

OPINION NO. 81-061**Syllabus:**

1. A board of township trustees may grant to its employees holiday pay in excess of the minimum entitlement set by R.C. 511.10.
2. A board of township trustees may grant overtime benefits to its firefighting employees.
3. A board of trustees of a non-civil service township may provide for payment of accrued sick leave to township employees upon their separation from service.
4. A board of township trustees may provide injury leave to those public safety personnel whose duties involve an increased risk of work-related injury.
5. A board of township trustees may provide that overtime be accrued by its firefighting employees, and that payment for such overtime be made only upon approval of the board.
6. A board of township trustees may not require its employees to gain approval of the board prior to payment of the eight hours of holiday pay granted by R.C. 511.10. Requirements of accrual and approval may, however, be imposed for any additional hours of holiday pay granted by the township trustees.
7. A board of township trustees may pay its employees at an advanced rate for those off-duty hours devoted to work-related courses or training.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, October 21, 1981

I have before me your request for my opinion in response to the following questions:

1. May a board of township trustees, by resolution, provide for the payment of holiday pay to township employees in excess of the eight hours authorized by Section 511.10, Revised Code?
2. May a board of township trustees, by resolution, provide for the

payment of overtime pay to township employees at an advanced rate which differs from that set forth in Section 4111.03, Revised Code, or under circumstances other than those set forth in that statute (for example, for hours worked in excess of eight hours in one day, or for all hours in excess of forty hours in active pay status in one week)?

3. May the board of township trustees of a non-civil service township, by resolution, provide for the payment of sick leave time, standing to an employee's credit, to such an employee upon separation from service with the township due to retirement, death, or other causes?
4. May a board of township trustees, by resolution, provide for paid injury leave, in addition to a general sick leave policy, for public safety personnel which the board determines to be exposed to an increased risk of work-related injury?
5. May a board of township trustees, by resolution, provide for the accrual of all overtime, and holiday pay, with same to be paid in cash or used as compensatory time in a manner and under such conditions as are specified by board resolution?
6. May a board of township trustees, by resolution, provide compensatory time at an advanced rate for employees who attend work-related courses and training during their off-duty hours?

It is my understanding, based on conversations between a member of my staff and your office, that the township employees with whom you are concerned are firefighters. These individuals ordinarily work fifty rather than forty hours per week and are, therefore, on duty more than the usual eight hours per day. In some respects the statutes governing firefighters differ from those which apply to other township employees. In the course of this opinion I will point out those areas in which my conclusions apply specifically to township firefighters, and, with respect to those areas, I will not address other township employees. With regard to those conclusions which apply to all township workers, I will speak generally of township employees.

The answers to your questions involve an application of the analysis used by the Ohio Supreme Court in the recent case of Ebert v. Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), to resolve issues concerning fringe benefits. In Ebert, the Supreme Court addressed the question of whether a county board of mental retardation "had authority to adopt a sick leave policy which granted benefits greater than those prescribed by R.C. 124.38." Ebert, 63 Ohio St. 2d at 32, 406 N.E.2d at 1099. The Court concluded that the board's power to increase sick leave benefits was derived from its power to fix the compensation of its employees. As the Court stated, 63 Ohio St. 2d at 33, 406 N.E.2d at 1100: "In order for the power to employ to have any significance, it must, of necessity, include the power to fix the compensation of such employees. It should be obvious that sick leave credits, just as other fringe benefits, are forms of compensation." The power to compensate, therefore, carries with it the power to grant fringe benefits.

The power to award fringe benefits is not, however, unlimited. In 1981 Op. Atty Gen. No. 81-052, I discussed the limitations on the ability of a public authority to grant fringe benefits to its employees, as follows:

Once the requisite authority to compensate has been established, any statutory provisions pertinent to the provision of the particular 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.

Pursuant to R.C. 505.38, a board of township trustees may "provide for the employment of such fire fighters as it considers best, and shall fix their compensation." A board of township trustees also has the authority to "appoint such superintendents, architects, clerks, laborers, and other employees as are necessary and fix their compensation." R.C. 511.10. Thus, a board of township trustees possesses the power to compensate which, under Ebert, carries with it the power to award fringe benefits. It is my understanding that the township trustees will exercise this power by means of a resolution or other statutorily authorized method. The remaining analysis of this opinion will, therefore, focus on the statutory schemes surrounding the various benefits mentioned in your letter in order to determine whether the statutes in any way restrict the authority of a board of township trustees to grant such benefits to its employees.

With regard to your first question concerning holiday pay for township employees, R.C. 511.10 reads, in pertinent part, as follows:

Any township employee working on a salary or hourly basis is entitled to eight hours of holiday pay for New Year's day, Martin Luther King day, Washington-Lincoln day, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, and Christmas day, of each year, provided that the employee is a regular employee with at least six months full-time township service prior to the month when such holiday occurs.

