

OPINION NO. 2012-001

Syllabus:

2012-001

A retiring judge of a court of common pleas may not receive a cash payment for sick leave that he accrued as a county employee prior to becoming a judge. (1980 Op. Att’y Gen. No. 80-057, syllabus, paragraph 3, approved and followed.)

To: Bill Mason, Cuyahoga County Prosecuting Attorney, Cleveland, Ohio

By: Michael DeWine, Ohio Attorney General, January 12, 2012

You have requested an opinion about the propriety of a judge of the court of common pleas receiving a cash payment for previously accrued, unused sick leave when he retires. You have informed us that in January 1993 a person became a judge of the court of common pleas. Prior to taking office, the person was employed by the county as a probation officer (April 20, 1973, to March 12, 1982), assistant prosecuting attorney (March 15, 1982, to February 14, 1992), and deputy auditor (March 8, 1992, to December 31, 1992).¹ In each of these three positions the person accrued sick leave. At the time the person began serving as a judge of the court of common pleas, he had 1100 hours of previously accrued, unused sick leave. When the person voluntarily terminated his employment with the county auditor’s office, the person did not receive a cash payment for any of his accrued, unused sick leave.

In light of these facts, you ask the following questions:²

1. May a retiring judge of a court of common pleas receive a cash payment for sick leave that he accrued as a county employee prior to becoming a judge?
2. If a retiring judge of a court of common pleas may receive a cash payment for sick leave that he accrued as a county employee prior to becoming a judge, what county office or department is required to make the cash payment?

¹ Before becoming a judge of the court of common pleas, the person did not separate from the active service of the county by taking a disability or service retirement under the Public Employees Retirement System. *See* R.C. Chapter 145 (providing for the establishment and operation of the Ohio Public Employees Retirement System).

² We are unable by means of a formal opinion to make findings of fact or determinations regarding the particular rights of a retiring judge of a court of common pleas. *See* 2005 Op. Att’y Gen. No. 2005-020 at 2-188. We are able, however, by means of this opinion, to set forth the general principles governing the payment of accrued, unused sick leave to county officers and employees.

3. If a retiring judge of a court of common pleas may receive a cash payment for sick leave that he accrued as a county employee prior to becoming a judge, how is the amount of the cash payment calculated?

Provisions establishing sick leave benefits for county employees and governing cash payments to county employees for accrued, unused sick leave are set forth in R.C. 124.38 and R.C. 124.39(B), respectively. *See* 2011 Op. Att’y Gen. No. 2011-046, slip op. at 3-5; 1980 Op. Att’y Gen. No. 80-057 at 2-223 and 2-224. R.C. 124.38 states, in relevant part:

Each of the following shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay:

(A) Employees in the various offices of the county, municipal, and civil service township service, other than superintendents and management employees, as defined in [R.C. 5126.20], of county boards of developmental disabilities[.]

. . . .

Employees may use sick leave, upon approval of the responsible administrative officer of the employing unit, for absence due to personal illness, pregnancy, injury, exposure to contagious disease that could be communicated to other employees, and illness, injury, or death in the employee’s immediate family. Unused sick leave shall be cumulative without limit. When sick leave is used, it shall be deducted from the employee’s credit on the basis of one hour for every one hour of absence from previously scheduled work.

The previously accumulated sick leave of an employee who has been separated from the public service shall be placed to the employee’s credit upon the employee’s re-employment in the public service, provided that the re-employment takes place within ten years of the date on which the employee was last terminated from public service. This ten-year period shall be tolled for any period during which the employee holds elective public office, whether by election or by appointment. (Emphasis added.)

Accord 2 Ohio Admin. Code 123:1-32-10(B)(1)(b).

