

July 1, 2015

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
4th Floor Administration Building
160 High Street N.W.
Warren, Ohio 44481-1092

SYLLABUS:

2015-022

1. Pursuant to R.C. 124.13(D), county department of job and family services (CDJFS) employees who accrue vacation leave in accordance with the provisions of R.C. 124.13 and convert accrued and unused vacation leave to cash payments pursuant to an annual leave conversion policy shall experience a corresponding reduction in their maximum three-year vacation leave balance.
2. Pursuant to Trumbull County's annual leave conversion policies, vacation leave "shall be converted on a last in, first out (LIFO) basis." Accordingly, a county employee who converts vacation leave to cash payments pursuant to one of those policies must experience a corresponding reduction in vacation leave hours that the employee has most recently accrued.
3. Whether a Trumbull County employee who converts vacation leave accrued under R.C. 325.19 to cash payments pursuant to an annual leave conversion policy shall experience a reduction in the vacation leave balance the employee has been permitted to carry over, or accumulate, from prior years depends on the specific facts and circumstances of the conversion. Relevant factors in making this determination include the amount of vacation leave that the employee converts under the annual leave conversion policy, the employee's anniversary date of employment, and the amount of vacation leave that the employee has accrued and not used since her most recent anniversary date of employment.

4. A county appointing authority is authorized to correct its payroll records and re-credit an employee with vacation leave benefits if it determines that such benefits have been inappropriately deducted from an employee's vacation leave balance as a result of the employee's annual conversion of vacation leave to cash payments.



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OPINION NO. 2015-022

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
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Warren, Ohio 44481-1092

Dear Prosecutor Watkins:

You have requested an opinion concerning the annual conversion of county employees' accrued, unused vacation leave to cash payments. The Trumbull County Board of Commissioners has adopted and implemented policies that permit employees of certain county offices to annually convert vacation leave that they accrued and did not use during the current calendar year to cash payments. *See generally* R.C. 124.39(C) (a political subdivision, including a county, may adopt policies similar to the provisions contained in R.C. 124.382 to R.C. 124.386); *see also* R.C. 124.384(C) (permitting the adoption of "a plan for early payment of accrued ... vacation leave" for certain state employees); 2000 Op. Att'y Gen. No. 2000-020, at 2-121 n.2 (in the case of a county, it is the board of county commissioners that is responsible for adopting any policy under R.C. 124.39(C)). Pursuant to statute, county employees shall generally take vacation leave during the year in which it accrues, provided, however, that an appointing authority may permit an employee to carry over vacation leave to the following year. R.C. 124.13(D) (with respect to county department of job and family services (CDJFS) employees); R.C. 325.19(C) (with respect to other county employees); 1989 Op. Att'y Gen. No. 89-012, at 2-48 (modified in part by 2009 Op. Att'y Gen. No. 2009-009 and qualified and questioned by 2008 Op. Att'y Gen. No. 2008-004) (a county employee "must generally use his vacation benefits during the year in which they accrue and prior to the next recurrence of the anniversary date of his employment, unless the appointing authority allows the employee to accumulate and carry over the unused leave to the following year"). County employees generally are not permitted to carry over vacation leave for more than three years. R.C. 124.13(D) (CDJFS "[e]mployees shall forfeit their right to take or to be paid for any vacation leave to their credit which is in excess of the accrual for three years"); R.C. 325.19(C) ("[n]o vacation leave shall be carried over for more than three years").

To better understand the questions you have presented, it is helpful to begin with an example. For purposes of our example, which we will use throughout this entire opinion, we will assume that Employee A is entitled to accrue 80 hours of vacation leave annually. *See* R.C. 124.13(B) (a CDJFS employee with more than one but less than eight years of service with the state or any political subdivision of the state shall accrue 80 hours of vacation leave annually); R.C. 325.19(A)(1) (a county employee with more than one but less than eight years of service with the county or any political

subdivision of the state is entitled to accrue 80 hours of vacation leave annually). Unless Employee A's appointing authority adopts a contrary policy, *see* R.C. 325.19(F); note 5, *infra*, Employee A may not carry over vacation leave for more than three years. Thus, the maximum amount of vacation leave that Employee A may carry over is 240 hours.¹ Your first question concerns what happens when Employee A's vacation leave balance reaches this 240 hour maximum. You wish to know whether Employee A continues to accrue vacation leave in the current year, beyond the 240 hour maximum, that she may convert to cash payments pursuant to the county's annual leave conversion policy.

Your specific questions are as follows:

1. May a Trumbull County employee who has accrued the maximum amount of vacation leave authorized for a three-year period under R.C. 124.13 and R.C. 325.19 convert vacation leave that accrues, but is not used, in the current calendar year without a corresponding reduction in the employee's maximum three-year vacation leave balance?
2. If the answer to question one is affirmative, may a Trumbull County appointing authority restore accrued vacation leave to an employee whose maximum three-year vacation leave balance was reduced as a result of a conversion to cash of vacation leave accrued and unused in calendar year 2014?

