

OPINION NO. 86-027**Syllabus:**

1. A director of a county department of human services has no authority to fix the compensation, including fringe benefits, of department employees without the approval of the board of county commissioners.
2. Although a policy may be adopted pursuant to R.C. 124.39(C) or R.C. 329.02 providing for the payment for accumulated but unused sick leave upon the death of an employee of a county department of human services, a board of county commissioners may not apply such policy retroactively to make payments for such unused sick leave to the estate of an employee, who died prior to adoption of the policy.

To: R. Alan Corbin, Brown County Prosecuting Attorney, Georgetown, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 6, 1986

I have before me your request for my opinion concerning payment for accumulated but unused sick leave upon the death of an employee of the county department of human services. I have restated your questions as follows:

1. Does the director of a county department of human services have independent authority to set a compensation and fringe benefit policy for employees of a county department of human services?
2. Does a board of county commissioners have authority to reverse a prior decision denying payment for accumulated but unused sick leave to the estate of a deceased employee and thereby authorize such payment?

You indicated in your request that the county director of human services circulated a proposed policy document among employees of the county department of human services which included a provision for the payment for unused sick leave upon the death of an employee similar to the policy provided in R.C. 124.39(D) for employees paid by warrant of the state Auditor. See footnote 1, *infra*. Although the policy document was circulated prior to the date of death of a particular employee, the policy was never adopted or approved by the board of county commissioners. Further, the board had never adopted a policy pursuant to R.C. 124.39(C) providing for the payment for unused

sick leave upon termination of employment other than retirement. Upon request of the county director of human services for payment for accumulated but unused sick leave to the estate of a deceased employee, the board of county commissioners refused to approve the payment since it was not in compliance with the established policy of the board.

In order to resolve your first question, it is important to understand the relationship between a board of county commissioners and the director of a county department of human services in the operation of the department. The authority of a board of county commissioners is statutory in nature. As such, the board has only such powers as are expressly conferred by statute or necessarily implied therefrom. State ex rel. Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947). Similarly, the director of a county department of human services is limited by R.C. Chapter 329, which establishes the director's authority to operate a county department of human services.

Pursuant to R.C. 329.02, the director of the county department of human services, with the approval of the board of county commissioners, has the authority to:

appoint all necessary assistants, superintendents of institutions under the jurisdiction of the department, and all other employees of the department, excepting that the superintendent of each such institution shall appoint all employees therein. The assistants and other employees of the department shall be in the classified civil service, and may not be placed in or removed to the unclassified service.

As stated in 1984 Op. Att'y Gen. No. 84-076 at 2-249: "Thus, R.C. 329.02 empowers the director of the county department of human services, with the approval of the board of county commissioners, to appoint necessary employees." (Footnote omitted.) See Abbott v. Myers, 20 Ohio App. 2d 65, 70, 251 N.E.2d 869, 874 (Franklin County 1969) (from R.C. 329.02 it is obvious that, "in relation to the appointment (and removal) of employees, the [human services] director is superior to the employees of the [human services] department and that the board of county commissioners is, in turn, superior to both the director and the employees of the [human services] department"); 1956 Op. Att'y Gen. No. 6316, p. 152 (syllabus, paragraph one) ("[t]he power to appoint all necessary assistants and employees of a county department of welfare[now human services], except employees of institutions within the department, has been granted jointly to the director of the department and the board of county commissioners, by virtue of the provisions of Section 329.02, Revised Code").

The authority to appoint employees necessarily includes the power to fix such employees' compensation. See Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980); Op. No. 84-076; 1981 Op. Att'y Gen. No. 81-082. Fringe benefits, as a component of compensation, may also be established by the appointing authority, subject to any constricting statutory authority. Id. Because the director's power to appoint employees is subject to the approval of the board of county commissioners, the power of the director to fix the compensation, including fringe benefits, of department employees is also subject to the approval of the board of county commissioners. Op. No. 84-076; Op. No. 81-082. See also Fleming v. Myers, 15 Ohio Misc. 205, 240 N.E.2d 511 (C.P.

