

March 23, 2009

The Honorable James J. Mayer, Jr.
Richland County Prosecuting Attorney
38 South Park—Second Floor
Mansfield, Ohio 44902

SYLLABUS:

2009-009

1. A county appointing authority may not, under its general power to fix the compensation of its employees, supersede R.C. 9.44(C) and grant pre-retirement service credit to employees for purposes of computing their vacation leave under R.C. 9.44(A) and R.C. 325.19. (1990 Op. Att’y Gen. No. 90-104, overruled in part. 1992 Op. Att’y Gen. No. 92-066, syllabus, paragraph 2, questioned. 2003 Op. Att’y Gen. No. 2003-021, modified.)
2. Under the first sentence of R.C. 325.19(F), a county appointing authority that employs both bargaining unit and non-bargaining unit employees may adopt an alternative schedule of vacation leave that supersedes R.C. 9.44(C), and allows its non-bargaining unit employees to include pre-retirement service credit in the computation of their vacation leave, only if at least one collective bargaining agreement covering the appointing authority’s bargaining unit employees explicitly provides that same pre-retirement service credit benefit to the employees covered by the agreement, and only upon the appointing authority’s notification to the board of county commissioners.
3. A county appointing authority that employs only non-bargaining unit employees has the power under the second sentence of R.C. 325.19(F) to adopt an alternative schedule, upon notification to the board of county commissioners, that increases the minimum vacation benefits to which its employees are entitled, and that supersedes statutory limitations, such as those in R.C. 325.19(C), on such benefits. (2005 Op. Att’y Gen. No. 2005-018, syllabus, paragraph 3; 1998 Op. Att’y Gen. No. 98-028, syllabus, paragraph 1; and, 1991 Op. Att’y Gen. No. 91-050, overruled. 2005 Op. Att’y Gen. No. 2005-018, syllabus, paragraphs 1 and 2; 1999 Op. Att’y Gen. No. 99-039; 1994 Op. Att’y Gen. No. 94-009, syllabus, paragraph 5; 1989 Op. Att’y Gen. No. 89-012, syllabus, paragraphs 1 and 2; and, 1987 Op. Att’y Gen. No. 87-063, syllabus, paragraph 2, modified. 1998 Op. Att’y Gen. No. 98-026, syllabus, paragraph 2, clarified.)

4. A county appointing authority that employs only non-bargaining unit employees has the power under the second sentence of R.C. 325.19(F) to adopt an alternative schedule, upon notification to the board of county commissioners, that supersedes R.C. 9.44(C), and grants its employees, who previously retired under a plan offered by the State, service credit earned prior to retirement for purposes of calculating their vacation leave. (1994 Op. Att’y Gen. No. 94-009, syllabus, paragraph 6, modified.)



RICHARD CORDRAY
OHIO ATTORNEY GENERAL

March 23, 2009

OPINION NO. 2009-009

The Honorable James J. Mayer, Jr.
Richland County Prosecuting Attorney
38 South Park—Second Floor
Mansfield, Ohio 44902

Dear Prosecutor Mayer:

You have asked about the power of county appointing authorities, in determining the rate at which their employees accrue vacation leave, to credit non-bargaining unit employees, who are hired or re-hired by the county after retiring from public service, with the years of service they earned prior to retirement. You have asked us to address the issue with regard to appointing authorities that employ both bargaining unit and non-bargaining unit employees, and appointing authorities that employ only non-bargaining unit employees.¹

The Power of an Appointing Authority to Provide Fringe Benefits to its Employees

Before examining the statutory scheme governing vacation leave for county employees, we reiterate the principles developed under case law that a county officer, board, or other agency with the statutory power to employ has the concomitant authority to fix its employees' compensation, including fringe benefits such as paid vacation leave and sick leave.² *Ebert v.*

¹ Your questions are limited to vacation leave benefits for non-bargaining unit employees. The establishment of benefits for employees in a collective bargaining unit is governed by R.C. Chapter 4117, as discussed more fully below. *See generally* notes 14 and 18, *infra*.