The Power of an Appointing Authority to Provide Fringe Benefits, Including Paid Vacation Leave, to its Employees

Before examining the statutory scheme governing vacation leave for county employees, we begin with a summary of the common law principle that a county officer, board, or other agency with the statutory power to employ (an "appointing authority") has the concomitant authority to fix its employees' compensation, including fringe benefits such as paid vacation leave. *Ebert v. Stark Cnty. Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 33, 406 N.E.2d 1098 (1980); 2015 Op. Att'y Gen. No. 2015-001, at 2-1; 2009 Op. Att'y Gen. No. 2009-009, at 2-61. A county appointing authority may not, however, provide its employees fewer fringe benefits than those established by statute as minimum entitlements. *See Cataland v. Cahill*, 13 Ohio App. 3d 113, 468 N.E.2d 388 (Franklin County 1984) (syllabus) ("vacation leave prescribed by statute are minimums only and, where the appointing authority is authorized to establish compensation of employees, ... vacation-leave benefits in addition to the minimums prescribed by statute may be granted as part of compensation"). For

¹ For purposes of our example, we assume that Employee A accrues 80 hours of vacation leave during each of the relevant years of accrual. When Employee A attains eight or more years of service, she will begin accruing 120 hours of vacation leave annually. *See* R.C. 124.13(B) (county department of job and family services (CDJFS) employees); R.C. 325.19(A)(1) (other county employees). Accordingly, when Employee A attains eight or more years of service, her vacation leave balance may exceed 240 hours.

example, if a statute provides county employees a certain number of hours of vacation leave annually, a county appointing authority may provide those employees additional hours of vacation leave annually, but may not provide those employees less vacation leave than prescribed by the statute. Furthermore, an appointing authority's power to establish a particular fringe benefit may be constricted otherwise by statute. For example, a statute may prescribe the maximum number of hours of vacation leave to which certain employees are entitled, thus constricting the appointing authority from providing its employees vacation leave benefits in excess of that statutory maximum. As summarized in 1981 Op. Att'y Gen. No. 81-052, "the 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." 1981 Op. Att'y Gen. No. 81-052, at 2-202. For ease of discussion, we will refer to the power of county appointing authorities to fix the compensation (including vacation leave benefits) of their employees, subject to statutory minimum entitlements and other statutory constrictions, as their *Ebert* power.²

² As explained above, the *Ebert* power gives county appointing authorities the power to vary the compensation, including the vacation leave benefits, of their employees from that set forth by statute. It is important to note that a board of county commissioners is not the appointing authority of all county employees. Rather, a board of county commissioners is entitled to appoint only certain county employees. See, e.g., R.C. 305.13 (clerk); R.C. 305.15 (engineer, upon written request of county engineer); R.C. 305.16 (superintendent, watchmen, janitors). A board of county commissioners may exercise its *Ebert* power only with respect to employees that the board is authorized to appoint, see, e.g., R.C. 305.13, and employees whose compensation the board is authorized to fix, see, e.g., R.C. 124.14(E)(1). See *Ebert v. Stark Cnty. Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 33, 406 N.E.2d 1098 (1980) (the power to employ includes the power to fix the compensation, including fringe benefits, of such employees); 1981 Op. Att'y Gen. No. 81-061, at 2-246 (the power to compensate carries with it, under *Ebert*, the power to grant fringe benefits); see also 2014 Op. Att'y Gen. No. 2014-034, at 2-298 n.3 (generally "a board of county commissioners has the authority to determine the compensation of only county personnel for whom the board is the appointing authority").

The General Assembly has, however, granted a board of county commissioners limited authority with respect to the compensation of all county employees. A board of county commissioners may procure and pay for the cost of various group insurance policies for county officers and employees and their immediate dependents. R.C. 305.171. Further, as is the case in Trumbull County, a board of county commissioners may adopt a policy authorizing county employees, including those the board does not appoint, to annually convert accrued and unused vacation leave to cash payments. See R.C. 124.39(C) (a political subdivision, including a county, may adopt policies similar to the provisions contained in R.C. 124.382 to R.C. 124.386); see also R.C. 124.384(C) (permitting the adoption of "a plan for early payment of accrued ... vacation leave" for certain state employees); 2000 Op. Att'y Gen. No. 2000-020, at 2-121 n.2 (in the case of a county, it is the board of county commissioners that is responsible for adopting any policy under R.C. 124.39(C)).

