

Note from the Attorney General's Office:

1984 Op. Att'y Gen. No. 84-071 was qualified by
1990 Op. Att'y Gen. No. 90-074.

OPINION NO. 84-071**Syllabus:**

1. A county board of mental retardation and developmental disabilities, pursuant to its authority to employ and fix the compensation of its employees, may adopt a policy which provides for cash payment to employees for accrued sick leave benefits upon termination of employment other than retirement, provided that the board's policy provides benefits at least as great as any benefits to which such employees may otherwise be entitled pursuant to statute or pursuant to a policy adopted by the board of county commissioners under the authority of R.C. 124.39(C).
2. A county board of mental retardation and developmental disabilities, pursuant to its authority to employ and fix the compensation of its employees, may adopt a policy which provides for cash payment to employees at the end of each school year for the past year's accrued sick leave benefits,

provided that the board's policy provides benefits at least as great as any benefits to which such employees may otherwise be entitled pursuant to statute or pursuant to a policy adopted by the board of county commissioners under the authority of R.C. 124.39(C).

To: David E. Lightliser, Licking County Prosecuting Attorney, Newark, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, November 28, 1984

I am in receipt of your request for an opinion on the following questions:

1. May a county board of mental retardation and developmental disabilities lawfully adopt a policy which provides for cash payment to employees for accrued sick leave benefits upon termination of employment other than retirement?
2. May a county board of mental retardation and developmental disabilities lawfully adopt a policy which provides for cash payment at the end of each school year for the past year's accrued sick leave benefits?

A county board of mental retardation and developmental disabilities (county board) is established and operated pursuant to R.C. Chapter 5126. The authority of such a board to provide sick leave benefits for its employees was addressed by the Ohio Supreme Court in Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980).¹ That case states that R.C. 124.38² confers a minimum sick leave benefit upon the employees of a county board, and that the power of a county board to employ³ carries with it the power to fix the compensation of its employees, including the establishment of sick leave benefits in excess of the minimum entitlement granted by R.C. 124.38, in the absence of any constricting statutory provisions. While both R.C. 124.38 and R.C. Chapter 5126 have been amended since the Ebert decision, the amendments have not affected the analysis presented by the court in that decision. A county board currently is authorized by R.C. 5126.05(J) to "[a]dopt a salary schedule and budget [and]

¹ When Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), was written, a board established under R.C. Chapter 5126 was known as a county board of mental retardation. By Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980), the name of such board was changed to a county board of mental retardation and developmental disabilities and substantial changes were made in statutory provisions. Neither those nor other amendments to R.C. Chapter 5126 have, however, affected the substance of the Ebert case as applied in this opinion.

² As in effect when Ebert v. Stark County Board of Mental Retardation was written, R.C. 124.38 set forth sick leave benefits applicable to "[e]ach 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 [R.C. 3319.141]." 1974 Ohio Laws 693, 700 (Am. H.B. 513, eff. Aug. 9, 1974). It currently applies to "[e]ach employee in the various offices of the county, municipal, and civil service township service, each employee of any state college or university, and each employee of any board of education for whom sick leave is not provided by [R.C. 3319.141]."

³ Prior to the enactment of Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980), see note 1, supra, a county board was authorized by R.C. 5126.03(C) to "[e]mploy such personnel and provide such services, facilities, transportation, and equipment as are necessary."

authorize expenditures for the purposes listed in this section" and by R.C. 5126.05(L) to "[c]ontract for employee benefits." These statutory provisions grant general authority for the board to employ and to fix the compensation, including fringe benefits, of its employees.⁴ See generally Ebert v. Stark County Board of Mental Retardation; State ex rel. Parsons v. Ferguson, 46 Ohio St.2d 389, 348 N.E.2d 692 (1976). R.C. 124.38 grants certain minimum sick leave benefits to employees of a county board, as employees in an office of the county service. See Ebert v. Stark County Board of Mental Retardation; 1981 Op. Att'y Gen. No. 81-015. No statutory provision restricts the board's power to provide sick leave benefits in excess of those granted by R.C. 124.38. Thus, a county board may grant its employees greater sick leave benefits than those established by statute. See 1982 Op. Att'y Gen. No. 82-055; Op. No. 81-015.

