

OPINION NO. 2006-052**Syllabus:**

1. Pursuant to R.C. 145.08(A), an employee elected to a position as the County Employee Representative on the Ohio Public Employees Retirement Board (OPERB) cannot be required to take vacation or other leave in order to attend meetings or other functions of the Board.
2. Absent particular circumstances requiring a contrary result, if a county employee serving as the County Employee Representative on the OPERB is on a suspension without pay while attending OPERB meetings or other functions, the county employer is not obligated to provide the county employee with compensation for time spent at the OPERB meetings or other functions.
3. In order to determine proper employee compensation, a county employer may request an employee who serves as the County Employee Representative on the OPERB to provide proof or verification of attendance at OPERB meetings or other functions and may place upon the employee the affirmative responsibility of providing this proof or verification.
4. A county employee serving as the County Employee Representative on the OPERB is not required to follow travel approval procedures established by the county pursuant to R.C. 325.20(A) when traveling for the purpose of attending OPERB meetings or other functions.
5. A county employee serving as the County Employee Representative on the OPERB is an "employee" within the meaning of R.C. 4123.01(A), is covered by the provisions of Ohio's workers' compensation law while serving as a member of the OPERB, and may submit a workers' compensation claim through the county. (1960 Op. Att'y Gen. No. 1253, p. 246, approved and followed in relevant part.)

To: Paul J. Gains, Mahoning County Prosecuting Attorney, Youngstown, Ohio

By: Jim Petro, Attorney General, December 19, 2006

We have received your request for an opinion on several questions concerning a situation in which an employee of the Mahoning County Department of Job and Family Services serves as the County Employee Representative on the Ohio Public Employees Retirement Board. You have asked the following questions pertaining to the employee's time away from job responsibilities to undertake Board duties:

1. Can an employee elected to a position as the County Employee Rep-

representative on the Retirement Board of the OPERS be required to take vacation or other leave in order to attend OPERS board meetings and/or functions?

2. If an employee is on a suspension without pay while attending OPERS board meetings and/or functions, is Mahoning County obligated to provide compensation for time spent at OPERS board meetings and/or functions?
3. Can Mahoning County ask such an employee to provide proof/verification of attendance at OPERS board meetings and/or functions? And, if so, is it the affirmative responsibility of the employee to provide such proof/verification?
4. As the employee was elected as the County Employee Representative, is that a state position or a county position? As relates to this, must said employee follow Mahoning County procedure and request that travel for OPERS board meetings and/or functions be approved ahead of time?
5. If said employee should be injured while at OPERS board meetings and/or functions, is that an OPERS or Mahoning County workers' compensation claim?

It is our understanding that, in the instant case, there are no applicable collective bargaining agreements that address these issues. Accordingly, this opinion does not consider any collective bargaining agreements or any possible conflicts between state or local laws and collective bargaining agreements.¹

For the reasons discussed below, we reach the following conclusions:

¹ Pursuant to R.C. Chapter 4117, certain public employees, including certain county employees, are authorized to form employee organizations and to bargain collectively to determine "wages, hours, terms and other conditions of employment" and enter into collective bargaining agreements. R.C. 4117.03(A)(4); *see* R.C. 4117.01(B), (C) (defining "[p]ublic employer" and "[p]ublic employee"); R.C. 4117.01(M) (defining "[w]ages" to mean "hourly rates of pay, salaries, or other forms of compensation for services rendered"); R.C. 4117.08. When no collective bargaining agreement exists or when an existing collective bargaining agreement makes no specification about a matter, state and local laws governing wages, hours, and terms and conditions of employment apply. If provisions of a collective bargaining agreement conflict with provisions of state or local law, the collective bargaining agreement prevails, subject to various exceptions provided by statute. Laws pertaining to certain specified matters (including "[l]aws pertaining to ... the retirement of public employees, ... [and] the provisions of division (A) of section 124.34 of the Revised Code governing the disciplining of officers and employees who have been convicted of a felony") prevail over conflicting provisions of collective bargaining agreements, and various other exceptions are provided. R.C. 4117.10(A); *see* 1998 Op. Att'y Gen. No. 98-028, at 2-150 (with certain limited exceptions, the terms of a collective bargaining agreement prevail over statutory

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2. Absent particular circumstances requiring a contrary result, if a county employee serving as the County Employee Representative on the OPERB is on a suspension without pay while attending OPERB meetings or other functions, the county employer is not obligated to provide the county employee with compensation for time spent at the OPERB meetings or other functions.
3. In order to determine proper employee compensation, a county employer may request an employee who serves as the County Employee Representative on the OPERB to provide proof or verification of attendance at OPERB meetings or other functions and may place upon the employee the affirmative responsibility of providing this proof or verification.
4. A county employee serving as the County Employee Representative on the OPERB is not required to follow travel approval procedures

provisions regarding a particular employee benefit) (clarified in part by 1999 Op. Att’y Gen. No. 99-039); *see also* 2006 Op. Att’y Gen. No. 2006-026, at 2-226 to 2-227; note 3, *infra*.

We are aware that there may be collective bargaining agreements that apply to the employment of the county employee here under consideration. It is our understanding, however, that no such collective bargaining agreement contains any provisions relating to the compensation of an employee for time spent participating in OPERB functions. Therefore, in order to answer your questions as they apply to your situation, it is not necessary to address any collective bargaining agreements or any possible conflicts between laws and collective bargaining agreements. *See, e.g.*, 2005 Op. Att’y Gen. No. 2005-027, at 2-284 n.1; 2004 Op. Att’y Gen. No. 2004-034, at 2-311 n.4.

