

Note from the Attorney General's Office:

1981 Op. Att'y Gen. No. 81-049 was overruled by
1990 Op. Att'y Gen. No. 90-014.

OPINION NO. 81-049**Syllabus:**

1. A person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer is an "employee" for the purposes of R.C. 124.39, regardless of whether the person may otherwise be properly classified as a public officer. (1980 Op. Att'y Gen. No. 80-065 approved and followed; 1973 Op. Att'y Gen. No. 73-104 overruled.)
2. A director of an administrative department created pursuant to R.C. 121.02 is an "employee" for the purposes of R.C. 124.39.

**To: Phillip S. Hamilton, Director, Ohio Department of Administrative Services,
Columbus, Ohio**

By: William J. Brown, Attorney General, August 31, 1981

I have before me your request for an opinion which poses the following questions:

1. Is a public officer who is subject to appointment, removal, promotion, or reduction by an appointing authority an employee for the purposes of R.C. 124.39?
2. Is the director of an administrative department created pursuant to R.C. 121.02 an employee for the purposes of R.C. 124.39?

R.C. 124.39, which deals with payment of unused sick leave upon retirement, reads in part as follows:

As used in this section, "retirement" means disability or service retirement under any state or municipal retirement system in this state.

(A) A state employee paid directly by warrant of the state auditor or an employee of a state college or university may elect, at the time of retirement from active service with an agency of state government and with ten or more years of service with the state or any of its political subdivisions, to be paid in cash for one-fourth of the value of his accrued but unused sick leave credit. Such payment shall be based on the employee's rate of pay at the time of retirement. Payment for sick leave on this basis shall be considered to eliminate all sick leave credit accrued by the employee at that time. Such payment shall be made only once to any employee. The maximum payment which may be made under this division shall be for one-fourth of one hundred twenty days.

In order to qualify for payment for unused sick leave upon retirement under R.C. 124.39, an individual must be "a state employee paid directly by warrant of the state auditor or an employee of a state college or university." Since it is my understanding that you are not inquiring about college or university employees, I am not considering them in this opinion.

"Employee," as used in R.C. Chapter 124, is defined in R.C. 124.01(F) as "any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer." The controlling test for whether a person is an employee for the purposes of R.C. 124.39 is whether the person meets the requirements set forth in R.C. 124.01(F), and not whether a person is otherwise properly classified as a public officer under common law principles. A person who is subject to appointment, removal, promotion, or reduction by an appointing authority is an employee for the purposes of R.C. 124.39, notwithstanding the fact that he may be

considered a public officer for some other purpose. See 1980 Op. Att'y Gen. No. 80-065.

Your request focuses in particular on directors of administrative departments created pursuant to R.C. 121.02. I note that these directors are referred to as "officers." See, e.g., R.C. 121.11, R.C. 121.12. For the reason given above, however, such labeling is not determinative for the purposes of R.C. 124.39. If the director of an administrative department fits within the definition of an employee as set out in R.C. 124.01(F), he is an employee for the purposes of R.C. 124.39.

Under R.C. 121.03, directors of administrative departments are subject to both appointment and removal by the Governor. R.C. 121.03(A) provides for the appointment of directors. It states in part that "administrative department heads shall be appointed by the governor, with the advice and consent of the senate, and shall hold their offices during the term of the appointing governor but subject to removal at the pleasure of the governor." Thus, the Governor is an appointing officer as contemplated by R.C. 124.01(D), which defines an appointing authority as: "the officer, commission, board, or body having the power of appointment to, or removal from, positions in any office, department, commission, board, or institution." The Governor clearly has the power to appoint and remove directors from their positions as heads of departments.

While the fact that the Governor has the power of appointment and removal of the directors about whom you have inquired is sufficient to bring them within the definition of "employee" appearing in R.C. 124.01(F), see 1980 Op. No. 80-065, I note that it appears that the Governor also has the powers of promotion and reduction. The terms "promotion" and "reduction" are not statutorily defined for purposes of R.C. 124.01(F), but some insight into their meaning can be derived from 1 Ohio Admin. Code 124-1-02(P) ("'[p]romotion' means the appointment of an employee to a different position which is assigned a higher pay range than his previous position") and 1 Ohio Admin. Code 124-1-02(S) ("'[r]eduction in pay' means an action which diminishes the affected employee's pay") and (T) ("'[r]eduction in position' means an action which diminishes the affected employee's duties or responsibilities to his detriment"). Pursuant to R.C. 124.15(H), the rate of pay of these directors may be "adjusted higher or lower" by the Governor, within the limits set forth therein. The Governor's capacity to so modify their compensation seems to constitute the power of "promotion" or "reduction" of their positions within the meaning of R.C. 124.01(F).

Based upon the foregoing, it is my opinion that the director of an administrative department created pursuant to R.C. 121.02 is an employee for the purposes of R.C. 124.39.

In your request you referred to my prior opinion, 1973 Op. Att'y Gen. No. 73-104, in which I concluded that a member of the Board of Review of the Bureau of Employment Services was a public officer and was not, therefore, an employee for the purposes of R.C. 124.39. Since the issuance of Op. No. 73-104, I have had the opportunity to reconsider the question of whether a public officer is an employee within the meaning of R.C. 124.01(F). In Op. No. 80-065, I concluded that the definition of employee in R.C. 124.01(F) includes public officers who are subject to appointment, removal, promotion, or reduction. Although I did not specifically address the conclusion reached in Op. No. 73-104 in the analysis of Op. No. 80-065, the reasoning of the later opinion is clearly controlling. Op. No. 73-104 must, therefore, be overruled. A member of the Board of Review does fall within the definition of an "employee" as set out in R.C. 124.01(F), as such a member is subject to appointment and removal by the Governor under R.C. 4141.06.

In specific response to your questions, it is, therefore, my opinion, and you are advised, that:

1. A person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer is an "employee"

for the purposes of R.C. 124.39, regardless of whether the person may otherwise be properly classified as a public officer. (1980 Op. Att'y Gen. No. 80-065 approved and followed; 1973 Op. Att'y Gen. No. 73-104 overruled.)

2. A director of an administrative department created pursuant to R.C. 121.02 is an "employee" for the purposes of R.C. 124.39.