Statutory Scheme Governing the Vacation Leave of County Employees

Two statutes govern the vacation leave accrual of most county employees: R.C. 124.13 and R.C. 325.19. R.C. 124.13 governs vacation leave accrual for CDJFS employees and certain state employees. *See generally* R.C. 124.13(E) (notwithstanding R.C. 325.19, which governs vacation leave benefits for county employees, CDJFS employees shall receive vacation leave benefits as provided in R.C. 124.13). Pursuant to R.C. 124.13(B), a full-time CDJFS employee, after one year of service with the state or any political subdivision of the state, is entitled to 80 hours of vacation leave with full pay upon attainment of the first year of employment and annually thereafter. “It is generally understood that a county employee [including a CDJFS employee] must work for an entire year before being granted any vacation leave, and will then be granted eighty hours of vacation leave that may be used beginning in the second year of employment.” 2002 Op. Att’y Gen. No. 2002-011, at 2-61. During the next six years, the employee accrues vacation leave in equal increments granted in each of twenty-six biweekly pay periods at a rate at which the amount accrued each year totals 80 hours. *Id.* at 2-60 to 2-61. The annual amount of vacation leave to which a CDJFS employee is entitled increases after eight, fifteen, and twenty-five years of service. R.C. 124.13(B). At those times, the biweekly rate at which the employee accrues vacation leave also increases. *Id.*

R.C. 325.19 governs vacation leave accrual for “[e]ach full-time employee in the several offices and departments of the county service[.]”³ Pursuant to R.C. 325.19(A)(1):

Each full-time employee in the several offices and departments of the county service, including full-time hourly rate employees, after service of one year with the county or any political subdivision of the state, shall have earned and will be due upon the attainment of the first year of employment, and annually thereafter, eighty hours of vacation leave with full pay.

Like CDJFS employees, county employees must work for a full year before they are granted any vacation leave. 2002 Op. Att’y Gen. No. 2002-011, at 2-61. At that time, they are granted 80 hours of vacation leave. *Id.* After one year of service, they begin to accrue vacation leave in equal increments during each biweekly pay period so that the annual amount of vacation leave earned equals 80 hours. *Id.* at 2-60 to 2-61. Also like CDJFS employees, county employees who accrue vacation leave under R.C. 325.19 are entitled to accrue more vacation leave after eight, fifteen, and twenty-five years of service. R.C. 325.19(A)(1). *See generally* 2009 Op. Att’y Gen. No. 2009-009, at 2-62 to 2-63 (“[p]ursuant to R.C. 325.19, a county employee’s entitlement to vacation leave and the rate at which he accrues vacation leave is based on the number of years he has served with the county and other

³ In addition to CDJFS employees, certain other county employees do not accrue vacation leave benefits under R.C. 325.19. *See* R.C. 325.19(G)-(I). Because you ask only about R.C. 124.13 and R.C. 325.19, we limit our discussion in this opinion to CDJFS employees, who accrue vacation leave under R.C. 124.13, and county employees who are entitled to accrue vacation leave under R.C. 325.19.

political subdivisions of the state”). At those times, the biweekly rate at which the employee accrues vacation leave also increases. R.C. 325.19(A)(1).⁴

R.C. 124.13 and Vacation Leave Benefits of CDJFS Employees

Because the vacation leave benefits of CDJFS employees are governed by R.C. 124.13, rather than R.C. 325.19, we must separately examine your questions with respect to CDJFS employees. We will first consider whether a CDJFS employee who has accumulated the maximum amount of vacation leave authorized for a three-year period under R.C. 124.13 may convert vacation leave that accrues, but is not used, in the current calendar year without a corresponding reduction in the employee’s maximum three-year vacation leave balance. Stated differently, this question asks: (1) may a CDJFS employee accumulate a vacation leave balance in excess of the accrual for three years;

⁴ R.C. 124.13 and R.C. 325.19 establish the minimum vacation leave benefits to which CDJFS employees and other county employees, respectively, are entitled. As described above, however, county appointing authorities may, subject to statutory minimum entitlements and other statutory constrictions, grant their employees vacation leave benefits that vary from those set forth in R.C. 124.13 and R.C. 325.19. Pursuant to its *Ebert* power, a county appointing authority may increase the number of hours of vacation leave to which its employees are entitled annually. *See* 1986 Op. Att’y Gen. No. 86-077 (syllabus, paragraph 8) (“[a] board of elections may adopt its own policy with respect to vacation leave benefits of its employees, provided that the board’s policy establishes vacation leave benefits at least as great as any benefits to which such employees may otherwise be entitled by statute”). For purposes of this opinion, we assume that the employees in question accrue vacation leave in accordance with the rates set forth in R.C. 124.13(B) or R.C. 325.19(A), rather than pursuant to a policy adopted by an appointing authority that increases, beyond the minimum statutory entitlements, the rates at which county employees accrue vacation leave.