Whether a collective bargaining agreement could prevail over the statutes discussed in this opinion is not clear. The reference in R.C. 4117.10(A) to “[l]aws pertaining to ... the retirement of public employees” encompasses many, if not all, of the provisions of R.C. Chapter 145 and rules enacted thereunder, so that these provisions will prevail over any conflicting provisions of a collective bargaining agreement. *See Streetsboro Educ. Ass’n v. Streetsboro City Sch. Dist. Bd. of Educ.*, 68 Ohio St. 3d 288, 293, 626 N.E.2d 110 (1994) (provision of State Teachers Retirement System law is a law pertaining to the retirement of public employees that prevails over conflicting provisions of a collective bargaining agreement). A determination as to whether there is a conflict between a particular statute or rule and a collective bargaining agreement must be made on a case-by-case basis. *See, e.g.*, 2006 Op. Att’y Gen. No. 2006-010, at 2-82 n.4.

established by the county pursuant to R.C. 325.20(A) when traveling for the purpose of attending OPERB meetings or other functions.

5. A county employee serving as the County Employee Representative on the OPERB is an "employee" within the meaning of R.C. 4123.01(A), is covered by the provisions of Ohio's workers' compensation law while serving as a member of the OPERB, and may submit a workers' compensation claim through the county. (1960 Op. Att'y Gen. No. 1253, p. 246, approved and followed in relevant part.)

Powers and Duties of the Ohio Public Employees Retirement Board County Employee Representative Who Is an Employee of a County Department of Job and Family Services

The Ohio Public Employees Retirement Board (OPERB) is created pursuant to R.C. 145.04 to carry out the general administration and management of the Ohio Public Employees Retirement System (OPERS). The Board consists of eleven members, including five employee members who are elected by various sectors of public employees. R.C. 145.04. The County Employee Representative is "a county employee member of the [public employees retirement] system," who is "elected by ballot by the county employee members of the system from among their number." R.C. 145.04(C); *see* R.C. 145.05-.058 (election procedures); 2 Ohio Admin. Code 145-1-02. The employee members serve for four-year terms. R.C. 145.05. The members serve without compensation, but are reimbursed for their expenses. R.C. 145.08.

The members of the Ohio Public Employees Retirement Board serve as trustees of the funds of the Ohio Public Employees Retirement System. The Board has full power to invest the funds and is directed to discharge its duties regarding the funds solely in the interest of the participants and beneficiaries, with care, skill, prudence, and diligence. R.C. 145.11. Participants and beneficiaries include public employees of numerous public bodies throughout the state. R.C. 145.01(A) (defining "[p]ublic employee"), (D) (defining "public employer"), (G) (defining "beneficiaries").

The County Employee Representative to whom your question relates is an employee of the Mahoning County Department of Job and Family Services, which is managed by the county director of job and family services, acting under the control and direction of the board of county commissioners. *See* R.C. 329.02; R.C. 329.022; R.C. 329.04(B). Subject to limited exceptions, the director, with the approval of the board of county commissioners, appoints the employees of the county department of job and family services. R.C. 329.01; R.C. 329.02; R.C. 329.021; *see also State ex rel. Belknap v. Lavelle*, 18 Ohio St. 3d 180, 181 n.1, 480 N.E.2d 758 (1985) (both the county director and the board of county commissioners are included within the term "appointing authority"); 2004 Op. Att'y Gen. No. 2004-031, at 2-278; 2003 Op. Att'y Gen. No. 2003-033, at 2-277 n.2; 1997 Op. Att'y Gen. No. 97-054, at 2-330 to 2-331; 1983 Op. Att'y Gen. No. 83-023. Like other county officials, the county director of job and family services and the county commissioners

have only the powers and duties granted by statute, either expressly or by necessary implication. *See, e.g., Geauga County Bd. of Comm'rs v. Munn Rd. Sand & Gravel*, 67 Ohio St. 3d 579, 582-83, 621 N.E.2d 696 (1993); *State ex rel. Shriver v. Bd. of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947); 2004 Op. Att'y Gen. No. 2004-031, at 2-275; 1983 Op. Att'y Gen. No. 83-023, at 2-83.²

As a county employee, the County Employee Representative is included in the civil service and the state service in accordance with R.C. Chapter 124. *See* R.C. 124.01(A) (“‘[c]ivil service’ includes all offices and positions of trust or employment in the service of the state and the counties ... thereof”); R.C. 124.01(B) (“‘[s]tate service’ includes all such offices and positions in the service of the state, the counties, and general health districts thereof, except the cities, city health districts, and city school districts”); *see also* R.C. 124.11; R.C. 124.20; R.C. 124.27; R.C. 124.34. With the exception of administrators appointed under R.C. 329.021 and the director of the county department of job and family services, all employees of the department are in the classified service. R.C. 329.02; R.C. 329.021; R.C. 329.022. County employees, including employees of the county department of job and family services, are governed by provisions of statutes, rules, and collective bargaining agreements that are applicable to them. *See, e.g.,* R.C. 124.38 (setting forth sick leave entitlement for various public employees, including employees in the county civil service); R.C. 325.19 (establishing vacation benefits and holidays for county employees, subject to provisions of collective bargaining agreements or alternative schedules established by appointing authorities and to various other exceptions); R.C. Chapter 4117 (establishing collective bargaining rights of public employees, including county employees); note 1, *supra*.

Question Whether an Employee Who Serves as the County Employee Representative May Be Required to Take Vacation or Other Leave in Order to Attend Meetings or Other Functions of the OPERB

Your first question is whether an employee who serves as the County Employee Representative may be required to take vacation or other leave in order to attend meetings or other functions of the OPERB. This issue is addressed by R.C. 145.08, which states, in part:

(A) The members of the public employees retirement board shall serve without compensation but *shall suffer no loss or penalty whatsoever because of absence from their regular employment to attend meetings authorized and called by the board*. The board members shall be reimbursed for all actual necessary expenses from the expense fund created under division (E) of section 145.23 of the Revised Code.