² In some instances, an appointing authority's power to fix the compensation of its employees is expressly granted by statute. *See, e.g.,* R.C. 325.17 (a county auditor, treasurer, sheriff, clerk of court, engineer and recorder "may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices, shall fix the compensation of those employees and discharge them.... The employees' compensation shall not exceed, in the aggregate, for each office, the amount fixed by the board of county commissioners for that office"). *See also* R.C. 305.17 (a board of county commissioners "shall

Stark County Bd. of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980); *Cataland v. Cahill*, 13 Ohio App. 3d 113, 468 N.E.2d 388 (Franklin County 1984). An employer, however, may not provide to its employees fewer fringe benefits than those established by statute as minimum entitlements. *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d at 32 (statute providing sick leave benefits for county employees “neither establishes nor limits the power of a political subdivision. Rather it ensures that the employees of such offices will receive at least a *minimum* sick leave benefit or *entitlement*”); *Cataland v. Cahill*, 13 Ohio App. 3d at 114 (“[s]ick leave and vacation leave prescribed by statute are minimums only and, where the appointing authority is authorized to establish compensation of employees, either sick-leave or vacation-leave benefits in addition to the minimums prescribed by statute may be granted as part of compensation”); 1998 Op. Att’y Gen. No. 98-026 (syllabus, paragraph 2) (“[a]n appointing authority that is empowered to hire county employees and fix their compensation may, if it chooses, grant them vacation leave in excess of the minimum entitlement prescribed by statute”). Furthermore, an employer’s authority to establish a particular fringe benefit may be constricted otherwise by statute. *Ebert v. Stark County Bd. of Mental Retardation*. As summarized in 1981 Op. Att’y Gen. No. 81-052, “the authority to provide fringe benefits flows directly from the authority to set compensation and is circumscribed only by apposite statutory authority which either ensures a minimum benefit entitlement or otherwise constricts the employer’s authority *vis a vis* a particular fringe benefit.” *Id.* at 2-202. For ease of discussion, we will refer to this power of county appointing authorities to fix the compensation of their employees, subject to statutory minimum entitlements and other statutory constrictions, as their *Ebert* power.

fix the compensation of all persons appointed or employed” under R.C. 305.13-.16); R.C. 309.06 (a county “prosecuting attorney may appoint any assistants, clerks, and stenographers who are necessary for the proper performance of the duties of his office and fix their compensation, not to exceed, in the aggregate, the amount fixed by the judges of the court of common pleas”).

Some appointing authorities are given explicit authority to establish their employees’ fringe benefits. *See, e.g.*, R.C. 5126.05(A)(7) (a county board of mental retardation and developmental disabilities shall “[a]uthorize all positions of employment [and] establish compensation, including but not limited to salary schedules and fringe benefits for all board employees”); R.C. 5126.21(C) (management employees of a county board of mental retardation and developmental disabilities “shall receive employee benefits that shall include sick leave, vacation leave, holiday pay, and such other benefits as are established by the board”); R.C. 5153.12 (a public children services agency “may establish compensation rates and vacation benefits for any of its employees”).

In responding to your questions, we assume that the county appointing authorities have the express or implied statutory authority to fix the vacation benefits of their non-bargaining unit employees.

Statutory Scheme Governing the Vacation Leave of County Employees

Next we will examine how the general power of an appointing authority to fix the compensation of its employees relates to the statutes that establish the vacation leave benefits to which county employees are entitled.

Paid Vacation Leave is Accrued Based on Years of Service

Full-time county employees are entitled to paid vacation leave after one year of service as provided under R.C. 325.19.³ Pursuant to R.C. 325.19, a county employee's entitlement to vacation leave and the rate at which he accrues vacation leave is based on the number of years he has served with the county and other political subdivisions of the state. R.C. 325.19(A)(1).⁴ *See generally* 2008 Op. Att'y Gen. No. 2008-005; 2003 Op. Att'y Gen. No. 2003-021; 1988 Op. Att'y Gen. No. 88-089.⁵ Division (A) of R.C. 9.44 expands the types of public service that may be counted in computing county employees' vacation leave to include prior service with the State, as well as with any political subdivision.⁶

³ R.C. 325.19 applies generally to full-time employees "in the several offices and departments of the county service." R.C. 325.19(A)(1). *See also* note 5, *infra*. Certain county employees are not, however, granted vacation benefits thereunder. *See, e.g.*, R.C. 124.13(E) ("[n]otwithstanding section 325.19 of the Revised Code, county department of job and family services employees shall receive vacation benefits as provided in this section"); R.C. 325.19(G)-(I); R.C. 5126.21(C) (R.C. 325.19 does not apply to management employees of a county board of mental retardation and developmental disabilities; the board fixes their benefits, which "shall include" vacation leave). We assume that the employees about whom you ask earn vacation leave under R.C. 325.19.