Furthermore, vacation leave benefits are proper subjects of collective bargaining under R.C. Chapter 4117. 2009 Op. Att’y Gen. No. 2009-009, at 2-68 n.14. Accordingly, the vacation leave provisions of R.C. 124.13 and R.C. 325.19 may be superseded by the terms of a collective bargaining agreement. We assume for purposes of this opinion that the county employees in question are not covered by a collective bargaining agreement that alters the provisions of R.C. 124.13 or R.C. 325.19. *See generally* 2009 Op. Att’y Gen. No. 2009-009, at 2-78 (“if a particular feature or component of a [fringe] benefit, including a limitation thereon, is governed by statute, the statutory feature or component will apply to employees covered by a collective bargaining agreement, unless the agreement explicitly and directly excludes that particular feature or component or includes specific language that otherwise varies that feature or component. If the agreement does not exclude, or otherwise address the feature or component, then the agreement ‘makes no specification about’ the matter, and employees are subject to the applicable statutory provisions. If the agreement does exclude, or makes other provision for, the feature or component, then the agreement and state law conflict, and the agreement prevails”).

and (2) if so, may such excess leave be converted to cash payments while the employee continues to carry over the maximum vacation leave accrual of three years?

Pursuant to R.C. 124.13(D), an appointing authority of CDJFS employees may, but is not required to, allow employees to carry over vacation leave beyond the year in which it accrues. Specifically, R.C. 124.13(D) states that a CDJFS employee:

shall take vacation leave during the year in which it accrues and is available for use that equals not less than the amount of vacation leave that the employee accrues and has available to use during that year, *except that an appointing authority may permit an employee to carry over vacation leave to the following year.* As used in this division, “year” means the twelve-month period that commences on an employee’s anniversary date of employment. (Emphasis added.)

Your letter indicates that various county employees “have already accrued the maximum amount of vacation leave authorized for a three (3) year period of time[.]” We will therefore presume that the appointing authority has allowed CDJFS employees to carry over the maximum amount of vacation leave permitted by R.C. 124.13. We must consider whether R.C. 124.13 permits a CDJFS employee to accrue vacation leave in excess of the three-year accrual and, if so, whether such excess leave may be converted to cash payments while the employee maintains a vacation leave balance equal to the three-year accrual.

In this regard, R.C. 124.13(D) states “[e]mployees shall forfeit their right to take or to be paid for any vacation leave to their credit which is in excess of the accrual for three years. Such excess leave shall be eliminated from the employees’ leave balance.”⁵ R.C. 124.13(D) thus allows a CDJFS

⁵ This constricting language of R.C. 124.13(D) prevents a CDJFS appointing authority from adopting a policy under its *Ebert* power that authorizes employees to maintain a vacation leave balance in excess of the accrual for three years. An appointing authority may, however, be able to adopt such a policy pursuant to R.C. 325.19(F), which authorizes a county appointing authority to adopt an alternative schedule of vacation leave for its employees under certain circumstances. *See generally* 2009 Op. Att’y Gen. No. 2009-009, at 2-70 (“[d]ivision (F) of R.C. 325.19 grants appointing authorities the new power to supersede statutes that, under an *Ebert* analysis, would otherwise constrict their authority to grant non-bargaining unit employees vacation benefits”). You have not indicated that any of the relevant county appointing authorities have adopted such alternative schedules of vacation leave. Further, the facts presented in your letter do not indicate that any employees have been authorized by their appointing authority to carry over vacation leave beyond the maximum amounts permitted by R.C. 124.13 and R.C. 325.19. Accordingly, this opinion assumes that no alternative schedules of vacation leave have been adopted that increase the maximum amount of vacation leave that an employee may carry over beyond that permitted by R.C. 124.13 or R.C. 325.19.

employee, with the permission of her appointing authority, to accrue a vacation leave balance equal to, but no greater than, her accrual for three years, regardless of when such leave was accrued.

To better understand how R.C. 124.13(D) operates, let us return to our earlier example of Employee A, who accrues 80 hours of vacation leave annually. The maximum vacation leave balance that Employee A is permitted to accumulate under R.C. 124.13(D) is 240 hours (80 hours per year times the maximum accrual of three years). When Employee A's vacation leave balance reaches this 240 hour maximum, any vacation leave that Employee A accrues beyond this amount "shall be eliminated" from her leave balance. R.C. 124.13(D). Thus, Employee A's vacation leave balance shall not exceed 240 hours.⁶ Because vacation leave in excess of Employee A's maximum three-year accrual of 240 hours has been eliminated, she is not able to convert such excess leave to cash payments pursuant to an annual leave conversion policy. Rather, any vacation leave that Employee A converts to cash payments under the annual leave conversion policy must necessarily be deducted from her maximum three-year vacation leave balance of 240 hours. This is consistent with the fact that Employee A forfeits her "right to take or to be paid for any vacation leave to [her] credit which is in excess of the accrual for three years." *Id.*

Accordingly, CDJFS employees who accrue vacation leave in accordance with the provisions of R.C. 124.13 and convert accrued and unused vacation leave to cash payments pursuant to an annual leave conversion policy shall experience a corresponding reduction in their maximum three-year vacation leave balance.⁷

⁶ When Employee A begins accruing vacation leave at a rate higher than 80 hours per year, *see* R.C. 124.13(B), Employee A's maximum three-year vacation leave balance may exceed 240 hours. *See* note 1, *supra*.