² This opinion does not consider the authority of a county that has acquired home rule powers pursuant to Ohio Const. art. X, § 1 or has adopted a charter pursuant to Ohio Const. art. X, §§ 3 and 4. *See Geauga County Bd. of Comm'rs v. Munn Rd. Sand & Gravel*, 67 Ohio St. 3d 579, 583 n.2, 621 N.E.2d 696 (1993); 2004 Op. Att'y Gen. No. 2004-031, at 2-274 n.1; 2002 Op. Att'y Gen. No. 2002-031, at 2-206 n.1.

Any determination by the board that a meeting of the board, or any part of the board, is necessary shall be final.

R.C. 145.08 (emphasis added). Pursuant to this provision, Board members are guaranteed that no loss or penalty may result from any absence from regular employment to attend meetings authorized and called by the board. This provision thus prevents a public employer from penalizing an OPERS Board member by requiring the Board member to use personal vacation time or other leave time to attend meetings authorized and called by the Board.

The duties of a Board member include both attendance at Board meetings and participation in other functions. The Board has regular and special meetings of the entire Board and also meetings of its various committees. *See* R.C. 145.07; R.C. 145.08(A); 2 Ohio Admin. Code 145-1-01(B), (D); 2 Ohio Admin. Code 145-1-03(A)(2) (“[m]eetings shall provide education to board members, be necessary for the performance of their duties, be appropriate to the general purpose of the retirement system and be in the interest of the retirement system’s participants”); 2 Ohio Admin. Code 145-1-13 (regularly scheduled meetings, special meetings, emergency meetings). The importance of attendance at Board meetings is evidenced by the fact that failure to attend Board meetings for three or more months without a valid excuse is considered resignation from the Board. R.C. 145.06. As quoted above, R.C. 145.08(A) specifies that “[a]ny determination by the board that a meeting of the board, or any part of the board, is necessary shall be final.”

In addition to attendance at Board meetings, various other activities are required of a Board member. The provisions of R.C. 145.041 require each new Board member to complete an orientation program and each continuing member to attend continuing education programs in accordance with R.C. 171.50. The provisions of R.C. 145.093 require the OPERB to provide periodic ethics training for its members. *See also* R.C. 145.09 (“[t]he board shall perform other functions as required for the proper execution of this chapter”).

Participation in the various Board functions may require travel. R.C. 145.08(C). Reimbursement is provided by the OPERB for actual, necessary and reasonable expenses incurred at the various functions that its members attend, including meetings of the Board or its committees; meetings, conferences, seminars, workshops, or sessions presented by other organizations; and other group meetings as authorized by the Board. 2 Ohio Admin. Code 145-1-03(A).

The reference in R.C. 145.08(A) to attendance at “meetings” authorized and called by the Board cannot reasonably be limited to the regular and special meetings of the Board scheduled in accordance with 2 Ohio Admin. Code 145-1-01(B). Rather, to protect the Board member from any loss of compensation or other penalty resulting from Board membership, the reference must be read as a general term that encompasses all Board functions, including Board and committee meetings, conferences, seminars, workshops, and other activities authorized by the Board for the performance of the statutory responsibilities of Board members. *See* R.C. 145.08-.09. *See generally Humphrys v. Winous Co.*, 165 Ohio St. 45, 49, 133 N.E.2d 780 (1956) (“[t]he primary duty of a court in construing a statute is to give effect to

the intention of the Legislature enacting it. In determining that intention, a court should consider the language used and the apparent purpose to be accomplished, and then such a construction should be adopted which permits the statute and its various parts to be construed as a whole and gives effect to the paramount object to be attained”).

We conclude, therefore, that pursuant to R.C. 145.08(A), an employee elected to a position as the County Employee Representative on the Ohio Public Employees Retirement Board cannot be required to take vacation or other leave in order to attend meetings or other functions of the Board.

Question Whether, If the County Employee Representative Is on a Suspension Without Pay While Attending OPERB Meetings or Other Functions, the County Is Obligated to Provide Compensation for Time Spent at the Meetings or Other Functions

Your second question concerns a situation in which the County Employee Representative is on a suspension without pay while attending OPERB meetings or other functions. You ask whether, in these circumstances, the county is obligated to provide the employee with compensation for time spent at the OPERB meetings or other functions.

As discussed above, a county employee is subject to relevant statutes, rules, and collective bargaining agreements, and a county employer has the powers that it is granted by statute. A public employer generally has authority to supervise and discipline its employees so that the business of the governmental entity may be performed efficiently. *See Moorer v. Copley Township*, 98 F. Supp. 2d 838, 844 (N.D. Ohio 2000) (“[a] government employer must have wide discretion in the fulfillment of their public duties, including the right to suspend employees who hinder the effective operation of the business”); *State ex rel. Robinson v. Allman*, 134 Ohio St. 502, 506-07; 17 N.E.2d 921 (1938) (history under Ohio law of power to suspend civil servant for disciplinary purposes).³

Existing statutes and rules permit a county employer to suspend an em-

³ R.C. 4117.08, which governs subjects that are appropriate for collective bargaining, outlines basic powers held by a public employer, stating in part:

(C) Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;

(2) Direct, supervise, evaluate, or hire employees;

(3) Maintain and improve the efficiency and effectiveness of governmental operations;

ployee in accordance with prescribed procedures. *See* R.C. 124.06 (“[n]o person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted, or reduced as an officer or employee in the civil service, in any manner or by any means other than those prescribed in this chapter, and the rules of the director of administrative services”): R.C. 124.20 (the Director of Administrative Services, with the approval of the State Personnel Board of Review, shall adopt rules governing, *inter alia*, suspensions in the county civil service); R.C. 124.34 (suspensions allowed only in specified circumstances);⁴ 2 Ohio Admin. Code Chapter 123:1-31 (Removals, Suspensions and Reductions); 2 Ohio Admin. Code 124-1-02(E) (“[s]uspension’ means the interruption of an employee’s employment and

- (4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
- (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;
- (6) Determine the adequacy of the work force;
- (7) Determine the overall mission of the employer as a unit of government;
- (8) Effectively manage the work force;
- (9) Take actions to carry out the mission of the public employer as a governmental unit.