Franklin County 1968), aff'd sub nom. Abbott v. Myers, 20 Ohio App. 2d 65, 251 N.E.2d 869 (Franklin County 1969) (R.C. 329.02 grants the county director of welfare (now human services) full charge of the county department of welfare (now human services) under the control and direction of the board of county commissioners). Thus, in response to your first question, a director of a county department of human services has no authority, independent of the board of county commissioners, to fix the compensation, including fringe benefits, of department employees.

Before turning to your second question, I must discuss generally the circumstances under which a county human services employee may be entitled to payment for unused sick leave upon his death.

There is no statute of which I am aware expressly providing for the payment, upon the death of an employee of a county department of human services, for the employee's accumulated but unused sick leave.¹ R.C. 124.39(C), however, provides that a political subdivision may "adopt a policy permitting an employee to receive payment upon a termination of employment other than retirement." It has been established that R.C. 124.39(C) authorizes a board of county commissioners, acting on behalf of the county, to promulgate those policies specified in R.C. 124.39(C) for the benefit of county employees. 1981 Op. Att'y Gen. No. 81-015. Further, it has been concluded that employees of county departments of human services are county employees. Op. No. 81-082. Thus, it appears that a board of county commissioners, pursuant to R.C. 124.39(C), may adopt the type of policy in question, covering all county employees, including employees of the county department of human services. However, in this case it is my understanding that the board of county commissioners has not instituted a policy pursuant to R.C. 124.39(C).

As discussed above, the director of a county department of human services has the authority, subject to the approval of the board of county commissioners, to fix the compensation, including fringe benefits, of department employees, subject to

¹ I note that R.C. 124.39(D) provides such a benefit to an employee whose salary or wage was paid by warrant of the auditor of state, as follows:

In case of death of an employee whose salary or wage was paid directly by warrant of the auditor of state, his unused sick leave shall be paid in accordance with section 2113.04 of the Revised Code, or to his estate. The rate of compensation shall be as provided in section 124.384 of the Revised Code.

Since employees of a county department of human services are county employees, see 1981 Op. Att'y Gen. No. 81-082, and are paid directly by warrant of the county auditor rather than by warrant of the state auditor, these employees do not fall within the scope of R.C. 124.39(D). Cf. 1984 Op. Att'y Gen. No. 84-076 (employees of a county department of human services do not fall within the scope of R.C. 124.386(A), granting personal leave to employees whose salary or wage is paid by warrant of the auditor of state).

any constricting authority. In 1984 Op. Att'y Gen. No. 84-071, I concluded in paragraph one of the syllabus that:

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).

See also Op. No. 84-076; 1984 Op. Att'y Gen. No. 84-061. Similarly, I believe that the director of the county department of human services, with the approval of the board of county commissioners, has the implied authority to adopt a policy which provides for the payment of accrued unused sick leave upon the death of an employee. I am unaware of any statute which restricts the authority of the director and county commissioners to adopt such a policy or which establishes a minimum entitlement with respect to such benefit. Further, in this case, the board of county commissioners has not acted pursuant to R.C. 124.39(C). Thus, the director may, with the approval of the board of county commissioners, establish a policy providing for the payment for unused sick leave upon the death of an employee.² As discussed above, however, in the situation you pose no policy was validly adopted for the employees of the department of human services in light of the fact that the board of county commissioners did not approve the director's proposed benefit policy.

Since the board of county commissioners neither approved the sick leave payment policy proposed by the county director of human services pursuant to R.C. 329.02 nor established a policy allowing for such payments pursuant to R.C. 124.39(C), I must now consider, in regard to your second question, whether there is any authority for the board of county commissioners to grant approval for or institute a policy of payment for accumulated but unused sick leave upon the death of employees and allow such payment to be made to the estate of an employee who died before the policy was implemented.

In regard to the board's authority to approve benefits under R.C. 329.02, I note that in 1981 Op. Att'y Gen. No. 81-011 my predecessor determined that boards of county commissioners possess the authority, as part of their power to compensate, to grant retroactive pay increases to their employees, and that the prohibition against retroactive compensation in Ohio Const. art. II, §29³ does not apply to

² However, in any county where a policy has been adopted pursuant to R.C. 124.39(C), a director of human services must provide benefits at least as great as any benefits adopted by the board of county commissioners under the authority of R.C. 124.39(C). See Op. No. 84-076; 1984 Op. Att'y Gen. No. 84-061.

