 124.38).

A determination as to whether board of elections employees are included within the purview of R.C. 124.38 as employees whose salaries or wages are paid in whole or in part by the state depends on the language of R.C. 3501.17, which as amended by Am. Sub. H.B. 1062, 113th Gen. A. (1980) (eff. March 23, 1981)¹ provides in part as follows:

The expenses of the board of elections shall be paid from the county treasury, in pursuance of appropriations by the board of county commissioners, in the same manner as other county expenses are paid. . . .

The entire compensation of the members of the board of elections and of the director, deputy director, and other employees in the board's offices; . . . and all other expenses of the board which are not chargeable to a political subdivision in accordance with this section shall be paid in the same manner as other county expenses are paid. (Emphasis added.)

The language of R.C. 3501.17 clearly provides that the expenses of the county boards of elections, which expenses include the compensation not only of the board members but also of their employees, are to be paid from county funds unless otherwise chargeable to a political subdivision. R.C. 3501.01(T) defines "political subdivision" as meaning either "county," "township," "city," "village," or "school district"; therefore, even though the salaries or wages of employees of the board of elections may not always be paid by the county itself, it is clear that no part of them is ever paid by the state. Thus, these employees are not includable within the purview of R.C. 124.38 as employees whose salaries or wages are paid in whole or in part by the state.

Therefore, if employees of the county boards of elections are to be entitled to benefit from the sick leave provisions of R.C. 124.38, they must be found to be "employee[s] in the various offices of the county, municipal, and civil service township service." This determination requires reference to R.C. Chapter 3501, to which I now turn.

R.C. 3501.06 establishes a board of elections in each county of the state. While each board of elections derives its authority from the state itself, R.C. 3501.11, it is empowered to exercise that authority only within the county where situated, and its expenses are paid from appropriations by the board of

¹ I note that Am. Sub. H.B. 1062, 113th Gen. A. (1980), also amends various other provisions of R.C. Chapter 3501, effective March 23, 1981.

commissioners of that county. R.C. 3501.17. Thus, although the members of the board of elections, and the employees thereof, are subject to dismissal by the Secretary of State, see R.C. 3501.16, in all other respects the board of elections, as an entity, is operated and funded like any other county office or board. See, e.g., R.C. 309.09 (the prosecuting attorney of the county is designated as the legal adviser of the "board of elections, and all other county offices and boards"). See also In Re Election of Council of Oak Harbor, 68 Ohio L. Abs. 242, 244, 118 N.E.2d 692, 695 (C.P. Ottawa County 1953). But see State ex rel. Columbus Blank Book Mfg. Co. v. Ayres, 142 Ohio St. 216, 51 N.E.2d 636 (1943) (members of boards of elections are not county officers).

In sum, even though the employees of the boards of elections perform functions established by state law, there is no other legal or factual basis for distinguishing them from other county employees. This conclusion is supported also by the recent decision of the Ohio Supreme Court in Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). The court there considered whether the employees of a county board of mental retardation were entitled to the benefits provided by R.C. 124.38.² The court appears to have determined that those employed by county boards of mental retardation were employees in the various offices of the county service and, as such, were entitled to the benefits of R.C. 124.38. At the time of the Ebert decision, county boards of mental retardation functioned much like county boards of elections in that both types of boards were established in each county of the state, were funded through appropriations by the boards of county commissioners, and hired their own employees. R.C. Chapters 3501 and 5126. Unlike members of boards of mental retardation, a majority of whom were appointed by the county commissioners, members of boards of elections are appointed by the Secretary of State from qualified electors within the county. The service of the members of both boards is, however, to the county pursuant to state statute. I see no reason, therefore, to differentiate between the employment status of board of elections employees and board of mental retardation employees. I conclude, therefore, that county board of elections employees are "employees in the various offices of the county. . . service" and are thus entitled to the sick leave benefits provided by R.C. 124.38.³

Your second question asks whether R.C. 124.39(B) authorizes the board of county commissioners or the board of elections to formulate a policy for payment of accumulated sick leave upon retirement for board of elections employees. R.C. 124.39 reads in part as follows:

(B) Except as provided in division (C) of this section, an employee of a political subdivision covered by section 124.38 or 3319.141 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 his accrued but unused sick leave credit. The payment shall be based on the employee's rate of pay at the time of retirement and eliminates

²Pursuant to Am. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980), county boards of mental retardation are now known as county boards of mental retardation and developmental disabilities.