⁷ An argument may be made that under Trumbull County's current annual leave conversion policies, CDJFS employees who remain at their maximum three-year vacation leave balance throughout the entire calendar year are not eligible to convert vacation leave to cash payments. This is because Trumbull County's policies apparently authorize the annual conversion of only vacation leave that has accrued during the current calendar year, which is defined as "January 1 to December 31." If a CDJFS employee is at her maximum three-year vacation leave balance as of January 1 and remains at that balance throughout the calendar year, any leave that the employee accrues in excess of that amount during the year "shall be eliminated from the employee[']s] leave balance." R.C. 124.13(D). If the leave to be eliminated under R.C. 124.13(D) is considered to be the "new" leave that the employee accrues during the current calendar year, she will not have any remaining "new" leave at the end of the year to cash out under Trumbull County's leave conversion policies. If, however, the excess leave to be eliminated under R.C. 124.13(D) is considered to be "old" leave, that is leave that the employee has accrued in prior years, the employee will have "new" leave, leave that has accrued during the current calendar year, to cash out pursuant to Trumbull County's leave conversion policies.

Vacation Leave Benefits of County Employees under R.C. 325.19

We will now consider whether a county employee who has accrued the maximum amount of vacation leave authorized for a three-year period under R.C. 325.19 may convert vacation leave that accrues, but is not used, in the current calendar year without a corresponding reduction in the employee's maximum three-year vacation leave balance. Stated differently, this question asks: (1) may a county employee accrue vacation leave under R.C. 325.19 in excess of the accrual for three years; and (2) if so, may such excess leave be converted to cash payments while the employee maintains a vacation leave balance equivalent to the accrual for three years?

Pursuant to R.C. 325.19(C), a county appointing authority may, but is not required to, allow employees to carry over vacation leave beyond the year in which it accrues. R.C. 325.19(C) states, in part:

[v]acation leave shall be taken by the employee during the year in which it accrued and prior to the next recurrence of the anniversary date of the employee's employment, *provided that the appointing authority may, in special and meritorious cases, permit such employee to accumulate and carry over the employee's vacation leave to the following year.* (Emphasis added.)

However, “[n]o vacation leave shall be carried over for more than three years.” R.C. 325.19(C). Unlike R.C. 124.13(D), R.C. 325.19(C) limits the vacation leave that a county employee may carry over beyond the current year based on when the vacation leave was accrued. *See Thompson v. Dawson*, 7th Dist. No. 02 CO 56, 2003-Ohio-3291, 2003 WL 21453804, at ¶18 (recognizing that R.C. 325.19 “clearly states that employees are only entitled to the vacation leave they accumulated in the three years immediately preceding the present year[,]” in addition to vacation leave accrued during the present year, rather than to vacation leave they have accumulated throughout their entire career). For purposes of the carry-over provisions of R.C. 325.19(C), a year is the twelve-month period that begins on an employee's anniversary date of employment. 1989 Op. Att’y Gen. No. 89-012, at 2-50 to 2-51 (modified in part by 2009 Op. Att’y Gen. No. 2009-009 and qualified and questioned by 2008 Op. Att’y Gen. No. 2008-004); *see also* R.C. 124.13(D) (similarly defining “year” for purposes of the carry-over provisions of R.C. 124.13(D)). Thus, under R.C. 325.19(C), a county appointing authority may allow an employee to “carry over,” or accumulate, vacation leave that the employee has accrued in the three years most recently preceding the employee's last anniversary date of employment. While carry-over of vacation leave under R.C. 325.19(C) operates on an anniversary date to anniversary date basis, Trumbull County's annual leave conversion policies operate on a calendar year basis. That is, Trumbull County's annual leave conversion policies authorize conversion of vacation leave that an employee accrued during the current calendar year, as defined as January 1st to December 31st. In the discussion that follows, we will refer to the twelve-month period that begins on an employee's anniversary date of employment as a “year” and to the twelve months between January 1st and December 31st as a “calendar year.”

Because you have indicated that various county employees “have already accrued the maximum amount of vacation leave authorized for a three (3) year period of time,” we assume that the

county appointing authorities in question have allowed their employees to accumulate the maximum amount of vacation leave authorized by R.C. 325.19. We must, therefore, consider whether R.C. 325.19 authorizes a county employee to accumulate vacation leave in excess of that which has been carried over for three years and whether such excess leave may be converted to cash payments while the employee maintains a vacation leave balance equivalent to the accrual for three years.