³ Ohio Const. art. II, §29 provides:

No extra compensation shall be made to any officer, public agent, or contractor, after the

political subdivisions. However, under the facts presented, the retroactive payment for accumulated sick leave to the estate of a deceased employee fails to constitute compensation in the form of a "fringe benefit."

In 1985 Op. Att'y Gen. No. 85-005 at p. 2-12, I discussed the elements of a fringe benefit as follows:

In discussing the provisions of former R.C. 305.171, concerning the procurement of insurance for county employees by the board of county commissioners, the court in Madden v. Bower, 20 Ohio St. 2d 135, 254 N.E.2d 357 (1969), considered the nature of "fringe benefits," stating:

The purpose of an employer, whether public or private, in extending "fringe benefits" to an employee is to induce that employee to continue his current employment. If inducement to continue public service could not be found in the provisions of former Revised Code section 305.171, the purpose of payments thereunder would be highly suspect, if not flatly unconstitutional.

20 Ohio St. 2d at 137-38, 254 N.E.2d at 359. Accordingly, a fringe benefit is generally understood to be a form of employee compensation the purpose of which is to encourage the employee to continue his current employment. See 1982 Op. Att'y Gen. No. 82-006 at 2-16 through 2-17 ("a fringe benefit is commonly understood to mean something that is provided at the expense of the employer and is intended to directly benefit the employee so as to induce him to continue his current employment").

The county may find that the adoption of a policy authorizing cash payments for unused sick leave upon the death of an employee may encourage certain employees to continue their current employment so that in the event that an employee dies during his employment his family or beneficiaries may take advantage of the policy. However, where the employee is deceased when the board approves such policy, the payment thereunder to the estate of the deceased employee does not function as a fringe benefit. Under these circumstances, it is impossible for the benefit to provide an inducement to continued employment. Thus, the payment no longer falls within the concept of a fringe benefit, and the director and county commissioners lack authority to make such a payment under R.C. 329.02. As stated in 1952 Op. Att'y Gen. No. 1713, p. 559 at 565: "The mere giving away of public funds to private persons without such persons rendering any service or providing any sort of consideration in return is clearly not the expenditure of public funds for a public purpose, but rather is the

service shall have been rendered, or the contract entered into; nor shall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the general assembly.

expenditure of public funds for a private purpose [and] has been judicially recognized as illegal in Ohio" (citations omitted). See also 1985 Op. Att'y Gen. No. 85-047. Cf. State ex rel. Ach v. Braden, 125 Ohio St. 307, 181 N.E. 138 (1932) (holding a poor relief act constitutional, declaring that it is a public purpose of the state to protect its needy citizens). In this instance, the payment of sick leave to the estate of an employee who died prior to the implementation of the policy serves no apparent public purpose, and clearly does not constitute compensation for purposes of R.C. 329.02.

In addition, I do not believe that a board of county commissioners may retroactively apply a policy adopted pursuant to R.C. 124.39(C) for payment for unused sick leave upon an employee's death. Although the language of R.C. 124.39(C) authorizes a political subdivision to "adopt a policy permitting an employee to receive payment upon a termination of employment other than retirement," I have been unable to find any instance when such a policy was adopted and then applied retroactively to provide a benefit to the estate of a deceased employee. Rather, the wording of R.C. 124.39(C) appears to contemplate a prospective application of the policy to terminations of employment of persons who were employees at the time or after the policy came into effect. This interpretation of R.C. 124.39(C) is particularly compelling in this instance in light of the general principle, set forth above, that the expenditure of public funds must serve a public purpose. Accordingly, a board of county commissioners may not adopt a policy which provides for payment for accumulated but unused sick leave upon an employee's death and apply such policy retroactively to make payments thereunder to the estate of a deceased employee.

It is, therefore, my opinion, and you are advised, that:

1. A director of a county department of human services has no authority to fix the compensation, including fringe benefits, of department employees without the approval of the board of county commissioners.
2. Although a policy may be adopted pursuant to R.C. 124.39(C) or R.C. 329.02 providing for the payment for accumulated but unused sick leave upon the death of an employee of a county department of human services, a board of county commissioners may not apply such policy retroactively to make payments for such unused sick leave to the estate of an employee, who died prior to adoption of the policy.