Under R.C. 124.38, a county employee who separates from the county service may receive credit, in certain circumstances, for previously accrued, unused sick leave when he is subsequently employed in the public service. *Accord* rule 123:1-32-10(B)(1)(b); *see* 2011 Op. Att’y Gen. No. 2011-046, slip op. at 3-4. In other situations, R.C. 124.39(B) authorizes a county employee who separates from county service to elect to receive a cash payment for accrued, unused sick leave:

Except as provided in division (C) of this section,³ *an employee of a political subdivision covered by [R.C. 124.38 or R.C. 3319.141] may elect, at the time of retirement⁴ 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 the employee's 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 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. (Emphasis and footnotes added.)

R.C. 124.39(B) permits a county employee who retires from the active service of a county to elect to receive a cash payment for accrued, unused sick leave when the employee has "ten or more years of service with the state, any political subdivisions, or any combination thereof." If a county employee does not elect to take a cash payment for accrued, unused sick leave when he retires from the county, R.C. 124.39(B) does not apply and the employee may receive credit under R.C. 124.38 for his previously accrued, unused sick leave when he is subsequently employed in the public service, provided the subsequent employment occurs within 10 years of the employee's retirement from public service with the county. *See* 2011 Op. Att'y Gen. No. 2011-046, slip op. at 4-6; 1994 Op. Att'y Gen. No. 94-009 (syllabus, paragraph 4) (modified, in part, on other grounds by 2009 Op. Att'y Gen. No. 2009-009 (syllabus, paragraphs 3 and 4)). R.C. 124.38 and R.C. 124.39(B) therefore establish how accrued, unused sick leave is to be treated when a county employee separates from public service.

In your particular situation, a person, as a deputy county auditor, was a

³ R.C. 124.39(C) authorizes county officials to enact a policy regarding cash payments to county employees for accrued, unused sick leave that differs from that set forth in R.C. 124.39(B). *See* 2005 Op. Att'y Gen. No. 2005-020; 2000 Op. Att'y Gen. No. 2000-020; 1990 Op. Att'y Gen. No. 90-074. As we explain later in this opinion, a judge of a court of common pleas is not an employee of the county for purposes of R.C. 124.39(C) and thus county officials do not have authority under R.C. 124.39(C) to enact a policy that allows a retiring judge of a court of common pleas to receive a cash payment for sick leave that he accrued as a county employee prior to becoming a judge.

⁴ The term "retirement," as used in R.C. 124.39, means "disability or service retirement under any state or municipal retirement system in this state." R.C. 124.39; *see also Kanieski v. Village of Northfield*, C.A. No. 13096, 1987 Ohio App. LEXIS 9075, at *3 (Summit County Oct. 7, 1987) (for purposes of R.C. 124.39, the term "retirement" denotes "the withdrawal from one's position or occupation under a formal procedure"); 1974 Op. Att'y Gen. No. 74-022 at 2-108 ("[r]etirement specifically denotes the termination of employment after a certain number of years of service, according to a formal procedure").

county employee for purposes of R.C. 124.38 and R.C. 124.39 prior to becoming a judge of the court of common pleas. *See* R.C. 124.01(F); R.C. 319.05; R.C. 325.17; *see also* R.C. 325.27. When the person voluntarily terminated his county employment to become a judge of the court of common pleas, he did not do so by retiring from the active service of the county. *See* note 1, *supra*. *See generally Kanieski v. Village of Northfield*, C.A. No. 13096, 1987 Ohio App. LEXIS 9075, at *3 (Summit County Oct. 7, 1987) (“[a]lthough, resignation and termination may be related to retirement, they are not synonymous terms”). The person thus was not eligible under R.C. 124.39(B) to elect to receive a cash payment for his accrued, unused sick leave.⁵ *See* 1980 Op. Att’y Gen. No. 80-057 (syllabus, paragraph 2) (when a county employee “has accumulated sick leave and transfers to a position of an elective county office, he is not entitled to payment for accrued but unused sick leave pursuant to R.C. 124.39(B), although he may be entitled to such payment if the county has adopted a policy pursuant to R.C. 124.39(C) which so provides”).