The Attorney General has considered the accrual and use provisions of R.C. 325.19(C) in 1989 Op. Att’y Gen. No. 89-012 (modified in part by 2009 Op. Att’y Gen. No. 2009-009 and qualified and questioned by 2008 Op. Att’y Gen. No. 2008-004).⁸ The Attorney General explained:

once an employee begins accruing vacation leave, *i.e.*, after attainment of the first year of employment, he may accumulate such leave as it accrues; upon his anniversary date, if such vacation leave for the current year has not yet been used, he may, with permission of his appointing authority, carry such leave over into the next year. R.C. 325.19(C), however, states that no leave shall be carried over for more than three years. Any vacation leave accrued but unused during the current year is not considered to be carried over until the occurrence of the employee’s anniversary date of employment. *Thus, it is possible that at any time, an employee receiving vacation benefits under R.C. 325.19 could have to his credit those vacation leave credits accrued during his current year of employment, plus the vacation leave accumulated but unused for the three years immediately preceding his last anniversary of employment.*

1989 Op. Att’y Gen. No. 89-012 (modified in part by 2009 Op. Att’y Gen. No. 2009-009 and qualified and questioned by 2008 Op. Att’y Gen. No. 2008-004) (emphasis added). Thus, the Attorney General explained that under R.C. 325.19 it is possible for an employee to accumulate a vacation leave balance in excess of the three-year accrual. This is possible because R.C. 325.19(C) permits an employee to “carry over” vacation leave for no “more than three years[,]” and vacation leave accrued and unused in the current year is not considered to be carried over until the employee’s next anniversary date of employment. Accordingly, the employee may have to his credit three-years’ worth of vacation leave that has been carried over, plus vacation leave that has accrued and not been used in the current year.

⁸ 1989 Op. Att’y Gen. No. 89-012 advised that county appointing authorities had no authority under their *Ebert* power to vary the terms of R.C. 325.19(C). Since issuance of that opinion, however, the General Assembly has enacted division (F) of R.C. 325.19, which authorizes county appointing authorities to adopt alternative schedules of vacation leave for their employees under certain circumstances. Due to R.C. 325.19(F)’s enactment, 2009 Op. Att’y Gen. No. 2009-009 modified in part the advice given in the 1989 opinion, and 2008 Op. Att’y Gen. No. 2008-004 qualified and questioned that advice. The advice provided in 1989 Op. Att’y Gen. No. 89-012, however, remains valid provided that the appointing authorities in question have not adopted alternative schedules of vacation leave that alter the provisions of R.C. 325.19(C). *See* note 5, *supra*.

That a county employee may accumulate a vacation leave balance in excess of the three-year accrual is also apparent from the last sentence of R.C. 325.19(C), which addresses the conversion of a county employee's unused vacation leave upon separation. This final sentence of R.C. 325.19(C) states:

[a]n employee is entitled to compensation, at the employee's current rate of pay, for the prorated portion of any earned but unused vacation leave *for the current year to the employee's credit* at time of separation, *and in addition shall be compensated for any unused vacation leave accrued to the employee's credit, with the permission of the appointing authority, for the three years immediately preceding the last anniversary date of employment.* (Emphasis added.)

Accordingly, a county employee's vacation leave balance under R.C. 325.19 may contain vacation leave accrued but unused in the current year, plus leave accumulated, with the permission of the appointing authority, during the three years immediately preceding the employee's last anniversary date of employment. We will now determine whether an employee may convert leave accrued but unused during the current calendar year to cash payments while maintaining a vacation leave balance equivalent to the accrual for three years.

The 1989 opinion discussed a similar question: whether a county employee was entitled to use, rather than convert, vacation leave accrued in the current year without a reduction in the amount of leave the employee had accumulated in the three years immediately preceding her last anniversary date of employment. 1989 Op. Att'y Gen. No. 89-012, at 2-51 to 2-52 (modified in part by 2009 Op. Att'y Gen. No. 2009-009 and qualified and questioned by 2008 Op. Att'y Gen. No. 2008-004). The opinion examined the portion of R.C. 325.19(C) that states, "[v]acation leave shall be taken by the employee during the year in which it accrued and prior to the next recurrence of the anniversary date of the employee's employment[.]" The Attorney General determined that this portion of R.C. 325.19(C), when read alone, appears to require vacation leave accrued during the current year to be used during the current year, prior to using any vacation leave that has been carried over from prior years. *Id.* at 2-51. Thus, pursuant to R.C. 325.19(C):

upon an employee's anniversary date of employment, he would be considered to have used the vacation leave accrued during the current year and only vacation leave used in excess of the current year's accrual would be deducted from his accumulated balance; any remaining leave accumulated during the first of the three years prior to the last anniversary date of employment could no longer be carried forward and would be deducted from the accumulated leave balance.

Id. This means that the vacation leave used by a county employee under R.C. 325.19(C) is generally considered to be the leave that the employee most recently accrued, rather than leave that the employee has, with the permission of the appointing authority, carried over from prior years. Accordingly, when a county employee uses vacation leave, such leave is deducted from the employee's "new" leave, and upon the employee's next anniversary date of employment, leave accumulated during the first of the three years immediately preceding her last anniversary date of

employment must be deducted from her leave balance because “[n]o vacation leave shall be carried over for more than three years.” R.C. 325.19(C).

