OPINION NO. 90-074

Syllabus:

1. Regardless of R.C. 124.39, county employees are entitled to receive payment for unused sick leave in accordance with a provision in an agreement covering such employees entered into under R.C. Chapter 4117.

2. Only in the manner set forth in R.C. 124.39(C) may a county appointing authority establish a policy concerning payment for unused sick leave for its employees who are not covered by a collective bargaining agreement, where such policy differs from R.C. 124.39(B) or from a policy established by the board of county commissioners pursuant to R.C. 124.39(C). (1984 Op. Att'y Gen. No. 84-071; 1984 Op. Att'y Gen. No. 84-061, 1983 Op. Att'y Gen. No. 83-073, and 1981 Op. Att'y Gen. No. 81-015, qualified.)

To: Kevin J. Baxter, Erie County Prosecuting Attorney, Sandusky, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, November 8, 1990

I have before me your opinion request concerning the compensation of various county employees. You specifically ask:

1. Whether or not a provision for conversion of sick leave in a bargaining unit contract is permissible under sections [124.39] and 4117.08 of the Ohio Revised Code?

2. Whether or not non-bargaining employees under the same appointing authority can be granted the same right of conversion of sick leave yearly accrual?

Collective bargaining between public employers and public employees is governed by R.C. Chapter 4117. Pursuant to R.C. 4117.01(B), the county is included within the definition of "public employer." The term "public employee" is defined generally in R.C. 4117.01(C) as meaning: "any person holding a position by appointment or employment in the service of a public employer...," with fifteen categories of employees who are expressly excepted from the definition. Thus, the provisions of R.C. Chapter 4117 have been found to apply to various county entities. *See, e.g., In re Ohio Council 8,* 1986 SERB 86-007 (1986) (finding the county sheriff to be the sole public employer of the employees in his office, for purposes of R.C. Chapter 4117); 1987 Op. Att'y Gen. No. 87-094 (application of R.C. Chapter 4117 to employees of a county child support enforcement agency); 1986 Op. Att'y Gen. No. 86-052 (application of R.C. Chapter 4117 to employees of county department of human services); 1986 Op. Att'y Gen. No. 86-051 (discussing operation

of R.C. 4117.09 concerning payroll deductions of dues and fees payable to an employee organization for county employees).

R.C. 4117.08 sets forth the permissible scope of agreements entered into under R.C. Chapter 4117. Pursuant to R.C. 4117.08(A): "All matters pertaining to wages, hours, or terms and other conditions of employment...are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section." *See generally* R.C. 4117.05 (designation of exclusive representative). The remainder of R.C. 4117.08 sets forth those matters which are not subject to bargaining and matters which are subject to bargaining only with the public employer's consent. R.C. 4117.10(A) further specifies the permissible scope of agreements entered into under R.C. Chapter 4117 and enumerates the instances where state law will or will not prevail over conflicting provisions of such agreements. As used in R.C. Chapter 4117, the term "wages" means "hourly rates of pay, salaries, or other forms of compensation for services rendered." R.C. 4117.01(L). Thus, forms of compensation are appropriate subjects for bargaining under R.C. Chapter 4117.

Your first question asks whether a provision for the conversion of unused sick leave is an appropriate subject for bargaining and inclusion in an agreement entered into under R.C. Chapter 4117. Policies concerning payment for unused sick leave have been characterized as a component of an employee's compensation. *See, e.g.*, 1984 Op. Att'y Gen. No. 84-071 (syllabus, paragraph one); 1983 Op. Att'y Gen. No. 83-073; 1981 Op. Att'y Gen. No. 81-015. *See generally Deeds v. City of Ironton*, 48 Ohio App. 3d 7, 11, 548 N.E.2d 254, 257 (Lawrence County 1988) ("[s]ince payment for sick leave affects wages and terms and conditions of employment, it was required to be bargained for, and the reservation of management rights in R.C. 4117.08(C)...does not include the right to impose additional sick leave requirements not included in the collectively bargained provision regulating sick leave"). Since the payment for unused sick leave is a part of compensation, such matter falls within the term "wages," for purposes of R.C. Chapter 4117 and, as such, is an appropriate matter for inclusion in an agreement entered into under that chapter. R.C. 4117.08; R.C. 4117.10.

Part of your concern appears to be that since the legislature has established a system under R.C. 124.39 for the payment for unused sick leave for county employees, such legislative action prohibits the county from establishing a different policy for county employees pursuant to a collective bargaining agreement. R.C. 124.39, as recently amended by Sub. S.B. 58, 118th Gen. A. (1990) (eff. July 18, 1990), now expressly authorizes a county appointing authority, pursuant to a collective bargaining agreement, to vary the statutory scheme for payment for unused sick leave. R.C. 124.39(C)(3). Further, nothing within R.C. 4117.08 or R.C. 4117.10 indicates the legislature's intent that R.C. 124.39 prevail over a conflicting provision within a collective bargaining agreement entered into under R.C. Chapter 4117 covering county employees. In answer to your first question, therefore, I conclude that, regardless of R.C. 124.39, county employees are entitled to receive payment for unused sick leave in accordance with a provision in an agreement covering such employees entered into under R.C. Chapter 4117.