Thus, under R.C. 511.10, every township employee who works on a salary or hourly basis and who has been employed for the required period of time is entitled to eight hours of holiday pay for the specific days listed.

In applying the analysis used by the Supreme Court in Ebert to your first question, it becomes apparent that a township may grant to its employees holiday pay in excess of the eight hours prescribed by R.C. 511.10. R.C. 511.10 does concern holiday pay for township employees, and must, therefore, be examined for its possible constricting effect. However, there is no indication that R.C. 511.10 was meant in any way to restrict a board of township trustees from awarding more than eight hours of holiday pay. Rather, like R.C. 124.38,¹ considered in the Ebert case,

¹R.C. 124.38 provides in pertinent part:

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.)

R.C. 511.10 ensures employees of a minimum entitlement. I conclude, therefore, that a board of township trustees may grant to township employees holiday pay in excess of that specified in R.C. 511.10.

Your second question concerns the ability of a board of township trustees to provide for a rate of overtime pay to township employees which differs from that specified in R.C. 4111.03. R.C. 4111.03(A) provides, in pertinent part, that "[a]n employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one workweek. . . ." The Ohio Supreme Court, in the case of Meeks v. Papadopoulos, 62 Ohio St. 2d 187, 404 N.E.2d 159 (1980), recently concluded that firefighters are not employees for the purposes of R.C. 4111.03 and are not, therefore, entitled to overtime under that statute. The Court's reasoning was based on the conclusion that R.C. 4111.01(E)(7) excludes firefighters from the definition of employee. The courts noted that a basis for the "legislative differentiation of . . . fire personnel under the Ohio Minimum Fair Wage Standard Act is that the responsibilities of these public employees, unlike their counterparts, have no temporal parameters and pose specialized scheduling considerations for their employers." Meeks, 62 Ohio St. at 194, 404 N.E.2d at 164.

Once it is concluded that township firefighters are not entitled to overtime pursuant to R.C. 4111.03, it becomes necessary to determine whether a township may, nonetheless, grant overtime benefits to these employees. As was noted previously, the fact that a statute concerning overtime benefits is in existence necessitates a consideration of whether that statute operates so as to constrict the authority of the township trustees to grant overtime to township firefighters. It is my opinion that the exclusion of firefighters from the coverage of R.C. 4111.03 does not act as such a restriction. As the Supreme Court noted in Meeks, the exclusion from R.C. 4111.03 means that firefighters are not entitled, as a matter of statutory right, to receive overtime benefits. The fact that they are not entitled to such benefits pursuant to statute does not, however, mean that they may not receive them if the township trustees choose to grant such fringe benefits. Thus, I conclude that the exclusion of firefighters from R.C. 4111.03 does not restrict the authority of a board of township trustees to grant overtime benefits to township firefighters on whatever terms it deems appropriate.

Your third question asks whether a board of township trustees of a non-civil service township may permit the payment to an employee of accrued sick leave² upon the employee's separation from service due to retirement, death or other causes. There is no statute which governs the payment of accrued sick leave to employees of a non-civil service township upon their separation from township service. Therefore, under the approach adopted by the Supreme Court in Ebert, a board of township trustees may, pursuant to its power to compensate, permit the payment of accrued sick leave to employees upon their separation from service with the township. Since the decision to award such a benefit and the manner in which it is to be awarded are within the discretion of the township trustees, they are free to determine which types of separation from service qualify for payment. I conclude, therefore, that a board of township trustees of a non-civil service township may provide for the payment of accrued sick leave to township employees upon separation from service due to retirement, death, or any other cause specified by the trustees.

Your fourth question concerns the authority of a board of township trustees to provide injury leave to those public safety employees whom the board believes to

²There is no statute which entitles the employees of a non-civil service township to sick leave. However, numerous past Opinions of the Attorney General have concluded that a board of township trustees may grant sick leave benefits to its employees if it so desires. 1964 Op. Att'y Gen. No. 814, p. 2-38; 1955 Op. Att'y Gen. No. 6033, p. 667; 1951 Op. Att'y Gen. No. 1035, p. 882.

be exposed to an increased risk of work-related injury.³ As with sick leave, there is no statute which governs injury leave for such township employees. Thus, under the Ebert analysis there is no restraint on the creation of such a benefit for township public safety employees. I conclude, therefore, that a board of township trustees may grant injury leave, in addition to the usual sick leave, to those public safety personnel whose duties involve an increased risk of work-related injury.