To better understand this, let us return to our example of Employee A. We will assume that Employee A has accrued 80 hours of vacation leave during each of the three years immediately preceding her last anniversary date of employment and has not used any of those hours. Thus, as of her most recent anniversary date of employment, she has “carried over” 240 hours. In the current year, Employee A has accrued another 80 hours of vacation leave and has used 40 hours of vacation leave. Under R.C. 325.19(C), the 40 hours that Employee A used during the current year are to be deducted from the “new” leave that Employee A accrued during the current year. Further, because “[n]o vacation leave shall be carried over for more than three years[,]” the 80 hours of vacation leave that she accrued during the first of the three years immediately preceding her last anniversary date of employment may no longer be carried over and must be deducted from her accumulated leave balance upon her next anniversary date of employment. Accordingly, upon her next anniversary date of employment, Employee A is entitled to carry over the 80 hours of vacation leave accrued during each of the two years most recently preceding her last anniversary date of employment, but only has 40 hours of vacation leave accrued and unused during the current year which she may carry over to the following year. This leaves her with a vacation leave balance of 200 hours. As this example illustrates, R.C. 325.19(C) generally operates on a “last-in, first-out” basis, meaning that any vacation leave that an employee uses is to be deducted from those hours that the employee most recently accrued.

In the 1989 opinion, however, the Attorney General recognized that R.C. 325.19(C) authorizes, but does not require, a county appointing authority to adopt a contrary policy that operates on a “first-in, first-out” basis. 1989 Op. Att’y Gen. No. 89-012, at 2-51 to 2-52 (modified in part by 2009 Op. Att’y Gen. No. 2009-009 and qualified and questioned by 2008 Op. Att’y Gen. No. 2008-004). The opinion explained:

the portion of R.C. 325.19(C) which empowers an appointing authority to allow an employee to carry over unused vacation leave from the current year “in special and meritorious cases” may reasonably be read to authorize an appointing authority to allow an employee to carry over vacation leave from the current year so that he may use the vacation leave carried over from three years earlier in order to avoid losing such leave. Such a reading results in accounting for vacation leave used on a first-in first-out basis[.]

Id. at 2-51 to 2-52. Thus, under R.C. 325.19(C), an appointing authority may adopt a policy authorizing employees to use vacation leave on a first-in, first-out basis. Application of such a policy to our most recent example involving Employee A would result in the 40 hours of vacation leave that Employee A used during the current year being deducted from the 80 hours of vacation leave that she accrued three years prior to her last anniversary date of employment (her “oldest” vacation leave). The other 40 hours that Employee A accrued three years earlier would be eliminated from her vacation leave balance upon her next anniversary date of employment because “[n]o vacation leave shall be carried over for more than three years.” R.C. 325.19(C). However, upon her next anniversary

date of employment, Employee A would now be able to carry over all 80 hours of vacation leave accrued and unused during the current year, as well as the 80 hours accrued and unused during each of the two years most recently preceding her last anniversary date of employment. Thus, she would continue to go forward with a 240 hour vacation leave balance.

The concepts described above regarding a county employee's use of vacation leave under R.C. 325.19(C) may also be applied to the conversion of vacation leave accrued under R.C. 325.19. Whether a county employee may convert vacation leave accrued but unused during the current calendar year to cash payments while maintaining a vacation leave balance equivalent to the accrual for three years depends, in part, on whether the conversion occurs on a "last-in, first-out" basis or a "first-in, first-out" basis. The annual leave conversion policies provided to us by your office indicate that "[l]eave shall be converted on a last in, first out (LIFO) basis." This means that vacation leave hours converted by an employee shall be deducted from those hours that the employee has most recently accrued.

In determining whether a Trumbull County employee may convert vacation leave accrued during the current calendar year without experiencing a reduction in the vacation leave that the employee has carried over, or accumulated, from prior years, an employee's anniversary date of employment also is an important factor to consider. This is because an employee's anniversary date of employment will determine how much "new" vacation leave, leave in excess of that which the employee has carried over from prior years, an employee may accrue under R.C. 325.19 before Trumbull County's annual leave conversion occurs at the end of the calendar year. For example, if Employee A's anniversary date of employment is December 30th, on that date she may, with the permission of her appointing authority, carry over 240 hours of vacation leave (80 hours of vacation leave accrued and unused from each of the three years immediately preceding that date). During the short period between her last anniversary date of employment (December 30th) and the end of the calendar year, she will not be credited with any "new" vacation leave. That is, she will not yet have to her credit any vacation leave beyond that which she has carried over from the three years immediately preceding her most recent anniversary date of employment. Therefore, if she wishes to convert vacation leave that she accrued during the current calendar year to cash payments, the amount of vacation leave that she converts must necessarily be deducted from leave that she has carried over from the year before. Accordingly, her annual conversion of vacation leave will result in her vacation leave balance falling below the 240 hours of vacation leave that she has been permitted to carry over.