See also note 1, *supra*.

⁴ R.C. 124.34 contains provisions governing suspensions of employees in the classified service of a county and states, in part:

(A) The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts of the state, holding a position under this chapter, shall be during good behavior and efficient service. No such officer or employee shall be reduced in pay or position, fined, suspended, or removed, except as provided in section 124.32 of the Revised Code [transfer; reinstatement of person who has been separated from service without delinquency or misconduct], and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony. An appointing authority may require an employee who is suspended to report to work to serve the suspension. An employee serving a suspension in this manner shall continue to be compensated at the employee’s regular rate of pay for hours worked. Such disciplinary action shall be recorded in the employee’s personnel file in the same man-

compensation for a fixed period of time’); *see also State ex rel. Bay v. Witter*, 110 Ohio St. 216, 221, 143 N.E. 556 (1924) (“an employe in the classified service can only be suspended or removed in accordance with the provisions of the Civil Service Act”). If a county employee is suspended for more than three working days, the employee must be served with a copy of the order of suspension stating the reason for the suspension, and there must be an opportunity for appeal. R.C. 124.34(B); 2 Ohio Admin. Code 123:1-31-01; 2 Ohio Admin. Code Chapter 124-3 (Section 124.34 Orders); *see also* R.C. 124.03(A) (duty of State Personnel Board of Review to hear appeals of job suspensions); *Traub v. Warren County Bd. of Comm’rs*, 114 Ohio App. 3d 486, 683 N.E.2d 411 (Franklin County 1996); *Spittal v. Piperni*, 643 F. Supp. 570 (N.D. Ohio 1986), *aff’d sub nom. Spittal v. Brown*, 836 F.2d 1348 (6th Cir. 1988). Certain rights and obligations relating to suspensions may be affected by collective bargaining agreements. *See* R.C. Chapter 4117; *Geneva Patrolmen’s Ass’n v. City of Geneva*, 16 Ohio App. 3d 320, 475 N.E.2d 1317 (Ashtabula County 1984); note 1, *supra*.

Provided that a county employee has been suspended without pay through proper procedures in accordance with applicable rules, statutes, and collective bargaining agreements, it does not appear that the county is required to provide the employee with pay simply because, during the time of suspension, the employee is attending OPERB meetings or other functions as the County Employee Representative.⁵ The provisions of R.C. 145.08(A) state only that Board members

“shall suffer no loss or penalty whatsoever because of absence from their regular

....

Conviction of a felony is a separate basis for reducing in pay or position, suspending, or removing an officer or employee, even if the officer or employee has already been reduced in pay or position, suspended, or removed for the same conduct that is the basis of the felony....

A person convicted of a felony immediately forfeits the person’s status as a classified employee in any public employment on and after the date of conviction for the felony....

See also 2 Ohio Admin. Code Chapter 124-3 (Section 124.34 Orders).

⁵ It appears that a county employee continues to be qualified to serve as the County Employee Representative on the OPERB and attend OPERB meetings or other functions while on a suspension without pay. While the County Employee Representative must be a county employee when elected by other county employee members, the statutes do not address possible suspension or even termination of county employment. Clearly the County Employee Representative must remain a member of the Ohio Public Employees Retirement System, but that status is not affected by a suspension. *See* 1945 Op. Att’y Gen. No. 470, p. 602 (syllabus) (“[i]t is permissible for the employe members of the public employes retirement board elected pursuant to [G.C. 486-34, now R.C. 145.04] to retain their offices as

employment to attend meetings authorized and called by the board.” If a suspension without pay results from activity unrelated to attendance at meetings or other functions of the Board, then the loss or penalty resulting from the suspension is not suffered “because of absence from . . . regular employment to attend meetings authorized and called by the board” and is not prohibited by R.C. 145.08(A). In these circumstances, the public employer would not be required to provide compensation for time that the County Employee Representative spends at OPERB meetings or other functions.

The rights of a particular employee may, however, be dependent upon the facts of a particular case. For example, a different result might be reached if it were established that the suspension was imposed as a punishment for participation in OPERB meetings or other functions, or that the suspension was scheduled intentionally to coincide with OPERB functions in order to relieve the employer of its ordinary duty to provide the employee with the usual compensation during attendance at OPERB functions. These or similar circumstances might support a finding that the suspension was used as a means of imposing a loss or penalty upon the employee because of absence from regular employment to attend functions of the Board, thereby violating the prohibition of R.C. 145.08(A).

We conclude, accordingly, that absent particular circumstances requiring a contrary result, if a county employee serving as the County Employee Representative on the OPERB is on a suspension without pay while attending OPERB meetings or other functions, the county employer is not obligated to provide the county employee with compensation for time spent at the OPERB meetings or other functions.

members of said board in the event that they cease to be public employees, so long as they do not withdraw their accumulated contributions, but leave the same in the system as provided by [G.C. 486-65a, now R.C. 145.41]”). Pursuant to R.C. 145.41, membership in OPERS ceases only upon refund of accumulated contributions, death, or retirement, except in certain disability situations. There is no suggestion that suspension in itself terminates membership in OPERS.