Your fifth question, which concerns the accrual of overtime and holiday pay, is phrased in general terms; however, it is my understanding that your specific concern is with the following set of facts. It is currently the practice in some Ohio townships to require firefighting employees to accrue all overtime and holiday pay in the same manner in which they accrue sick leave. In order for an employee to take either the accrued overtime in the form of cash or compensatory time or the accrued holiday pay in the form of cash, he must first submit a request to the board of township trustees. That request must be approved by the board prior to receipt by the employee of either the cash or the compensatory time.

As was previously discussed in answer to your second question, firefighters are not entitled to receive overtime in accordance with R.C. 4111.03, but may be granted overtime benefits by the board of township trustees. It follows from the fact that the trustees may grant overtime benefits if they so choose, that they may also prescribe the manner in which the overtime policy functions. Consequently, a board of township trustees may require its firefighting employees to accrue overtime in the same manner in which they accrue sick leave and to submit an application to the board for its approval prior to the receipt of cash or compensatory time for the accrued hours.

As I discussed in answer to your first question, township employees are granted a minimum entitlement to holiday pay by R.C. 511.10, quoted in pertinent part above. R.C. 511.10 clearly states that a township employee working on a salary or hourly basis who is a regular employee with at least six months prior service with the township is entitled to eight hours of holiday pay for the days specified. This statute grants an unconditional right to the employee to receive this pay. A board of township trustees does not have the authority to reduce, by resolution, an employee's benefits below the statutory minimum. See Ebert v. Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980) ("board's authority includes the power to modify its sick leave policy and reduce the benefits to the level prescribed by R.C. 124.38. . ."). The addition of prerequisites to the receipt of what would otherwise be an unconditional benefit would operate so as to reduce the employee's benefit. Moreover, a board of township trustees, as a creature of statute, possesses only those powers expressly granted or necessarily implied. Trustees of New London Township v. Miner, 26 Ohio St. 452 (1875). When the legislature said that an employee was entitled to holiday pay, it did not give the board of township trustees the authority to decide when and if the employee could receive this entitlement. The provisions of R.C. 511.10 can be contrasted with those areas in which local authorities have been given the statutory authority to approve an employee's use of a particular benefit. See, e.g., R.C. 124.38 ("[e]mployees may use sick leave, upon approval of the responsible administrative officer. . ."). Since there is no statutory authority for a board of township trustees to require approval of the holiday pay granted by R.C. 511.10, I conclude that a board of township trustees may not require township firefighting employees to accrue the holiday pay provided for in R.C. 511.10 and to submit an application for the approval of the board prior to receipt by the employee of a cash payment for those hours.

³ It is my understanding that the proposed injury leave policy does not include a provision, such as that discussed in 1980 Op. Att'y Gen. No. 80-080, which would require employees on injury leave to turn over any money received from Workers' Compensation to the township; therefore, I am not considering what impact, if any, such a provision might have.

I note, however, that the conclusion reached above applies only to the minimum holiday benefit provided by R.C. 511.10. If a board of township trustees should decide to award payment for holiday hours in excess of the eight hours set by R.C. 511.10 it could, of course, also decide the manner in which such an additional benefit would be administered. A board of township trustees may, therefore, require its employees to accrue any holiday hours in excess of the R.C. 511.10 entitlement and to obtain township approval prior to the receipt of payment for those hours.

Your sixth question asks whether those township employees who attend work-related courses or training during their off-duty hours may be provided with compensatory time at an advanced rate of pay for those hours. It is my understanding, based on conversations between a member of my staff and your office, that under this plan the employees in question would be paid for such off-duty hours at a rate higher than their usual pay rate. If, for example, an employee spent four hours attending a work-related course, he might receive six hours of pay. There is no statutory scheme governing the payment of wages or other benefits to employees who take part in work-related schooling. Thus, as has been previously discussed, under the analysis set forth by the Supreme Court in Ebert, the township trustees may award such benefits as they deem appropriate pursuant to their statutory power to compensate. I conclude, therefore, that a board of township trustees may compensate its employees at an advanced rate for those off-duty hours which the employees spend taking part in work-related courses or training.

Therefore, it is my opinion, and you are advised, that:

1. A board of township trustees may grant to its employees holiday pay in excess of the minimum entitlement set by R.C. 511.10.
2. A board of township trustees may grant overtime benefits to its firefighting employees.
3. A board of trustees of a non-civil service township may provide for payment of accrued sick leave to township employees upon their separation from service.
4. A board of township trustees may provide injury leave to those public safety personnel whose duties involve an increased risk of work-related injury.
5. A board of township trustees may provide that overtime be accrued by its firefighting employees, and that payment for such overtime be made only upon approval of the board.
6. A board of township trustees may not require its employees to gain approval of the board prior to payment of the eight hours of holiday pay granted by R.C. 511.10. Requirements of accrual and approval may, however, be imposed for any additional hours of holiday pay granted by the township trustees.
7. A board of township trustees may pay its employees at an advanced rate for those off-duty hours devoted to work-related courses or training.