However, the person’s voluntary termination of his employment with the county auditor’s office constituted a separation from public service for purposes of R.C. 124.38. *See* 1994 Op. Att’y Gen. No. 94-009 at 2-38 (“a termination of county employment constitutes a separation for purposes of R.C. 124.38”); 1980 Op. Att’y Gen. No. 80-057 at 2-224 (voluntarily leaving county employment to accept an appointment to a county office that is normally filled by election constitutes separation from public service for purposes of R.C. 124.38). Accordingly, pursuant to R.C. 124.38, the person may receive credit for his accrued, unused sick leave upon his “re-employment in the public service, provided that the re-employment takes place within ten years of the date on which the employee was last terminated from public service.”

You have stated that the person was elected as a judge of the court of common pleas within 10 years of the date on which he separated from public service with the county auditor’s office. *See* Ohio Const. art. IV, § 6(A)(3); R.C. 2301.01-.02. Nevertheless, as explained below, this person was not re-employed in the public service for purposes of R.C. 124.38 and R.C. 124.39 when he became a judge of

⁵ It is assumed for the purpose of this opinion that as a deputy county auditor this person was not subject to a collective bargaining agreement or county policy that allowed him to retain accrued, unused sick leave when he voluntarily terminated his employment and, upon his retirement from the court of common pleas, receive a cash payment for that leave. *See generally* 2007 Op. Att’y Gen. No. 2007-022 (syllabus, paragraph 1) (“[a] county employee who is not eligible to retire under a state retirement system at the time he separates from county service is not, in the absence of a county policy to the contrary, entitled to payment for his unused sick leave at the time he separates from county service or when he subsequently retires”); 2000 Op. Att’y Gen. No. 2000-020 at 2-121 n.4 (“[p]ayment for unused sick leave is an appropriate matter for inclusion in a collective bargaining agreement, and employees who are covered by a collective bargaining agreement that addresses the matter of payment for unused sick leave are entitled to the benefits under that agreement regardless of R.C. 124.39”).

the court of common pleas. Consequently, at that time he was not eligible under R.C. 124.38 to receive credit for his previously accrued, unused sick leave, or to elect, upon his retirement from his judicial office, to receive a cash payment for such leave pursuant to R.C. 124.39(B).

The provisions of R.C. 124.38 and R.C. 124.39 apply to a person who serves as an “employee” in the public service. For purposes of R.C. 124.38 and R.C. 124.39, the term “employee” means “any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer.” R.C. 124.01(F). *See generally* 1981 Op. Att’y Gen. No. 81-049 at 2-191 (overruled, in part, on other grounds by 1990 Op. Att’y Gen. No. 90-014 (syllabus, paragraph 1)) (“[t]he 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)’”).

1990 Op. Att’y Gen. No. 90-014 at 2-58 and 2-59 examined the scope of R.C. 124.01(F) and determined that the term “employee” does not include a person elected to a public office because the person is not subject to appointment, removal, promotion, or reduction by an appointing officer:

The definition of “employee” appearing in R.C. 124.01(F) indicates that it applies to a person who holds a “position,” in contrast with a person who holds an “office.” *See* R.C. 124.01(A), (B). While the term “officer” is not defined, the use of that term in R.C. 124.01(D) suggests that a person with the power of appointment to, or removal from, a position in an office, department, commission, board, or institution is an officer, whether he holds such power by himself or as a member of a commission, board, or body. It should be noted that R.C. 124.01(D) speaks of appointment to “positions in” any office, department, commission, board, or institution. The posts held by the members of a commission or board are “on” the commission or board; board members are officers who constitute the board, rather than simply holding positions in the commission or board. The posts held by board members are, accordingly, “offices,” rather than positions.

The definition of “employee” currently appearing in R.C. 124.01(F) and the contrasting usage of “offices” and “positions” in definitions relating to civil service have long been part of Ohio law. *See, e.g.*, G.C. 486-1; 1914-1915 Ohio Laws 400. With few exceptions, those provisions have been read as excluding from the term “employee” both elected officers and certain appointed officials. (Footnote omitted.)