Hence, our research discloses no basis for concluding that suspension from employment, in itself, affects the rights of the County Employee Representative to continue to serve on the OPERB. It is possible, however, that facts supporting a suspension might also support termination of membership on the Board. *See, e.g.*, R.C. 124.34(A) (consequences of felony conviction); R.C. 145.057 (the office of an employee member of OPERB is deemed vacant if the member is convicted of or pleads guilty to a felony, a theft offense, or certain ethics violations; the office is forfeited upon complaint and hearing resulting in a finding of misconduct in office). For purposes of this opinion, we assume that the County Employee Representative continues to serve on the OPERB during any periods of suspension.

Question Whether the County May Ask an Employee Who Serves as the County Employee Representative to Provide Proof or Verification of Attendance at OPERB Meetings or Other Functions, and Whether the Employee Is Responsible for Providing That Proof or Verification

You have asked, next, whether the county employer may request an employee who serves as the County Employee Representative to provide proof or verification of attendance at OPERB meetings or other functions. You have asked also, if this request is made, whether the employee has the affirmative responsibility of providing this proof or verification.

Even though a particular employee serves as the County Employee Representative on the OPERB, that employee remains an employee of his or her county employer, is subject to general supervision by the county employer, and must comply with standard administrative procedures applicable generally to the employees with whom he or she serves. *See, e.g.*, 2 Ohio Admin. Code 123:1-44-02 (state and county employees “must follow standard agency policies” in requesting leaves of absence or vacation leaves expressly for the purpose of engaging in religious observances); *supra* note 3 and accompanying text. The procedures must comply with relevant statutes, rules, and applicable collective bargaining agreements. *See, e.g.*, R.C. 124.38 (various public employees, including county employees, may use sick leave, upon approval of the responsible administrative officer of the employing unit, for purposes specified by statute); 2 Ohio Admin. Code 123:1-32-05 (sick leave uses); note 1, *supra*.

A county employer has an obligation to expend public funds in accordance with law and to protect the public treasury by ensuring that each employee is paid only the amount to which that employee is entitled. *See State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918) (syllabus, paragraph one) (public money constitutes a public trust fund that “can be disbursed only by clear authority of law”); *see also State v. McKelvey*, 12 Ohio St. 2d 92, 94, 232 N.E.2d 391 (1967) (all measures providing for the spending of public funds are to be strictly construed); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916) (if the authority to expend public funds “is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county”).

To carry out this obligation, the employer is empowered to implement reasonable procedures for determining when employees are absent from their duties and for ascertaining whether each absence is an absence during which the employee may lawfully continue to receive compensation. *See, e.g., Steinhour v. Ohio State Univ.*, 62 Ohio App. 3d 704, 709, 577 N.E.2d 413 (Franklin County 1989) (“the appropriate administrative officer is not required to grant sick leave merely because it is requested for a valid reason, but may make a determination of the validity of the stated reason for use of sick leave”); *South Euclid Fraternal Order of Police, Lodge 80 v. D’Amico*, 13 Ohio App. 3d 46, 48, 468 N.E.2d 735 (Cuyahoga County 1983) (“[w]hile the employing unit has the right to grant or deny sick leave, it does have the duty to see to it that sick leave is used only as allowed by law”); *Har-*

barger v. Ballard, 53 Ohio App. 2d 281, 284, 373 N.E.2d 390 (Summit County 1977) (upholding mayor's executive order increasing instances in which physician's statement could be required to justify sick leave and finding that the change "intended only to protect the city from a wrongful or improper claim. This was in line with the Mayor's duty").

In some instances, procedures for determining whether to grant paid leave are prescribed by statute. *See, e.g.*, R.C. 124.38 (various public employers, including county appointing authorities, "shall require an employee to furnish a satisfactory written, signed statement to justify the use of sick leave. If medical attention is required, a certificate stating the nature of the illness from a licensed physician shall be required to justify the use of sick leave. Falsification of either a written, signed statement or a physician's certificate shall be grounds for disciplinary action, including dismissal"); 2 Ohio Admin. Code 123:1-32-04;⁶ 2 Ohio Admin. Code 123:1-32-05(B). *See generally State ex rel. Britton v. Scott*, 6 Ohio St. 3d 268, 452 N.E.2d 1312 (1983) (state university procedure provides for employees requesting paid sick leave to submit a form indicating the reason for the absence; the employer has discretion to approve or disapprove the request).

Where statutes and rules do not provide specific procedures for determining whether paid leave is justified, the employer must, of necessity, have implied authority to establish reasonable procedures to ensure that an employee who is absent from job duties receives compensation only as authorized by law. *See generally State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E.2d 138 (1915) (syllabus, paragraph four) ("[w]here an officer is directed by the constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed"), *aff'd sub nom. Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, 608 (1878) ("[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is

⁶ Section 123:1-32-04 of the Ohio Administrative Code is entitled "Notification for use of sick leave by employees of county offices and state colleges or universities." It states, in part:

(A) Notification. An employee who is unable to report for work, and who is not on a previously approved day of vacation, sick leave, compensatory time, leave of absence, or *other approved leave* shall be responsible for notifying the employee's immediate supervisor or other individual designated by the appointing authority that he will be unable to report for work. The notification must be made within one-half hour after the time the employee is scheduled to report for work, unless emergency conditions prevent such notification. If operational needs of an appointing authority require a different notification time, the appointing authority may establish a reasonable notification time requirement. The appointing authority shall be responsible for informing all employees of the applicable notification policy. (Emphasis added.)

that the legislature intended the party might perform it in a reasonable manner”). This authority must be implied both to permit the employer to supervise its employees and also to enable the employer to make certain that public funds are expended in a lawful manner. *See, e.g., South Euclid Fraternal Order of Police, Lodge 80 v. D’Amico*, 13 Ohio App. 3d at 48 (a city is empowered “to enact procedures to see that sick leave is properly used”); 2 Ohio Admin. Code 123:1-32-07(E) (with regard to notification and approval of personal leave for employees paid by warrant of the Auditor of State, “[r]easonable notification policies should be based upon the operational requirements of an agency”); 1987 Op. Att’y Gen. No. 87-067, at 2-416 (“[s]ince, as a general rule, it is the individual appointing authority who determines his employees’ compensation and allows for the payment of such compensation, the appointing authority must keep accurate records of the compensation his employees are to receive”) (overruled in part on other grounds by 1998 Op. Att’y Gen. No. 98-026).