⁴ At the option of the appointing authority, employees' prior service with a regional council of government also may be included in computing their vacation leave. R.C. 325.19(A)(1).

⁵ *See* R.C. 325.19(A)(1) (rate at which full-time county employees earn paid vacation leave); R.C. 325.19(A)(2) (hours of vacation leave accrued by full-time employees "who render any standard of service other than forty hours per week ... and who are in active pay status in a biweekly pay period"); R.C. 325.19(A)(3) (hours of vacation leave accrued by full-time employees "who are in active pay status in a biweekly pay period for less than eighty hours or the number of hours of service otherwise accepted as full-time by their employing office or department"); R.C. 325.19(B) (paid vacation leave for part-time employees). *See also* R.C. 325.19(J) (defining "full-time employee" and "part-time employee").

⁶ R.C. 9.44(A) reads in pertinent part:

Except as otherwise provided in this section, a person employed, other than as an elective officer, by the state or any political subdivision of the state,

Reemployed Retirees are Barred under R.C. 9.44(C) from Including Service Earned Prior to Retirement

Division (C) of R.C. 9.44, however, excludes from the service credit of employees who are hired by the county after they retire from public service (whether it be retirement from the same county, another county, other political subdivision, or the State), the service they earned prior to retirement.⁷ Division (C) reads:

An employee who has retired in accordance with the provisions of any retirement plan offered by the state and who is employed by the state or any political subdivision of the state on or after June 24, 1987, *shall not have prior service* with the state, any political subdivision of the state, or a regional council

earning vacation credits currently, is entitled to have the employee's prior service with any of these employers counted as service with the state or any political subdivision of the state, for the purpose of computing the amount of the employee's vacation leave.

⁷ An employee who separates from county service is entitled to compensation, at his current rate of pay, "for the prorated portion of any earned but unused vacation leave for the current year to the employee's credit at time of separation," and may, "with the permission of the appointing authority," be paid for any unused vacation leave he has accrued for the preceding three years. R.C. 325.19(C). Retirement from county service constitutes "separation" for purposes of R.C. 325.19(C). 1994 Op. Att'y Gen. No. 94-009. *See generally* 2005 Op. Att'y Gen. No. 2005-018 at 2-170 to 2-171 (enumerating employment actions that constitute a "separation" from service for purposes of R.C. 325.19). *See also* R.C. 325.19(E) (payment for unused vacation leave also must be paid by the county upon an employee's death).

Therefore, a county employee who previously retired from county service (whether from Richland County or another county) would have been paid at the time he retired for the unused vacation leave he accrued (for up to three years if permitted by the appointing authority), and would have had no obligation, upon reemployment in the public service, to repay the county from which he retired. (If the county employee previously retired from state service or from the service of another type of political subdivision, treatment of his unused vacation leave would be governed by any applicable statutes or under policies established by the appointing authority under its *Ebert* authority. *See, e.g.*, R.C. 124.13(E) and R.C. 124.134(C) (treatment of state employees' unused vacation leave). *See also* 2008 Op. Att'y Gen. No. 2008-017 (authority of the board of a general health district to create its own vacation leave system for district employees); 1993 Op. Att'y Gen. No. 93-040 at 2-209 ("[v]acation benefits for township employees are not governed by statute," and "the board of township trustees, pursuant to its authority to fix the compensation of various township employees ... is authorized to provide vacation leave as a fringe benefit, if, and to the extent, the trustees so desire ... subject to any statutory provisions limiting that authority"))).

of government established in accordance with Chapter 167. of the Revised Code *counted* for the purpose of computing vacation leave.⁸ (Emphasis and footnote added.)

R.C. 9.44(C) thus stands as an exception to the general service credit provisions of R.C. 325.19(A) and R.C. 9.44(A), and an employee who is hired or rehired by the county after retiring under a plan offered by the State⁹ may not have included in the years used to compute his vacation leave the service he earned with the county, another political subdivision, or the State prior to retirement. *See* 1994 Op. Att’y Gen. No. 94-009.