³I note that in 1965 Op. Att'y Gen. No. 65-193, one of my predecessors concluded that board of elections employees are state employees for purposes of vacation leave benefits under R.C. 121.161. In that opinion my predecessor focused on the functioning of board members as deputies of the Secretary of State, rather than examining the relationship of board employees to the board itself. Since that opinion concerned vacation, rather than sick leave, and considered different statutory provisions than those at issue here, I am not reconsidering its conclusions at this time.

all sick leave credit accrued but unused by the employee at the time payment is made. An employee may receive one or more payments under this division, but the aggregate value of accrued but unused sick leave credit that is paid shall not exceed, for all payments, the value of thirty days of accrued but unused sick leave.

(C) A political subdivision may adopt a policy allowing an employee to receive payment for more than one-fourth the value of his unused sick leave or for more than the aggregate value of thirty days of his unused sick leave, or allowing the number of years of service to be less than ten. The political subdivision may also adopt a policy permitting an employee to receive payment upon a termination of employment other than retirement or permitting more than one payment to any employee.

The express language of R.C. 124.39(C) authorizes a "political subdivision" to adopt a policy allowing a larger payment for unused sick leave than that set forth in R.C. 124.39(B), allowing a lesser number of years service before payment may be made than set forth in R.C. 124.39(B), permitting more than one payment per employee, or permitting payment upon termination other than retirement. Whether the board of county commissioners or the board of elections may adopt a policy for payment of unused sick leave pursuant to R.C. 124.39(C) depends on the meaning of "political subdivision," as used in that section. I believe that the legislature intended that R.C. 124.39(B) and R.C. 124.39(C) be read in pari materia, so that "political subdivision," as used in R.C. 124.39(C), is modified by the words, "covered by section 124.38 or 3319.141 of the Revised Code," the language used to describe the types of political subdivisions covered by R.C. 124.39(B).⁴ If a subdivision is not bound by the minimums established by R.C. 124.39(B), there is no need to authorize such subdivision to grant sick leave benefits in excess of those minimums. Thus, the only type of political subdivision which is authorized to formulate a policy for payment for unused sick leave pursuant to R.C. 124.39(C) is a "political subdivision covered by section 124.38 or 3319.141 of the Revised Code."

It is clear, therefore, that because board of elections employees are "in the various offices of the county. . . service," the county is the political subdivision authorized to formulate a policy for payment of unused sick leave pursuant to R.C. 124.39(C). The county commissioners, acting on behalf of the county,⁵ may promulgate a policy for payment for accumulated sick leave upon retirement of county board of elections employees, provided such policy is within the limits established by R.C. 124.39.

A county board of elections, not being a political subdivision covered by R.C. 124.38 or 3319.141, is not authorized to act pursuant to R.C. 124.39(C). It is, therefore, necessary to examine the specific powers of such a board to determine whether it may otherwise act to formulate a sick leave payment policy for board employees. R.C. 3501.11(D) provides that a board of elections shall "[a]ppoint and remove its director, deputy director, and employees and all registrars, judges, clerks, and other officers of elections, fill vacancies, and designate the ward or district and precinct in which each shall serve." R.C. 3501.14 reads in pertinent part as follows:

The board of elections shall, by a vote of not less than three of

⁴See State ex rel. O'Neil v. Griffith, 136 Ohio St. 526, 27 N.E.2d 142 (1940) ("[w]here two sections of a statute relating to the same subject-matter are amended in the same act, effective at the same time, they are in pari materia. . ."). Because R.C. 124.39(B) and (C) were enacted in the same act, (Am. H.B. 179, 112th Gen. A. (1978) (eff. Sept. 25, 1978)), relate to the same subject matter, and became effective at the same time, the sections are in pari materia.

⁵1978 Op. Att'y Gen. No. 78-057, at 2-139.

its members, fix the annual compensation of its director and deputy director. . . .

The board may, when necessary, appoint a deputy director. . . and other employees, prescribe their duties, and, by a vote of not less than three of its members, fix their compensation.

These sections establish the power of the board of elections to appoint its employees, and R.C. 3501.14 specifically authorizes the board to fix the compensation of board employees. As part of the board of elections' power to fix the compensation of its employees, the board is also authorized to establish a policy concerning the payment for accumulated, unused sick leave upon retirement, provided that the policy so established provides benefits equal to or greater than any benefits to which such employees may otherwise be entitled, either by statute or by action of the county commissioners. Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980); see State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976) ("payments for fringe benefits may not constitute 'salary,' in the strictest sense of that word, but they are compensation").