Your second question asks whether a public employer may provide those of his employees who are excluded from the definition of "public employee," for purposes of R.C. Chapter 4117, the same right to payment for unused sick leave as his other employees receive pursuant to a contract entered into under R.C. Chapter 4117. As discussed above, a policy for the payment of unused sick leave is merely a form of compensation. Op. No. 84-071; Op. No. 81-015. Thus, if the particular county employing entity has authority to fix the compensation of its employees, then it may establish a policy for payment for unused sick leave, subject, however, to any constricting statutory authority. *See generally* 1981 Op. Att'y Gen. No. 81-052.

As discussed in answer to your first question, R.C. 124.39(B) sets forth the scheme for the payment for county employees' unused sick leave, which scheme may be varied pursuant to R.C. 124.39(C), stating in part:

> 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.

In 1984 Op. Att'y Gen. No. 84-061, I interpreted this portion of R.C. 124.39 as authorizing a board of county commissioners, in the manner set forth in R.C. 124.39(C), to vary the sick leave payment policy prescribed for county employees by R.C. 124.39(B). At the same time I considered the power of an individual county appointing authority to prescribe a separate policy for its own employees, and I concluded in the syllabus, that:

> Whether or not the board of county commissioners has acted pursuant to R.C. 124.39(C) to vary the policy set forth in R.C. 124.39(B) for the payment of accumulated, unused sick leave, a county appointing authority, such as the county auditor or treasurer, may adopt a sick leave payment policy for his employees, provided that the policy affords his employees benefits equal to or greater than any sick leave payment benefits to which such employees are entitled by R.C. 124.39(B) or by action of the county commissioners, pursuant to R.C. 124.39(C).

Similar conclusions were reached in Op. No. 84-071; Op. No. 83-073; and Op. No. 81-015.

Recently, however, in Sub. S.B. 58 the legislature amended R.C. 124.39 in such a manner as to expressly limit the ability of a county appointing authority to adopt a policy different from that applicable to its employees under R.C. 124.39(B) or pursuant to a policy adopted by the board of county commissioners under R.C. 124.39(C). Added to the above-quoted language of R.C. 124.39(C) by Sub. S.B. 58 is the following:

> Notwithstanding [R.C. 325.17] or any other section of the Revised Code authorizing any appointing authority of a county office, department, commission, or board to set compensation, any modification of the right provided by division (B) of this section, and any policy adopted under division (C) of this section, shall only apply to a county office, department, commission, or board if it is adopted in one of the following ways:
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> (1) By resolution of the board of county commissioners for any office, department, commission, or board that receives at least one-half of its funding from the county general revenue fund;
>
> (2) By order of any appointing authority of a county office, department, commission, or board that receives less than one-half of its funding from the county general revenue fund. Such office, department, commission, or board shall provide written notice to the board of county commissioners of such order.
>
> (3) As part of a collective bargaining agreement.

As a result of its amendment in Sub. S.B. 58, R.C. 124.39(C) now prescribes the manner in which the employees of a county appointing authority may receive payment for unused sick leave other than pursuant to R.C. 124.39(B) or pursuant to a policy adopted by the county commissioners under R.C. 124.39(C) or as part of a collective bargaining agreement. Due to the language added to R.C. 124.39(C) by Sub. S.B. 58, I must, therefore, qualify Op. No. 84-071, Op. No. 84-061, Op. No. 83-073, and Op. No. 81-015 to the extent that R.C. 124.39(C) now limits the manner in which a payment for unused sick leave policy may be adopted, other than through a collective bargaining agreement, for employees of individual county appointing authorities.

In answer to your second question, I conclude that, only in the manner set forth in R.C. 124.39(C), may a county appointing authority establish a policy concerning payment for unused sick leave for its employees who are not covered by a

collective bargaining agreement, where such policy differs from R.C. 124.39(B) or from a policy established by the board of county commissioners pursuant to R.C. 124.39(C).

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

1. Regardless of R.C. 124.39, county employees are entitled to receive payment for unused sick leave in accordance with a provision in an agreement covering such employees entered into under R.C. Chapter 4117.

2. Only in the manner set forth in R.C. 124.39(C) may a county appointing authority establish a policy concerning payment for unused sick leave for its employees who are not covered by a collective bargaining agreement, where such policy differs from R.C. 124.39(B) or from a policy established by the board of county commissioners pursuant to R.C. 124.39(C). (1984 Op. Att'y Gen. No. 84-071; 1984 Op. Att'y Gen. No. 84-061, 1983 Op. Att'y Gen. No. 83-073, and 1981 Op. Att'y Gen. No. 81-015, qualified.)