Can County Appointing Authorities Supersede R.C. 9.44(C) and Grant Non-bargaining Unit Employees Service Credit Earned Prior to Retirement?

You have asked about the extent to which a county appointing authority may override the limitation in R.C. 9.44(C) and permit non-bargaining unit employees to include in the computation of their vacation leave the service credit they earned prior to retirement. We turn first to examine whether a county appointing authority, under its *Ebert* authority to fix the compensation of its employees, may allow non-bargaining unit employees, who previously retired under a plan offered by the State, to include the service they earned prior to retirement in computing their vacation leave.

In 1990 Op. Att’y Gen. No. 90-104 at 2-463, the Attorney General addressed whether municipalities could supersede R.C. 9.44, noting that “R.C. 9.44 provides a benefit to public employees through *language of entitlement rather than as a direct grant or restriction of the power of the compensating authority*” (emphasis added), citing division (C), as well as divisions (A) and (B). (*See* note 6, *supra*, and notes 10 and 17, *infra*.) The opinion explained:

Thus, R.C. 9.44(A) establishes a minimum prior service credit benefit to which certain municipal employees are entitled as a matter of state law, while R.C. 9.44(B)(2) and (C) lessen or remove the minimum entitlement established in R.C. 9.44(A).... The language of R.C. 9.44(B)(2) and (C) does not, therefore, operate to prohibit municipalities from counting more prior service than provided by either of these divisions. It simply removes the right of an employee covered by R.C. 9.44(B) or (C) to demand that a municipality do so as a matter of state law. Because R.C. 9.44(A), (B) and (C) all operate to establish minimum

⁸ For purposes of analyzing R.C. 9.44(C), we assume that the employees about whom you ask were most recently employed by the county on or after June 24, 1987.

⁹ Retirement plans offered by the State are the plans established under R.C. Chapter 145 (Public Employees Retirement System), R.C. Chapter 742 (Ohio Police and Fire Pension Fund), R.C. Chapter 3307 (State Teachers Retirement System), R.C. Chapter 3309 (School Employees Retirement System), and R.C. Chapter 5505 (State Highway Patrol Retirement System).

entitlements, in accord with the reasoning of *Ebert*, municipalities are free ... to provide for recognition of prior service credit in excess of the amounts established in R.C. 9.44(A), (B) or (C).

Id. at 2-463. See 1992 Op. Att’y Gen. No. 92-066.¹⁰ See also 2003 Op. Att’y Gen. No. 2003-021 at 2-166 (citing 1990 Op. Att’y Gen. No. 90-104 and 1992 Op. Att’y Gen. No. 92-066 for the proposition that “R.C. 9.44(C) does not bar a county appointing authority from adopting for its employees a policy for crediting prior service that is more generous than the provisions of R.C. 9.44”).¹¹

While division (A) of R.C. 9.44 clearly sets forth *minimum* prior service benefits to which eligible employees are entitled, we cannot agree that division (C) similarly uses language of entitlement. R.C. 9.44(C) is a *prohibition*, stating that employees who retire from public service “*shall not have* prior service” with the State or any political subdivision counted for the purpose of computing vacation leave. Division (C) stands in clear contradistinction to the language in division (A) of R.C. 9.44 that an employee “*is entitled*” to have his prior service

¹⁰ In 1992 Op. Att’y Gen. No. 92-066, the Attorney General examined whether a county appointing authority could supersede R.C. 9.44(B), which, at the time, limited the eligible service credit of county employees who were hired on or after July 5, 1987 to prior service with a county. See note 17, *infra*. The opinion stated that “[a]lthough R.C. 9.44(B)(1) removes the minimum prior service entitlement established for them by R.C. 9.44(A), it does not restrict the county children services board’s authority, pursuant to its authority to establish compensation rates and vacation benefits under R.C. 5153.12, to prescribe a greater prior service credit benefit than that to which its employees are entitled by R.C. 9.44(A) or (B)(1).” *Id.* at 2-273.

The service credit of county employees is no longer so limited, but, under the current version of R.C. 9.44(B), employees of a municipal corporation may have only prior service with that municipal corporation counted, and township employees may have only their prior service with a township counted. See note 12, *infra*.