In order to perform its duty to ensure proper employee compensation, a county employer may find it necessary both to request an employee to provide reasonable justification for an absence and to require the employee to provide satisfactory evidence in support of that justification. Requirements of this nature are commonly used to establish the proper use of paid leave and may appropriately be used in determining whether leave for OPERB purposes is justified. *Cf. R.C. 124.38(C)* (requiring a county employee to submit a satisfactory written, signed statement and in some circumstances a physician’s statement to justify the use of sick leave); 1969 Op. Att’y Gen. No. 69-164, at 2-343 (construing statute providing that the appointing authority shall require an employee to furnish a satisfactory affidavit to justify the use of sick leave and concluding that the affidavit must contain “sufficient facts so that the appointing authority is satisfied that the use of sick leave is justified”). *See generally* 2003 Op. Att’y Gen. No. 2003-029, at 2-246 (finding that the county auditor has authority to decide what kind of documentation is sufficient to support the payment of an expense from the county treasury).

The provisions of R.C. 145.08(A) prevent the county employer from denying the County Employee Representative the right to be absent from the employee’s regular employment to attend meetings or other functions of the OPERB. They do not, however, excuse the employee from complying with reasonable county procedures for providing both notice of and justification for absences from job duties. Compliance with basic requirements regarding attendance is part of the employee’s responsibility as a civil servant and cannot reasonably be construed as a loss or penalty prohibited by R.C. 145.08(A). *Cf. 2 Ohio Admin. Code 123:1-32-05(C)* (“[a]pplication for use of sick leave with the intent to defraud shall be grounds for disciplinary action which may include dismissal”).

We conclude, therefore, that, in order to determine proper employee compensation, a county employer may request an employee who serves as the County Employee Representative on the OPERB to provide proof or verification of attendance at OPERB meetings or other functions and may place upon the employee the affirmative responsibility of providing this proof or verification.

Question Whether the Position of County Employee Representative Is a State or County Position, and Whether the Employee Must Follow County Procedures With Regard to Requests for Approval of Travel to OPERB Meetings or Other Functions

You have asked whether the position of County Employee Representative on the OPERB is a state or county position. You have also asked, in relation to this issue, whether the employee must follow county procedures with regard to approval of travel to Board meetings or other functions.

As outlined above, the position of County Employee Representative may be filled only by an individual who is a county employee member of OPERS. *See* R.C. 145.01(A), (B); R.C. 145.04(C). Thus, employment with a county is a qualification required to assume the position of County Employee Representative. Further, the County Employee Representative is entitled to receive normal compensation from county employment for time spent attending OPERS functions. *See* R.C. 145.08(A). In this sense, serving on the Board is included as an authorized function of the County Employee Representative's employment with the county. *See, e.g.*, 1960 Op. Att'y Gen. No. 1253, p. 246, at 248 ("regarding the employee members [on the OPERB], it might be said that each represents his particular subdivision in his service on the board as well as all members of his class of employment, as such service deals with all employees under the system").

The position of member of the OPERB, however, has as its statutory function service to the OPERS and is part of the management of OPERS. As was stated in *Jackson A & E Associates v. OPERS*, Franklin App. No. 02AP-1218, 2003-Ohio-7033, at ¶17: "Pursuant to the [applicable] statutory provisions, the [public employees retirement] 'system' itself is made effective by, and acts through, its governing body, the board, which is authorized to administer and manage PERS. Thus, the board constitutes a part of PERS, acting on behalf of the system in a fiduciary manner." Even though a particular Board member is elected by county employees, that member has fiduciary responsibilities to all participants and beneficiaries of OPERS. *See* R.C. 145.11.

It is clear under the provisions of R.C. Chapter 145 discussed above that the Board has statewide responsibilities; however, the relationship between the State of Ohio and OPERS has not been defined with precision. For some purposes and by some authorities, OPERS has been considered an agency or instrumentality of the state, and for some purposes and by some authorities OPERS has been found to be an entity separate from and independent of the state. *See, e.g.*, *Jackson A & E Associates v. OPERS*, at ¶11-15; 2004 Op. Att'y Gen. No. 2004-014 (syllabus, paragraph five) (OPERS and the other state retirement systems "are neither state agencies nor political subdivisions for purposes of R.C. 9.24, and their moneys are not state funds for purposes of R.C. 9.24"); 1996 Op. Att'y Gen. No. 96-032 (syllabus) (OPERS and the other state retirement systems "are not state agencies, as that term is defined at R.C. 121.41(D) and R.C. 1.60, for purposes of the statutes governing the powers and duties of the Inspector General"); *cf. Norris v. State Teachers Ret. Sys.*, No. 59915, 1992 Ohio App. LEXIS 2564, at *12 (Cuyahoga

County May 21, 1992) (the School Employees Retirement Board and the State Teachers Retirement Board are instrumentalities of the state); 1993 Op. Att'y Gen. No. 93-071, at 2-327 to 2-329 (the Highway Patrol Retirement System is an agency or instrumentality of the state and, when administering the provisions of R.C. 5505.16(C), qualifies as the employer of its members for purposes of the Federal Age Discrimination in Employment Act).

