

OPINION NO. 76-044**Syllabus:**

1. R.C. 124.391 contains no requirement that eligibility for payment of unused sick leave is conditioned upon notice of intent to retire given to the employing school board by a school teacher or other school employee. R.C. 124.391 thrusts responsibility upon the school board to determine payment eligibility and to notify the individual teacher or employee if he is eligible for payment or transfer of unused sick leave.

2. Eligibility of a school teacher or other school employee for payment of unused sick leave, pursuant to R.C. 124.391, is to be determined by the board of education of the employing school district under its unused sick leave policy, not by applying the standards for service retirement under the state's retirement systems.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, June 11, 1976

You have requested my opinion on the following questions:

"1. Under Section 124.391 of the Revised Code, must a school teacher or employee, in order to become eligible to redeem accrued sick leave for cash payment upon retirement, formally indicate an intention to retire prior to the expiration of his last contract?

"2. Where a teacher or employee in a school district has been notified that he would not be reemployed during the following school year, and has not indicated prior to the expiration of his contract whether he would seek to transfer to another school district or instead to apply for a retirement from his current position, and said employee does not in fact apply for retirement benefits until approximately thirty (30) days after termination of his contract, is the employee barred from seeking to redeem his accrued sick leave at retirement under Section 124.391 of the Revised Code?

"3. If the employee described in situation Number 2, above, permits his contract to expire, and accepts employment on a part-time basis during the brief period of time between the expiration of his contract and his formal retirement, is the employee then barred from seeking to redeem his accrued sick leave under Section 124.391 of the Revised Code?

"4. If the employee in situation Number 2, above, accepts pay from a neighboring school district for teaching as a substitute during the thirty

(30) days between the expiration of his contract and his application for retirement, has the employee forfeited his right to redeem accrued sick leave with the school district which had terminated him?"

The entitlement, crediting and use of sick leave for all employees of boards of education is provided for in either R.C. 124.38 or R.C. 3319.141. Your questions, however, focus on sick leave credit once earned, and raise a number of issues about the operation of R.C. 124.391 ("Conversion of sick leave credit") as it relates to teachers and school employees. That Section provides:

"All employees covered by Section 124.38 of the Revised Code but not eligible for benefits under Section 124.39 of the Revised Code, and those covered by Section 3319.141 of the Revised Code, shall at the time of their retirement receive pay for all or part of their unused sick leave to the extent consistent with the policy of the appointing authority in effect. The appointing authority shall promulgate the adoption or any modification of any such policy by written notice to each employee. The promulgation of a written notice that the appointing authority has determined that employees will receive any part of their unused sick leave constitutes a policy for purposes of this Section. An appointing authority may include in its policy a requirement that an employee have a minimum number of years service with the unit in order to be eligible for a payment for unused sick leave. If no such policy is in effect at such time, each employee with ten or more years of service with the state or any of its political subdivisions shall receive payment based on the employee's rate of pay at retirement for one-fourth of the employee's accrued but unused sick leave at retirement up to a maximum accrual of one hundred twenty days. If an employee eligible for a payment pursuant to this Section does not apply to the authority within one hundred twenty days after receipt of written notice of eligibility for payment or transfer of accumulated sick leave from the appointing authority, the payment shall be made to the employee.

With respect to your first question, R.C. 124.391 contains no direct requirement that a school teacher or employee formally indicate an intention to retire prior to the expiration of his last contract. It does appear, however, that the appointing authority could pursuant to that Section, promulgate a policy requiring such notice as a prerequisite to eligibility for unused sick leave payments.

The first issue raised by your second, third, and fourth questions is: what is the meaning of the word "retirement" as it is used in R.C. 124.391, yet that term as used in R.C. 124.391 is undefined. Accordingly, it becomes necessary to determine the meaning of "retirement" from its contextual and common usage. R.C. 1.42.

At the outset it must be noted that "service retirement" is a term defined in relation to the State Teachers Retirement System

(STRS; see R.C. 3307.38) and the Public School Employees Retirement System (PSERS; see R.C. 3309.34). Without any legislative indication that these special definitions apply to "retirement" as used in R.C. 124.391, "service retirement" is, then, a technical term which is not reasonably applied to R.C. 124.391.

As a practical matter, use of the technical "service retirement" definitions would yield unreasonable results and they are, therefore, unacceptable. See R.C. 1.47. For example, a 52 year old teacher with 25 years of service credit would not yet be eligible for STRS benefits if he left his employment with the school district. (The STRS eligibility requirement is age 55 with 25 years service.) If the teacher accepted a position as teacher with another school district, he could not under 124.391 transfer his accumulated sick leave for three years, even though that section, as well as R.C. 3319.141, clearly speaks of transfers of accumulated sick leave from one appointing authority to another. It is apparent then that the General Assembly in using the term "retirement" in R.C. 124.391 did not intend to condition the payment or transfer of accumulated sick leave on the "service retirement" of the employee under one of the applicable retirement systems.

It has been suggested that "retirement" under R.C. 124.391 might be construed to mean "retirement-in-fact;" that is, leaving one's usual occupation or profession. This definition, however, is absent guidelines for the uniform application and is absent clear indication of what person or entity is to decide the question which the legislature most logically must have intended. This suggestion also yields unreasonable results. For example, if a teacher retires from public teaching at age 55 after 25 years of service and is then employed as a teacher in a private school system, he would not have "retired-in-fact" under R.C. 124.391 (even though he could qualify under the STRS term of "service retirement") and he would then have precluded any payment for unused sick leave--payment which otherwise seem to have been established as a matter of right under R.C. 124.391.