¹¹ The issue in 2003 Op. Att’y Gen. No. 2003-021 was whether R.C. 9.44(C) applies to pre-retirement service credit that was not included in computing a county employee’s eligibility for retirement. The Attorney General concluded that: “Pursuant to R.C. 9.44(C), a county employee employed on or after June 24, 1987, who previously retired in accordance with the provisions of a retirement plan offered by the State, may not count any of his prior service with the State, a political subdivision of the State, or regional council of government in determining the rate at which he accrues vacation leave under R.C. 325.19(A)(1), even where such service earned prior to his retirement was not used to determine his retirement eligibility and benefits” (syllabus). The ability of an appointing authority to vary the terms of R.C. 9.44(C) was not at issue, and the opinion mentioned 1990 Op. Att’y Gen. No. 90-104 and 1992 Op. Att’y Gen. No. 92-066 only in an attempt to help ameliorate “any perceived inequity in the application of R.C. 9.44.” *Id.* at 2-166. See note 12, *infra*.

counted. Contrary to the description in 1990 Op. Att’y Gen. No. 90-104, R.C. 9.44(C) does not merely “lessen or remove” the entitlement provided under R.C. 9.44(A) or “simply remove” the right of an employee to demand that a political subdivision provide pre-retirement service credit. R.C. 9.44(C) is an affirmative prohibition against the employee’s receipt of such service credit. As recognized in 1994 Op. Att’y Gen. No. 94-009, R.C. 9.44(C) “operates as a restriction upon the general service credit provisions of R.C. 9.44(A) by *prohibiting* an employee who has retired under a state retirement plan and is employed by the state or a political subdivision on or after June 24, 1987, from including as prior service any time served prior to retirement.” (Emphasis added.) *Id.* at 2-40.

The language in division (C) of R.C. 9.44 is more akin to the mandatory or prohibitory language in R.C. 325.19(C) that we have found in the past to be constricting: “Vacation leave *shall be taken* by the employee during the year in which it accrued,” and “[n]o vacation leave *shall be carried over* for more than three years” (emphasis added). *See* 1989 Op. Att’y Gen. No. 89-012; 1987 Op. Att’y Gen. No. 87-063. Indeed, R.C. 9.44(C) uses stronger prohibitory language than other language in R.C. 325.19(C) that we have found to be constricting. For example, 1991 Op. Att’y Gen. No. 91-050 concluded that, because the General Assembly has prescribed in R.C. 325.19(C) only one method (compensation) for disposing of a county employee’s unused vacation leave at the time he separates from service, county appointing authorities are restricted from providing employees other options such as permitting them to keep their accumulated leave when they transfer from one county office to another. *Id.* at 2-259. *See also* 2005 Op. Att’y Gen. No. 2005-018; 1994 Op. Att’y Gen. No. 94-009. Similarly, in 1987 Op. Att’y Gen. No. 87-063, the Attorney General advised that, “[s]ince R.C. 325.19(C) and (E) expressly provide for just two instances where an employee may receive cash payment for unused vacation leave, I must conclude that the General Assembly specifically intended to limit payment only to those two instances.” *Id.* at 2-389. Division (C) of R.C. 325.19 does not affirmatively prohibit employees from transferring accrued vacation leave from one county employer to another or exercising other non-cash options upon separation from service; nor does division (C) prohibit employees from receiving payment for unused leave on occasions other than separation from service or death. Nonetheless, the opinions, relying upon the principle of statutory construction, *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of the other), concluded that, by entitling employees only to cash payments for unused vacation leave at the time of separation or death, R.C. 325.19(C)—by implication—barred counties from providing other methods for disposing of unused leave or allowing payment for unused vacation leave at times other than upon separation or death. In this instance, R.C. 9.44(C) bars employees from counting pre-retirement service credit—not by implication, but expressly.