Hence, it is not clear whether a member of the OPERB holds a state position. *See generally In re Appeal of Ford*, 3 Ohio App. 3d 416, 446 N.E.2d 214 (Franklin County 1982) (finding that the State Teachers Retirement System is an agency and instrumentality of the state, but that employees of that retirement system are not in the service of the state). However, it is not necessary to determine that issue in order to answer your question. It is sufficient to note that that, regardless of the precise nature of OPERS or the position of Board member, it is clear that the member serving as the Board's County Employee Representative holds a position of trust on the OPERB and, while serving in that position, is acting on behalf of the OPERB.

Your fourth question asks specifically about compliance with the county procedure applicable to travel requests. It is our understanding that this procedure is established pursuant to R.C. 325.20(A), which states that, except as otherwise provided by law, no elected county officer, no deputy, and no county employee "shall attend, at county expense, any association meeting, convention, or training sessions conducted pursuant to section R.C. 901.10 of the Revised Code [training sessions for sealers of weights and measures and their inspectors] unless authorized by the board of county commissioners." The head of the county office desiring the travel must submit an application showing the necessity of attendance and the probable costs to the county. If a majority of the members of the board of county commissioners approves the application, the expenses are paid from the moneys appropriated to the office for traveling expenses. R.C. 325.20(A).

Thus, approval pursuant to R.C. 325.20(A) is required before a county employee attends an association meeting, convention, or certain type of training session, but only if the attendance is "at county expense." The intent of the statute is to give the board of county commissioners a means of exercising control over the travel and training expenses of county agencies and departments. *See* 2003 Op. Att'y Gen. No. 2003-029, at 2-245.

The provisions of R.C. 325.20(A) are not applicable to travel by an OPERB member to meetings or other functions of the OPERB, because that travel does not involve any cost to the county. R.C. 145.08(A) specifies that OPERB members shall be reimbursed by OPERS "for all actual necessary expenses." Travel expenses are among the expenses for which OPERB reimbursement may be provided, pursuant to proper procedures and with adequate documentation. *See e.g.*, R.C. 145.08(C); R.C. 145.092; 2 Ohio Admin. Code 145-1-03 (OPERB travel and expense reimbursement policy). For example, statutory provisions specify that, except in emergencies, no out-of-state travel expenses are reimbursed unless they are approved in advance by a majority of the Board at a regular Board meeting. R.C. 145.08(D).

Further, Board members are expressly prohibited from accepting payment or reimbursement for travel expenses (other than for meals and other food and beverages provided to the members) from any source other than the OPERS expense fund. R.C. 145.08(D); *see* R.C. 145.23(E). Accordingly, the county is not permitted to provide a Board member with payment for travel expenses incurred in attending OPERB functions. For this reason, the provisions of R.C. 325.20(A) cannot apply to travel undertaken by the County Employee Representative in order to attend OPERB meetings or other functions.

We conclude, therefore, that a county employee serving as the County Employee Representative on the OPERB is not required to follow travel approval procedures established by the county pursuant to R.C. 325.20(A) when traveling for the purpose of attending OPERB meetings or other functions. As discussed above, however, the employee must follow appropriate procedures for notifying the employer of absences relating to attendance at OPERB functions.

Question Whether, If the County Employee Representative Happens to be Injured While at an OPERB Meeting or Other Function, There Would Be a Workers' Compensation Claim Through OPERS or Through the County

Your fifth question concerns the possibility that the County Employee Representative might be injured while at an OPERB meeting or other function. You ask whether, in that situation, a workers' compensation claim should be made through the county or through OPERS.

Ohio's workers' compensation program is authorized by the Ohio Constitution and established through the provisions of R.C. Chapters 4121 and 4123. A basic purpose of the program is to provide compensation to, or death benefits for, employees who suffer injuries or contract occupational diseases in the course of their employment. *See* Ohio Const. art. II, § 35; R.C. 4123.54. Statutory provisions establish requirements for inclusion in the program and entitlement to benefits.

The workers' compensation program includes both employees of public employers and employees of private employers. R.C. 4123.01(A), (B), (H). The definition applicable to public employees, including county employees, appears in R.C. 4123.01(A)(1)(a) and defines "[e]mployee" to mean:

(a) Every person in the service of the state, or of any county, municipal corporation, township, or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations and townships, whether paid or volunteer, and wherever serving within the state or on temporary assignment outside thereof, and executive officers of boards of education, under any appointment or contract of hire, express or implied, oral or written, including any elected official of the state, or of any county, municipal corporation, or township, or members of boards of education. (Emphasis added.)

Thus, every person in the service of a county is an "[e]mployee" for purposes of workers' compensation provisions. It is clear, accordingly, that a person

employed by a county department of job and family services is an employee for purposes of Ohio's workers' compensation law and that, in appropriate circumstances, the employee may make a claim for injuries suffered in the course of county employment. *See* R.C. 4123.01(C) (defining "[i]njury" to include "any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment," and setting forth certain exclusions); 1998 Op. Att'y Gen. No. 98-012, at 2-62 ("pursuant to R.C. 4123.01(B)(1), the county is the employer of a county employee for purposes of the statutes and rules concerning workers' compensation").

The question whether service on the Board of OPERS is included as county service for purposes of the workers' compensation law was addressed in 1960 Op. Att'y Gen. No. 1253, p. 246. That opinion concluded that an employee who serves as an employee representative on the OPERB does so as part of the employee's regular employment with the employer that compensates the employee, stating:

In summary, I am of the opinion that, under the statutes, service on the board is a part of the regular employment of each member, including each employee member, and that each member is paid by his respective employer for such service. Since all members are covered by workmen's compensation in their regular employment, it follows that they are covered when serving as members of the board.