Accord 1980 Op. Att’y Gen. No. 80-057 at 2-224.

A person elected to a public office thus does not serve in a position that is subject to appointment, removal, promotion, or reduction by an appointing officer for purposes of R.C. 124.01(F). Also, as explained in 1980 Op. Att’y Gen. No. 80-057 at 2-224, a person appointed to fill a public office that is normally filled by election does not serve in a position that is subject to appointment, removal, promotion, or reduction by an appointing officer for purposes of R.C. 124.01(F):

In applying [R.C. 124.38 and R.C. 124.39] to the individual involved here, it is necessary to consider R.C. 124.01(F), where “employee,” as used in R.C. Chapter 124, is defined as “any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer.” The individual in the question you pose is leaving his position as a county employee to accept appointment as an elective county officer. *Although he is accepting appointment to the office, the office itself is an elective position, not a position which is subject to appointment, removal, promotion, or reduction by an appointing officer. In this instance, therefore, it is clear that the employee is transferring to a position as a public officer, and not continuing his status as an employee within the meaning of R.C. Chapter 124.* (Emphasis added.)

The position of judge of a court of common pleas is an office normally filled by election. *See* Ohio Const. art. IV, § 6(A)(3); R.C. 2301.01-.02; *see also* Ohio Const. art. IV, § 13 (a vacancy in the office of common pleas court judge is filled by appointment by the Governor). This means that a person who becomes a judge of a court of common pleas does not serve in a position that is subject to appointment, removal, promotion, or reduction by an appointing officer. *See* 1990 Op. Att’y Gen. No. 90-014 at 2-58 and 2-59; 1980 Op. Att’y Gen. No. 80-057 at 2-224. Therefore, a judge of a court of common pleas is not an “employee,” as defined in R.C. 124.01(F), who may receive credit for his previously accrued, unused sick leave under R.C. 124.38 or elect, upon his retirement from his judicial office, to receive a cash payment for such leave pursuant to R.C. 124.39(B). *See generally* 1980 Op. Att’y Gen. No. 80-057 at 2-225 (“[u]nder R.C. 124.39, in order to be compensated upon retirement for unused sick leave, one must be in the status of employee, not officer, upon retirement”); 1973 Op. Att’y Gen. No. 73-104 at 2-403 (reinstated, in part, by 1990 Op. Att’y Gen. No. 90-014 (syllabus, paragraph 1) and overruled by 1981 Op. Att’y Gen. No. 81-049 (syllabus, paragraph 1)) (when R.C. 143.29 (now R.C. 124.38) and R.C. 143.291 (now R.C. 124.39) “are read as a whole, the phrase ‘public service’ seems to refer only to those who have the status of public employees. When the member of the Board [of Review of the Bureau of Employment Services] became an officer, he left the ‘public service’, as that term is used in these two Sections. He did not return to it within ten years, and he is retiring as an officer, not as an employee”).

This conclusion is in accord with 1980 Op. Att’y Gen. No. 80-057, which considered the disposition of a county employee’s accrued, unused sick leave upon his appointment to a county office that is normally filled by election. In that opinion it was observed that neither R.C. 124.38 nor R.C. 124.39(B) applies to a person who is appointed to serve in a county office that is normally filled by election. In reaching this conclusion, the opinion at 2-224 through 2-226 stated:

The provisions for the crediting of accumulated sick leave outlined in R.C. 124.38 apply in only two situations, either where an employee who has separated from the public service is reemployed in the public service within ten years or where an employee transfers from one public agency to another. Clearly, the situation you pose is not one in

which a separated county employee is becoming reemployed in the public service. The individual involved here is separating from public service as a county employee to serve as an elected public officer, rather than a public employee. This is also not a situation covered by the latter provision of R.C. 124.38, which, as noted previously, provides for a transferring employee to be credited with up to the maximum of the sick leave accumulation permitted in the agency to which the employee transfers. In this instance, the employee is transferring to a position as a public officer. There is no provision in the Revised Code for either payment for or accumulation of sick leave benefits for one who holds the position of an elective county officer. The transferring employee is, therefore, not entitled under the above-stated provision of R.C. 124.38 to transfer his unused sick leave to his new position as county officer.