We must also consider that, although employees who retire under a plan offered by the State are not prohibited from being reemployed in the public service, the General Assembly does not favor such a practice, and has placed various limitations—besides R.C. 9.44(C)—upon employees who do so. *See, e.g.*, 124.181(E)(2); R.C. 145.38-.382. It is difficult to view R.C. 9.44(C), an example of this disfavor, as language of entitlement. Therefore, we overrule 1990

Op. Att’y Gen. No. 90-104 to the extent it advises that division (C) of R.C. 9.44 can be superseded by a county appointing authority under its *Ebert* power to fix compensation.¹²

A County Appointing Authority may Adopt “Alternative Schedules” of Vacation Leave Under R.C. 325.19(F)

Having concluded that a county appointing authority has no *Ebert* power to supersede R.C. 9.44(C) for its non-bargaining unit employees, we turn now to division (F) of R.C. 325.19, which authorizes appointing authorities to establish “alternative schedules” of vacation leave for their non-bargaining unit employees under certain circumstances. R.C. 325.19(F) requires that an appointing authority’s power to vary the terms of R.C. 9.44(C) for non-bargaining unit employees be analyzed differently for appointing authorities that employ only non-bargaining unit employees and appointing authorities that employ both bargaining unit and non-bargaining unit employees; if an appointing authority employs both types of employees, the terms of the collective bargaining agreements covering the bargaining unit employees also become relevant.

Appointing Authorities with Both Bargaining Unit and Non-Bargaining Unit Employees (Am. Sub. S.B. 358 (1989))

The first sentence of R.C. 325.19(F) governs the power of appointing authorities that employ both bargaining unit and non-bargaining unit employees to adopt alternative schedules varying the statutory vacation benefits of their non-bargaining unit employees. *See* 1999 Op. Att’y Gen. No. 99-039 at 2-246. The first sentence of division (F) reads:

Notwithstanding this section or any other section of the Revised Code, any appointing authority of a county office, department, commission, board, or body may, upon notification to the board of county commissioners, establish alternative schedules of vacation leave and holidays for employees of the appointing authority for whom the state employment relations board has not established an appropriate bargaining unit pursuant to section 4117.06 of the Revised Code, as long as the alternative schedules are not inconsistent with the provisions of at

¹² Furthermore, we modify 2003 Op. Att’y Gen. No. 2003-021, as explained in note 11, *supra*, and we question 1992 Op. Att’y Gen. No. 92-066, as explained in note 10, *supra*. Although interpretation of R.C. 9.44(B) is not before us, we must discount 1992 Op. Att’y Gen. No. 92-066 as support for any contention that an appointing authority may vary the limitations on service credit in the current version of division (B). *Cf.* 1988 Op. Att’y Gen. No. 88-089 at 2-429 (“[a] person who is employed initially by a county on or after July 5, 1987, however, is limited by R.C. 9.44(B)(2) to receiving service credit for purposes of R.C. 325.19 only for prior time served with a county” (emphasis added)).

least one collective bargaining agreement covering other employees of that appointing authority, if such an agreement exists.¹³ (Footnote added.)

Under division (F), therefore, a county appointing authority that employs both bargaining unit and non-bargaining unit employees may establish “alternative schedules” providing non-bargaining unit employees the same “vacation leave” enjoyed by the appointing authority’s bargaining unit employees under at least one collective bargaining agreement.¹⁴ In 2008 Op. Att’y Gen. No. 2008-004, we concluded that R.C. 325.19(F) authorizes appointing authorities to adopt alternative schedules that vary not only the number of vacation hours to which employees are entitled, but also the pay-out provisions found in divisions (C) and (E) of R.C. 325.19 (which, as discussed above, may not be varied by an appointing authority based on its *Ebert* power). We must now determine whether division (F) of R.C. 325.19 authorizes an appointing authority to adopt an alternative schedule that varies the provisions of a statute other than R.C. 325.19—such as R.C. 9.44.

An examination of the introductory clause in the first sentence of R.C. 325.19(F) leads us to conclude that an appointing authority is authorized to vary R.C. 9.44(C) for non-bargaining unit employees to the extent that a collective bargaining agreement does so for the appointing authority’s bargaining unit employees. Under R.C. 325.19(F), an appointing authority may adopt alternative schedules of vacation leave that are consistent with at least one collective bargaining agreement “[n]otwithstanding this section or any other section of the Revised Code.” This “notwithstanding” language authorizes an appointing authority to adopt alternative schedules that supersede provisions in any section of the Revised Code, so long as the alternative schedules provide benefits that are consistent with those found in at least one collective bargaining agreement governing the appointing authority’s bargaining unit employees. Thus,

¹³ The first sentence of division (F) of R.C. 325.19, with the exception of the last phrase, “if such an agreement exists,” was enacted by Am. Sub. S.B. 358, 117th Gen. A. (1988) (eff. March 17, 1989). The last phrase was added in 2007 by legislation discussed more fully below.