In contrast, if an employee's anniversary date of employment is earlier in the calendar year, the employee will be able to accrue "new" vacation leave between her anniversary date and the end of the calendar year that she may convert to cash payments without experiencing a reduction in the vacation leave that she has been permitted to carry over from prior years. For example, let's assume that Employee A's anniversary date of employment is July 1st. On that date, she is permitted to carry over 240 hours of vacation leave (80 hours of vacation leave accrued and unused from each of the three years immediately preceding that date). Between July 1st and the end of the calendar year, she continues to accrue "new" leave each biweekly pay period. Because this "new" leave has been accrued during the current calendar year, it is eligible to be converted to cash payments under Trumbull County's annual leave conversion policies. If Employee A converts only the "new"

vacation leave that she has accrued and not used since her July 1st anniversary date of employment, she will not experience a reduction in the vacation leave balance that she has carried over from prior years. That is, only the “new” leave that she has accrued since July 1st will be deducted from her vacation leave balance and all 240 hours that she has carried over from prior years will remain. If, however, she converts more vacation leave than she has accrued and not used since her July 1st anniversary date of employment, she will experience a reduction in the amount of vacation leave that she has carried over from prior years. For instance, if she has accrued and not used 40 hours of vacation leave since July 1st, but converts 50 hours of vacation leave to cash payments, 10 hours of vacation leave will be deducted from the vacation leave that she most recently carried over.

As demonstrated by the foregoing explanation and examples, whether a Trumbull County employee’s annual conversion of vacation leave accrued under R.C. 325.19 will result in the employee’s vacation leave balance falling below her three-year accrual depends on the specific facts and circumstances of the conversion. Relevant factors in making this determination include the amount of vacation leave that the employee converts under the annual leave conversion policy, the employee’s anniversary date of employment, and the amount of vacation leave that the employee has accrued and not used since her most recent anniversary date of employment.

A County Appointing is Authorized to Correct Payroll Records and Re-Credit an Employee with Vacation Leave Benefits if such Benefits Have Been Inappropriately Deducted from an Employee’s Leave Balance

Your next question essentially asks whether a county appointing authority may restore accrued vacation leave to an employee if the employee’s vacation leave balance was inappropriately reduced as a result of the employee’s annual conversion of vacation leave benefits to cash payments. The Attorney General has advised that “a county appointing authority has the obligation to keep records of the compensation and fringe benefits granted to its employees and the corresponding authority to modify such records when appropriate.” 1989 Op. Att’y Gen. No. 89-088, at 2-417. For example, in 1998 the Attorney General advised that a county appointing authority was authorized to correct its payroll records when employees had not been credited with the full amounts of vacation leave to which they were entitled. 1998 Op. Att’y Gen. No. 98-026, at 2-139 (clarified in part by 2009 Op. Att’y Gen. No. 2009-009); *see also* 1987 Op. Att’y Gen. No. 87-067 (syllabus, paragraph 2) (overruled, in part on other grounds, by 1998 Op. Att’y Gen. No. 98-026) (a county appointing authority who failed to credit its employees with the entire amount of vacation leave to which they were entitled following an amendment of R.C. 325.19 has the implied authority to correct its payroll records to accurately reflect the full amount of vacation leave benefits to which such employees are entitled). Similarly, if it is determined as a factual matter that an employee’s vacation leave balance was erroneously reduced as a result of the employee’s annual conversion of vacation leave benefits to cash payments, the employee’s appointing authority has the implied authority to correct its payroll records and re-credit the employee with vacation leave benefits so that the employee’s vacation leave balance reflects the appropriate amount.

Conclusions

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

1. Pursuant to R.C. 124.13(D), county department of job and family services (CDJFS) employees who accrue vacation leave in accordance with the provisions of R.C. 124.13 and convert accrued and unused vacation leave to cash payments pursuant to an annual leave conversion policy shall experience a corresponding reduction in their maximum three-year vacation leave balance.
2. Pursuant to Trumbull County's annual leave conversion policies, vacation leave "shall be converted on a last in, first out (LIFO) basis." Accordingly, a county employee who converts vacation leave to cash payments pursuant to one of those policies must experience a corresponding reduction in vacation leave hours that the employee has most recently accrued.
3. Whether a Trumbull County employee who converts vacation leave accrued under R.C. 325.19 to cash payments pursuant to an annual leave conversion policy shall experience a reduction in the vacation leave balance the employee has been permitted to carry over, or accumulate, from prior years depends on the specific facts and circumstances of the conversion. Relevant factors in making this determination include the amount of vacation leave that the employee converts under the annual leave conversion policy, the employee's anniversary date of employment, and the amount of vacation leave that the employee has accrued and not used since her most recent anniversary date of employment.
4. A county appointing authority is authorized to correct its payroll records and re-credit an employee with vacation leave benefits if it determines that such benefits have been inappropriately deducted from an employee's vacation leave balance as a result of the employee's annual conversion of vacation leave benefits to cash payments.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is fluid and cursive, with a long, sweeping underline.

MICHAEL DEWINE
Ohio Attorney General