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. . . . Because the employee involved here is not being reemployed or being transferred to a position which allows accumulation of sick leave, he does not qualify under R.C. 124.38 to have his accumulated sick leave credited to him in his new position

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Your next question asks whether an elected county official who had accumulated sick leave while a county employee may be compensated for the unused sick leave upon retirement as a county officer The Revised Code makes no provision for payments to an individual retiring from an elective county office who had previously accumulated sick leave while a county employee. R.C. 124.38 provides for accumulated sick leave of an employee who has been “separated” from the public service to be placed to his credit upon his reemployment in the public service

. . . [W]hen the county employee transfers to the position of county officer, he separates from the public service, within the meaning of R.C. 124.38. Upon separation from service, a county employee loses all accrued and unpaid sick leave unless he returns to employment in the public service within ten years. Under R.C. 124.39, in order to be compensated upon retirement for unused sick leave, one must be in the status of employee, not officer, upon retirement.

. . . . R.C. 124.39(B) states that payment for accumulated but unused sick leave “shall be based on the employee’s rate of pay at the time of retirement.” If the member is not receiving pay as an employee at the time his retirement becomes effective, there is no basis for computing the amount to which he would be entitled. One who retires from county office is, therefore, not entitled to payment for unused sick leave accumulated as a county employee prior to his service as a county officer. (Citations omitted.)

See 1973 Op. Att’y Gen. No. 73-104 at 2-402 and 2-403.

1980 Op. Att’y Gen. No. 80-057 thus concluded that, “[a]n individual who retires from an elective county office is not entitled to payment for unused sick leave accumulated as a county employee prior to his service as a county officer.” 1980 Op. Att’y Gen. No. 80-057 (syllabus, paragraph 3); see 1973 Op. Att’y Gen. No. 73-104 (syllabus, paragraph 2) (“[w]hen a public employee, who has accrued unused sick leave, accepts appointment to a public office from which he ultimately retires, he is not entitled to payment for any of the unused sick leave accrued as a public employee”).

As currently written, neither R.C. 124.38 nor R.C. 124.39(B) applies to a person who serves as a judge of a court of common pleas. See R.C. 124.01(F). Moreover, no provision of law explicitly permits a judge of a court of common pleas to (1) receive credit for previously accrued, unused sick leave that he accrued as a county employee prior to becoming a judge or (2) elect, upon his retirement from his office, to receive a cash payment for such leave.⁶ Accordingly, the reasoning of 1980 Op. Att’y Gen. No. 80-057 remains an accurate statement of the law that controls here. Consequently, a retiring judge of a court of common pleas may

⁶ 2 Ohio Admin. Code 123:1-32-11 states, in part:

(A) Sick leave. Upon appointment to a position governed by [R.C. 121.03] or a similar position that does not accrue sick leave under [R.C. 124.38 or R.C. 124.382], an employee with accrued and unused sick leave balances may:

. . . .

(2) Retain the accrued and unused sick leave and, upon completion of the employee’s appointment, receive compensation at the employee’s then current base rate of pay at the rates established in [R.C. 124.384(A)] for all accrued and unused sick leave accrued under [R.C. 124.38 or R.C. 124.382], provided that the employee does not return to a position in the state service that accrues sick leave under [R.C. 124.38 or R.C. 124.382].