¹⁴ Briefly stated, certain public employees have the right to “[b]argain collectively with their public employers to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements.” R.C. 4117.03(A)(4). *See also* R.C. 4117.01(C) (delineating which public employees are subject to R.C. Chapter 4117); R.C. 4117.04. The State Employment Relations Board (SERB) must determine appropriate collective bargaining units, and each bargaining unit is entitled to elect an employee organization to be the unit’s exclusive representative with whom the public employer must bargain collectively. R.C. 4117.04-.07. *See also* R.C. 4117.08; R.C. 4117.10(A); note 18, *infra*. Vacation leave benefits, including recognition of prior service credit, are proper subjects of collective bargaining. *See State ex rel. Clark v. Greater Cleveland Regional Transit Authority*, 48 Ohio St. 3d 19, 548 N.E.2d 940 (1990); *State ex rel. Hadsell v. Springfield Township*, 92 Ohio App. 3d 256, 259, 634 N.E.2d 1035 (Hamilton County 1993); 1988 Op. Att’y Gen. No. 88-089.

“notwithstanding” R.C. 9.44(C), an appointing authority, upon notification to the board of county commissioners, may adopt alternative schedules of vacation leave that allow non-bargaining unit employees to include pre-retirement service credit in computing their vacation leave so long as at least one collective bargaining agreement covering the appointing authority’s bargaining unit employees does so.

We are aware that earlier opinions have narrowly interpreted R.C. 325.19(F) as a limitation on, rather than an expansion of, an appointing authority’s power to fix the vacation benefits of its non-bargaining unit employees. These opinions interpreted the language “notwithstanding this section or any other section of the Revised Code” as notwithstanding the statutes empowering appointing authorities to compensate their employees, as described in *Ebert*. They thus read division (F) of R.C. 325.19 as constricting the power of an appointing authority to provide its non-bargaining unit employees vacation benefits in excess of the statutory minimums where a collective bargaining agreement covering the appointing authority’s bargaining unit employees exists and does not provide the bargaining unit employees such enhanced vacation benefits—notwithstanding the appointing authority’s statutory power generally to compensate and provide vacation benefits to its employees. 1999 Op. Att’y Gen. No. 99-039 at 2-246 to 2-247; 1998 Op. Att’y Gen. No. 98-028. For example, an appointing authority which, under the *Ebert* analysis, ordinarily could grant its employees more hours of vacation leave than the minimum entitlements provided under R.C. 325.19(A), would be barred from doing so under R.C. 325.19(F) if it had both non-bargaining unit and bargaining unit employees and a collective bargaining agreement granted the bargaining unit employees only the statutory number of vacation hours.

In another respect, however, division (F) expands an appointing authority’s power to enhance the vacation benefits of its non-bargaining unit employees. Division (F) of R.C. 325.19 grants appointing authorities the new power to supersede statutes that, under an *Ebert* analysis, would otherwise constrict their authority to grant non-bargaining unit employees vacation benefits. See 2008 Op. Att’y Gen. No. 2008-004 (despite the constricting language in R.C. 325.19(C), an appointing authority is authorized by division (F) to grant non-bargaining unit employees annual payments for unused vacation leave if a collective bargaining agreement provides that benefit to the appointing authority’s bargaining unit employees). If a collective bargaining agreement provides bargaining unit employees a vacation benefit, division (F) authorizes the appointing authority to provide its non-bargaining unit employees with the same benefit (upon notification to the board of county commissioners), even though section 325.19 “or any other section of the Revised Code” would constrict the appointing authority from doing so. The “notwithstanding” language clearly expands the power of an appointing authority to adopt alternative schedules that vary the provisions of any statute that would otherwise constrict the power of an appointing authority to establish vacation benefits for its non-bargaining unit employees.