Having analyzed R.C. 124.391 and having discussed the matter with your office, I conclude that retirement as used in R.C. 124.391 means qualifying for payment of unused sick leave under the policy of the employing board of education which is in effect at the time a teacher or other school employee leaves active service. As explained below this construction has its basis in the language of R.C. 124.391 and it allows for reasonable results consistent with the policy of the employing school district, which has primary responsibility for the payment.

Note that the middle four sentences of R.C. 124.391 provide for a policy on payment of unused sick leave in each employing school district. The policy is to be established by the board of education for the district and is to be provided, in writing, to the employees. The section, further, establishes a policy to be followed where the local board has not promulgated its own.

Note also that in addition to "retirement" the "sample" policy set out in the statute consists of two other elements: (a) minimum time for eligibility and (b) maximum amount to be paid. Inasmuch as the legislature did specifically address a minimum time and a maximum amount in designing that "sample" policy, it seems apparent that the primary emphasis is upon control of the amount to be paid not upon whether payment is to be made. That is, if the legislature had meant for "retirement" under R.C. 124.391 to be the critical element to be addressed then one must conclude that R.C. 124.391 inadvertently fails

to define retirement. In light of the requirement that (a) a statute be construed to allow for the object sought to be attained (R.C. 1.49) and (b) that the apparent design of R.C. 124.391 is to provide for payment as a matter of right, administered by employers and (c) that the legislatively established policy details minimum time and maximum amount; inadvertent failure to otherwise define retirement as the key to payment is not likely. See R.C. 1.47.

The conclusion that retirement is to be measured by established board policy is bolstered by the fact that the last sentence of R.C. 124.391 thrusts responsibility on the local board of education to initially determine if a person is eligible for payment of unused sick leave. It is only a practical matter to conclude that the board of education is best capable of making the eligibility determination pursuant to its own promulgated policy rather than under technical statutory tests for "service retirement" (R.C. 3307.38 and R.C. 3309.34) or the evidence-gathering, "retirement-in-fact" proposal. As an additional practical fact, I am aware that your office as well as others which deal with payments under R.C. 124.391 consistently refer to such payments not as a "retirement" payment but as "severance pay."

In this manner when a teacher or other school employee covered by R.C. 124.391 leaves his employment with a local board of education, it then becomes the duty of the board or its designated employee to determine whether that individual meets the payment criterion which the local board has promulgated as policy. As a practical matter the existing board policies may or may not define "retirement" in addition to establishing the minimum time and maximum amount for payment. In the absence of such a definition one must conclude that such boards make the "retirement" determination on a case-by-case basis. Even where a board has promulgated no written policy and instead relies on that provided in R.C. 124.391, it remains the board's obligation to determine whether retirement has taken place. While the wisdom of determining "retirement" on a case-by-case basis without established definition may be argued--especially in light of potential challenges to negative determinations--the fact remains that the board has the responsibility and liability to make those determinations as a matter of its own policy, and the policy may be to do it on a case-by-case basis.

Applying the foregoing analysis to the specific questions you have posed, it is apparent that the first three questions must be answered in the negative. Pursuant to the last sentence of R.C. 124.391, the board is required to notify the individual, in writing, of his eligibility for payment or transfer of unused sick leave. Thus it is the local school board, with the power to make the payment, which retains the responsibility and liability for an employee's unused sick leave - until payment is made or the sick leave credit is transferred. It is only where an employee leaves active service without retiring under the board's policy, that the liability is otherwise satisfied.

Your fourth question must also be answered in the negative, but requires further explanation of the operation of R.C. 124.391. In the fourth question you are concerned with a school teacher or employee who has been notified by the school board that his contract will not be renewed, but who has also been employed by a second board of education during a 30 day time period between when he had

been terminated by the first board and when he had applied for retirement under STRS or PSERS.

In this situation it is the duty of the first board to determine, as of the date of termination, whether the individual qualifies for payment under the board's unused sick leave policy. That responsibility, as well as the duty to notify the individual if he is eligible, are not affected by the individual's subsequent employment by another school board. While it is true that, pursuant to the last sentence of R.C. 124.391, the individual has 120 days (after receipt of notice of eligibility) to elect between transfer and payment of the unused sick leave, it is a voluntary election to be made, and - failing an election - the first board shall make payment to him.

If this individual elects to have his unused sick leave transferred to the second district, then the board of the first school district is relieved of its responsibility. In such a case it then will become the duty of the board in the second school district to make an eligibility determination, based on its unused sick leave policy, and to otherwise comply with R.C. 124.391 when the individual leaves employment with that second board.

Based upon the foregoing, therefore, it is my opinion, and you are so advised, that:

1. R.C. 124.391 contains no requirement that eligibility for payment of unused sick leave be conditioned upon notice of intent to retire given to the employing school board by a school teacher or other school employee. R.C. 124.391 thrusts responsibility upon the school board to determine payment eligibility and to notify the individual teacher or employee if he is eligible for payment or transfer of unused sick leave.

2. Eligibility of a school teacher or other school employee for payment of unused sick leave, pursuant to R.C. 124.391, is to be determined by the board of education of the employing school district under its unused sick leave policy, not by applying the standards for service retirement under the state's retirement systems.