It is clear, therefore, that pursuant to R.C. 124.39(C) the board of county commissioners may adopt a policy for payment for unused sick leave for employees in the various offices of the county service. As employees in the county service, board of elections employees are entitled to the benefits of any policy adopted for county employees pursuant to R.C. 124.39(C). See generally 1978 Op. Att'y Gen. No. 78-057 (a policy adopted by a political subdivision pursuant to R.C. 124.39(C) need not be uniform as to all offices, agencies and departments within the political subdivision). The board of elections, however, may also adopt its own policy with regard to payment for unused sick leave for its employees, provided that the board's policy provides benefits at least as great as any benefits to which such employees may otherwise be entitled either by statute or by action of the county commissioners.

The last question asks whether R.C. 3501.14 allows a county board of elections to fix the amount of hours of service that will entitle an employee of the board to sick leave with pay. Because this question concerns the accrual of sick leave benefits, it is again necessary to examine the provisions of R.C. 124.38, which reads in part as follows:

Each employee, whose salary or wage is paid in whole or in part by the state, each employee in the various offices of the county, municipal, and civil service township service, and each employee of any board of education for whom sick leave is not provided by section 3319.141 of the Revised Code, shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay. (Emphasis added.)

As I pointed out in 1976 Op. Att'y Gen. No. 76-001, the language of R.C. 124.38 does not permit a distinction between part-time and full time employees. Had the General Assembly intended such a distinction, those statutory provisions pertaining to sick leave would contain the express distinction of coverage, as

⁶Like the provisions of R.C. 124.38 and R.C. 124.39(B), any policy adopted pursuant to the provisions of R.C. 124.39(C) for employees in the various offices of the county service sets minimum benefits to which employees of a county board of elections are entitled as employees in the county service. See Ebert v. Stark County Bd. of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980).

between part-time and full time employees, contained in the amended version of R.C. 325.19 regarding vacation time for county employees.

Because a board of elections has the authority to set its employees' compensation and because the board is not restricted by R.C. Chapter 3501 in fixing its employees' compensation, it may also adopt its own sick leave policy as part of their compensation. Again, the only limitation on the board's authority to promulgate a policy in regard to the number of hours of service that will entitle its employees to paid sick leave is any statutory minimum applicable to board of elections employees.

I conclude, therefore, that R.C. 124.38 sets a minimum amount of sick leave to which board of elections employees are entitled; it also sets the number of hours of service which will entitle board employees to sick leave. Pursuant to its power to fix the compensation of its employees, the board of elections may adopt a policy granting greater benefits than those provided by R.C. 124.38, but may not require a greater number of hours of service than stated in R.C. 124.38 to qualify its employees for paid sick leave. Therefore, so long as the board of elections adopts a policy which grants its employees at least four and six-tenths hours of sick leave with pay for each completed eighty hours of service, the board is acting within its authority.

It is, therefore, my opinion and you are advised, that:

1. The employees of county boards of elections are employed in offices of the county service and are thus within the purview of the provisions of R.C. 124.38 and R.C. 124.39(B) regarding sick leave; such sections establish minimum benefits to which board of elections employees are entitled.
2. Only the political subdivisions named in R.C. 124.39(B) are authorized to act pursuant to R.C. 124.39(C).
3. The board of county commissioners may, pursuant to R.C. 124.39(C), promulgate a policy for the payment of accumulated unused sick leave to employees of a county board of elections, allowing a larger payment for unused sick leave than set forth in R.C. 124.39(B), allowing a lesser number of years service before payment may be made than set forth in R.C. 124.39(B), permitting more than one payment per employee, or permitting payment upon termination other than retirement.
4. The board of elections may adopt its own policy with regard to payment for sick leave for its employees, provided that the board's policy provides benefits at least as great as any benefits to which such employees may otherwise be entitled.
5. The board of elections may not require a greater number of hours of service than stated in R.C. 124.38 to qualify its employees for paid sick leave.

⁷I note that the county commissioners of the county in which the board is located lack authority to adopt a policy fixing the number of hours of service that will entitle a board of elections employee to sick leave with pay. The board of elections' authority to vary the required number of hours of service for purposes of receiving sick leave benefits arises from the board's authority to fix its employees' compensation. Because the county commissioners do not fix the compensation of board of elections employees and are not otherwise authorized by statute to establish a policy regarding service time for sick leave benefits of county employees, the county commissioners have no authority to vary the service time provisions of R.C. 124.38.