1960 Op. Att'y Gen. No. 1253, p. 246, at 248.

The 1960 opinion indicates that the County Employee Representative is covered by workers' compensation because of employment with and compensation by the county. That is a reasonable reading of the statute, and it is our understanding that it has been generally accepted for a number of years. It is consistent with the fact that the County Employee Representative receives regular compensation from the county for time spent carrying out functions of the OPERB. We affirm this analysis and conclude that a county employee serving as the County Employee Representative on the OPERB is an "employee" within the meaning of R.C. 4123.01(A), is covered by the provisions of Ohio's workers' compensation law while serving as a member of the OPERB, and may submit a workers' compensation claim through the county.⁷

Whether a particular incident is covered by workers' compensation depends

⁷ Your opinion request asks only about the County Employee Representative on the OPERB. Accordingly, this opinion addresses only that OPERB member.

The conclusion set forth in 1960 Op. Att'y Gen. No. 1253, p. 246, was applied to all members then serving on the OPERB (the Attorney General, the Auditor of State, the Director of State Personnel, and four employee members), each of whom was in the service of the state or a political subdivision of the state and thus covered by workers' compensation through employment with a public body. The analysis set forth in that opinion continues to apply to those members of the Board who are similarly employed. Since the issuance of the 1960 opinion, however, the membership on the OPERB has changed. Members now include (in addition to the

upon whether the injury was “received in the course of, and arising out of, the injured employee’s employment.” R.C. 4123.01(C); *see, e.g., Fisher v. Mayfield*, 49 Ohio St. 3d 275, 276, 551 N.E.2d 1271 (1990); *Kohlmayer v. Keller*, 24 Ohio St. 2d 10, 263 N.E.2d 231 (1970); *Marbury v. Indus. Comm’n*, 62 Ohio App. 3d 786, 577 N.E.2d 672 (Montgomery County 1989). The right of any individual to compensation under the workers’ compensation system must be determined on a case-by-case basis in light of the totality of the facts and circumstances, and cannot be determined by an opinion of the Attorney General. *See, e.g., Stivison v. Good-year Tire & Rubber Co.*, 80 Ohio St. 3d 498, 687 N.E.2d 458 (1997); *Fisher v. Mayfield*, 49 Ohio St. 3d at 276-78; 2006 Op. Att’y Gen. No. 2006-026, at 2-228 n.10.

Director of Administrative Services and employee members) retirant members, who are former members of OPERS elected by other retirees; the Treasurer of State’s investment designee, who is prohibited from being currently employed by the state or a political subdivision of the state; and two appointed investment expert members, one appointed by the Governor and one appointed jointly by the Speaker of the House of Representatives and the President of the Senate. R.C. 145.04. This opinion does not attempt to determine whether each of these members comes within the workers’ compensation system. In particular, it is not clear if election by retirees or appointment pursuant to the OPERB statutes is sufficient to bring a member within the workers’ compensation system. *Cf.* 1960 Op. Att’y Gen. No. 1253, p. 246, at 248 (“[c]ertainly all members of the board are serving under color of some appointment”); 1959 Op. Att’y Gen. No. 295, p. 163 (members of the Ohio Wildlife Council, appointed for a term of office and serving without compensation but receiving reimbursement for expenses, were employees for purposes of the workers’ compensation law and, when they flew as passengers in a state-owned aircraft in the course of discharging their official duties, they came within the coverage of the worker’s compensation law). *See generally* R.C. 4123.01(A)(2) and 4123.03 (allowing employer to voluntarily include in the workers’ compensation program certain individuals not otherwise covered); 1982 Op. Att’y Gen. No. 82-045; 1980 Op. Att’y Gen. No. 80-098, at 2-397; 1978 Op. Att’y Gen. No. 78-031.

Further, we have been informed that OPERS is considered a private employer for workers’ compensation purposes. *See* R.C. 4123.01(B)(2). Whether a member of the OPERB may be covered by workers’ compensation through OPERS appears to be unsettled at this time; however, we are unable to state definitively that no member of OPERB may ever submit a workers’ compensation claim through OPERS. *See generally* 1993 Op. Att’y Gen. No. 93-071 (syllabus, paragraph one) (for purposes of the Federal Age Discrimination in Employment Act, the Ohio Highway Patrol Retirement System qualifies as the employer of its members when administering the provisions of R.C. 5505.16(C)); 1981 Op. Att’y Gen. No. 81-013.

Conclusions

For the reasons set forth above, it is my opinion, and you are hereby advised, as follows:

1. Pursuant to R.C. 145.08(A), an employee elected to a position as the County Employee Representative on the Ohio Public Employees Retirement Board (OPERB) cannot be required to take vacation or other leave in order to attend meetings or other functions of the Board.
2. Absent particular circumstances requiring a contrary result, if a county employee serving as the County Employee Representative on the OPERB is on a suspension without pay while attending OPERB meetings or other functions, the county employer is not obligated to provide the county employee with compensation for time spent at the OPERB meetings or other functions.
3. In order to determine proper employee compensation, a county employer may request an employee who serves as the County Employee Representative on the OPERB to provide proof or verification of attendance at OPERB meetings or other functions and may place upon the employee the affirmative responsibility of providing this proof or verification.
4. A county employee serving as the County Employee Representative on the OPERB is not required to follow travel approval procedures established by the county pursuant to R.C. 325.20(A) when traveling for the purpose of attending OPERB meetings or other functions.
5. A county employee serving as the County Employee Representative on the OPERB is an "employee" within the meaning of R.C. 4123.01, is covered by the provisions of Ohio's workers' compensation law while serving as a member of the OPERB, and may submit a workers' compensation claim through the county. (1960 Op. Att'y Gen. No. 1253, p. 246, approved and followed in relevant part.)