Your question addresses not the granting of sick leave as such, but, rather, the conversion of sick leave to cash payments upon the termination of employment other than retirement and at the end of the school year. R.C. 124.39 authorizes the granting of certain conversion benefits and other benefits, as follows:

(B) Except as provided in division (C) of this section, an employee of a political subdivision covered by section 124.38 or 3319.141 [boards of education] of the Revised Code may elect, at the time of retirement from active service with the political subdivision, and with ten or more years of service with the state, any political subdivisions, or any combination thereof, to be paid in cash for one-fourth the value of his accrued but unused sick leave credit. . . . [T]he aggregate value of accrued but unused sick leave credit that is paid shall not exceed. . .the value of thirty days of accrued but unused sick leave.

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

A political subdivision may adopt policies similar to the provisions contained in sections 124.382 to 124.386 of the Revised Code.

R.C. 124.382 through R.C. 124.386 establish a variety of benefits for employees who are paid by warrant of the Auditor of State, among them sick leave (R.C. 124.382), cash payment at the end of the year for accumulated sick leave (R.C. 124.383), cash payment for accumulated sick leave upon separation for any reason including retirement (R.C. 124.384), disability leave (R.C. 124.385), and personal leave (R.C. 124.386).

In Op. No. 81-015, my predecessor considered R.C. 124.39 and determined that only the political subdivisions named in R.C. 124.39(B) may act pursuant to R.C. 124.39(C). I concur in that determination. R.C. 124.39(B) references R.C. 124.38, which states, in part:

Each employee in the various offices of the county, municipal, and civil service township service, each employee of any state college or university, 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.

As reflected in the Ebert decision, employees of a county board are considered to be in the county service for purposes of R.C. 124.38. See Op. No. 81-015. Thus, the county is the political subdivision which is authorized to formulate a policy for the payment of unused sick leave to such employees under R.C. 124.39(C). A county

⁴ Specific authority for a county board to employ a superintendent and fix his compensation appears in R.C. 5126.05(I).

board, not being a political subdivision covered by R.C. 124.38 or 3319.141, is not authorized to act pursuant to R.C. 124.39(C). Under the analysis set forth in the Ebert case, however, a county board may, pursuant to its authority to employ, grant its employees not only sick leave, but also other fringe benefits in excess of statutory entitlements, to the extent that no statute constricts its authority to grant particular benefits. See 1981 Op. Att'y Gen. No. 81-052; 1981 Op. Att'y Gen. No. 81-036 (superintendent of a county board of mental retardation may enter into written employment contracts which confer benefits equal to or exceeding the minimum benefits provided by statute); 1979 Op. Att'y Gen. No. 79-064 (county board of mental retardation, which has power to fix the compensation of its employees, may procure group health insurance for such employees). Under such analysis, a county board may, pursuant to its power to employ, grant its employees the benefit of cash payments for sick leave at times other than retirement, in the absence of any constricting statutory provisions.

In Op. No. 81-015, my predecessor applied the foregoing analysis to a county board of elections and reached a conclusion which may, I believe, be applied also to your question:

It is clear, therefore, that pursuant to R.C. 124.39(C) the board of county commissioners may adopt a policy for payment for unused sick leave for employees in the various offices of the county service. As employees in the county service, [county board] employees are entitled to the benefits of any policy adopted for county employees pursuant to R.C. 124.39(C). See generally 1978 Op. Att'y Gen. No. 78-057 (a policy adopted by a political subdivision pursuant to R.C. 124.39(C) need not be uniform as to all offices, agencies and departments within the political subdivision).⁵ The [county board],

⁵ On the question of uniformity, 1978 Op. Att'y Gen. No. 78-057 states, at 2-139:

The express language of R.C. 124.39(C) does not require that a policy be applied uniformly with respect to all offices, agencies and departments contained within a political subdivision. Neither is there anything implicit in the word "policy" which mandates such a uniform application. Because "policy" is not defined in R.C. Chapter 124, it must be ". . . read in the context and construed according to the rules of grammar and common usage." R.C. 1.42. "Policy" is defined in Webster's Third New International Dictionary (1961) as follows:

. . . a definite course or method of action selected (as by a government, institution, group or individual) from among alternatives and in light of given conditions to guide and usually determine present or future decisions.