Because a judge of a court of common pleas is not appointed to a position governed by R.C. 121.03, which provides for the appointment of administrative department heads in the executive branch of state government, or a similar position, rule 123:1-32-11(A)(2) does not apply when a county employee separates from the public service to serve as a judge of a court of common pleas. See Ohio Const. art. IV, § 13 (authorizing the Governor to make an appointment when the office of common pleas court judge is vacant); Ohio Const. art. IV, § 6(A)(3) and R.C. 2301.01-.02 (election of common pleas court judges). Compare Ohio Const. art. III, § 1 (“[t]he executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general”), with Ohio Const. art. IV, § 1 (“[t]he judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such

not receive a cash payment for sick leave that he accrued as a county employee prior to becoming a judge.⁷

You have also asked, if a retiring judge of a court of common pleas may other courts inferior to the supreme court as may from time to time be established by law”).

⁷ In the absence of a collective bargaining agreement or policy that provides otherwise, R.C. 124.38 authorizes a judge of a court of common pleas who takes service retirement under a state or municipal retirement system in this state and who did not previously elect to receive a cash payment for sick leave that he accrued as a county employee prior to becoming a judge to receive credit for his accrued, unused sick leave if he is subsequently employed in the public service within 10 years of the date on which he last separated from employment in the public service. *See generally* 1994 Op. Att’y Gen. No. 94-009 (syllabus, paragraph 4) (modified, in part, on other grounds by 2009 Op. Att’y Gen. No. 2009-009 (syllabus, paragraphs 3 and 4)) (“[i]f a county employee who is subject to R.C. 124.39(B) terminates her employment in order to retire under the Public Employees Retirement System, and elects not to receive payment under R.C. 124.39(B) for her previously accumulated, unused sick leave, R.C. 124.38 entitles that employee to receive credit for such sick leave upon her reemployment by the county, as long as such reemployment occurs within ten years of the date of her last termination from public service”); 1980 Op. Att’y Gen. No. 80-057 at 2-226 (R.C. 124.38 “clearly states that crediting of previously accumulated sick leave shall occur upon reemployment. There is nothing in the wording of R.C. 124.38 which limits the crediting of such sick leave, except that the former employee must be reemployed within ten years of his last termination from public service. If the individual involved here is reemployed with the county after having served as an elected official, he will be credited with previously accumulated sick leave upon reemployment, provided that his reemployment with the county occurs within ten years of the date he previously left county employment. The only exception would be if the individual had been paid for sick leave pursuant to a policy adopted under R.C. 124.39(C). In such case, the sick leave credit would have been eliminated, as provided by R.C. 124.39(B)”). R.C. 124.38 provides further that the 10 year period is tolled for any period during which the judge holds his office or any other “elective public office, whether by election or by appointment.”

However, the retired judge is not entitled under R.C. 124.39(B) to elect to receive a cash payment for his accrued, unused sick leave when he terminates his subsequent employment in the public service unless a collective bargaining agreement or policy grants him such a benefit. *See* notes 3 and 5, *supra*. *See generally* 2003 Op. Att’y Gen. No. 2003-038 (syllabus, paragraph 1) (“[a] person who takes service retirement under the State Teachers Retirement System and subsequently becomes a county employee is ineligible to be a member of the Public Employees Retirement System (PERS), and when he terminates county employment, he cannot retire under PERS. The county employee is not, therefore, entitled under R.C. 124.39(B) to elect to receive payment for his unused sick leave credit at the time he terminates his county employment”).

receive a cash payment for sick leave that he accrued as a county employee prior to becoming a judge, what county office or department is required to make the cash payment and how the amount of the cash payment is calculated. Because we have determined that a retiring judge of a court of common pleas may not receive a cash payment for sick leave that he accrued as a county employee prior to becoming a judge, it is unnecessary for us to consider your remaining questions.

Based on the foregoing, it is my opinion, and you are hereby advised that a retiring judge of a court of common pleas may not receive a cash payment for sick leave that he accrued as a county employee prior to becoming a judge. (1980 Op. Att'y Gen. No. 80-057, syllabus, paragraph 3, approved and followed.)