Accordingly, because of the absence of language in R.C. 124.39 either expressly or impliedly requiring a political subdivision to promulgate a uniform policy for the payment of accumulated, unused sick leave uniformly as to all offices, agencies and departments contained therein, I conclude that such policy need not be uniform. However, if such distinctions are drawn, they must be reasonable in order to comport with the guarantees of equal protection found in Art. I, §2, Ohio Const. and the Fourteenth Amendment of the United States Constitution. See, [e.g.,] State, ex rel. City of Garfield Heights v. Nadratowski, 46 Ohio St. 2d 441 (1976); Kinney v. Kaiser Aluminum & Chemical Corp., 41 Ohio St. 2d 120 (1975).

See 1981 Op. Att'y Gen. No. 81-082; 1980 Op. Att'y Gen. No. 80-030 (different fringe benefits may be provided to various groups of county employees).

however, may also adopt its own policy with regard to payment for unused sick leave for its employees, provided that the board's policy provides benefits at least as great as any benefits to which such employees may otherwise be entitled either by statute or by action of the county commissioners.

Op. No. 81-015 at 2-59 (footnote added).

You have described a situation in which the board of county commissioners of the county served by the county board has adopted a policy providing for payment for unused employee sick leave benefits upon retirement, but has not adopted a policy governing payment for such sick leave benefits upon termination of employment other than retirement or a policy providing for payment for such sick leave benefits at the end of the school year. No statutory provision either grants such benefits to the employees of a county board or restricts the authority of a county board to grant such benefits. I conclude, therefore, that the county board may, in the exercise of its authority to employ and fix the compensation of its employees, adopt a policy providing for such benefits. See generally 1983 Op. Att'y Gen. No. 83-073 (syllabus) ("[a] county may pay a county employee for unused sick leave when such employee separates from employment, but does not retire, only if the board of county commissioners has adopted, pursuant to R.C. 124.39(C), a policy for making such payment or if the employee's appointing authority has adopted a policy authorizing such payment").

In accordance with the foregoing, it is my opinion, and you are hereby advised, as follows:

1. A county board of mental retardation and developmental disabilities, pursuant to its authority to employ and fix the compensation of its employees, may adopt a policy which provides for cash payment to employees for accrued sick leave benefits upon termination of employment other than retirement, provided that the board's policy provides benefits at least as great as any benefits to which such employees may otherwise be entitled pursuant to statute or pursuant to a policy adopted by the board of county commissioners under the authority of R.C. 124.39(C).
2. A county board of mental retardation and developmental disabilities, pursuant to its authority to employ and fix the compensation of its employees, may adopt a policy which provides for cash payment to employees at the end of each school year for the past year's accrued sick leave benefits, provided that the board's policy provides benefits at least as great as any benefits to which such employees may otherwise be entitled pursuant to statute or pursuant to a policy adopted by the board of county commissioners under the authority of R.C. 124.39(C).

⁶ I am aware that, in 1981 Op. Att'y Gen. No. 81-052, issued on September 10, 1981, my predecessor considered whether a board of education could provide its teaching employees with cash payments for unused sick leave at the end of a school year and concluded, in paragraph 4 of the syllabus, that it could not, on the basis that R.C. 124.39 and R.C. 3319.141 constricted the general authority of a board of education to provide this particular fringe benefit. That conclusion in no way affects the analysis contained in this opinion both because, as discussed herein, a county board of mental retardation and developmental disabilities is not a political subdivision subject to R.C. 124.39, and because R.C. 124.39 has been amended to permit the adoption of policies similar to the provisions contained in R.C. 124.383, which provides for the payment of cash benefits for sick leave credit remaining at the end of the year. See Am. Sub. H.B. 694, 114th Gen. A. (1981) (eff. Nov. 15, 1981). In light of the amendment of R.C. 124.39, I question the continuing validity of the conclusion reached in Op. No. 81-052 (syllabus, paragraph 4).