Earlier opinions have read division (F) of R.C. 325.19 narrowly in another respect—that although an appointing authority has the power to *increase* the statutory vacation benefits of its non-bargaining unit employees to correspond with (but not exceed) the benefits provided under a

collective bargaining agreement, division (F) does not authorize an appointing authority to *diminish* the statutory benefits of its non-bargaining unit employees, even where a collective bargaining agreement diminishes those benefits for bargaining unit employees. 1999 Op. Att’y Gen. No. 99-039 at 2-247, n.5; 1998 Op. Att’y Gen. No. 98-028. In light of the courts’ treatment of statutory benefits as employee entitlements, we believe that more explicit statutory authority is necessary to empower appointing authorities to reduce the statutory minimums provided to non-bargaining unit employees.¹⁵ The diminution of statutory entitlements is not, however, the issue posed by your questions. Here, the statutory provision sought to be varied is not the grant of a minimum statutory entitlement, but a constriction of, or limitation on, a benefit employees are otherwise entitled to receive. The appointing authority seeks to eliminate a restriction on benefits—not to reduce an entitlement. Therefore, an appointing authority’s elimination of the bar in R.C. 9.44(C) against inclusion of pre-retirement service credit would not fall within the limitation on an appointing authority’s power to diminish the statutory benefits of its non-bargaining unit employees.

We thus read the first sentence of R.C. 325.19(F) as authorizing a county appointing authority, upon notification to the board of county commissioners, to adopt an alternative schedule of vacation leave that supersedes R.C. 9.44(C) and allows non-bargaining unit employees to include pre-retirement service credit in the computation of their vacation leave if at least one collective bargaining agreement covering the appointing authority’s bargaining unit employees provides that benefit. This conclusion is not only required by the language of division (F), but is consistent with the statutory scheme governing county vacation leave as a whole. In 2008 Op. Att’y Gen. No. 2008-004, we concluded that R.C. 325.19(F) authorizes appointing authorities to adopt alternative schedules that vary more than just the number of vacation hours to which employees are entitled, explaining:

The overriding purpose served by the adoption of alternative schedules is to “allow[] for the equivalency of ... benefits among an appointing authority’s employees that are in a bargaining unit and those that are not in a bargaining

¹⁵ See *Harden v. Ohio Attorney General*, 101 Ohio St. 3d 137, 2004-Ohio-382, 802 N.E.2d 1112, at ¶ 13 (“vacation leave is a statutory entitlement, not a gratuity”); *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 32, 406 N.E.2d 1098 (1980) (R.C. 124.38, which provides sick leave benefits to county employees, “ensures that the employees of such offices will receive at least a *minimum* sick leave benefit or *entitlement*”); *South Euclid Fraternal Order of Police v. D’Amico*, 13 Ohio App. 3d 46, 47, 468 N.E.2d 735 (Cuyahoga County 1983) (“[t]he employing unit does not ‘grant’ sick leave [under R.C. 124.38]; the employee earns it and accumulates it as a vested right”). Cf. *State ex rel. Clark v. Greater Cleveland Regional Transit Authority*, 48 Ohio St. 3d at 23 (employees negotiating a collective bargaining agreement bring “with them pockets filled with benefits to which they are entitled under Ohio law” [in this case, prior service credit under R.C. 9.44(A)], and “retain[] their entitlement to them” if a collective bargaining agreement “fail[s] to specifically take the benefits provided by R.C. 9.44” from the employees).

unit.” 1999 Op. Att’y Gen. No. 99-039 at 2-247. R.C. 325.19(F) was “intended simply to ensure that, within the office of a single county appointing authority, those employees who were not part of a bargaining unit could obtain ... vacation leave, and holiday benefits equivalent to those obtained by bargaining unit employees either pursuant to a collective bargaining agreement or by statute, while assuring the non-bargaining unit employees the minimums otherwise specified by statute.” 1998 Op. Att’y Gen. No. 98-028 at 2-153.

Id. at 2-51.

The issue in 2008 Op. Att’y Gen. No. 2008-004 was the relationship between the alternative schedule language in division (F) of R.C. 325.19 and the pay-out provisions found elsewhere in the same statute (divisions (C) and (E) of R.C. 325.19, *see* note 7, *supra*); the opinion concluded that, in light of the purpose of division (F) “to allow for the equivalency of benefits,” it authorized an appointing authority to adopt alternative schedules of vacation leave to pay non-bargaining unit employees for unused vacation leave at times other than upon separation from service or death if a collective bargaining agreement included that benefit for bargaining unit employees.¹⁶ Although 2008 Op. Att’y Gen. No. 2008-004 addressed only R.C. 325.19, both R.C. 325.19 and R.C. 9.44 govern the use of prior service credit to compute the vacation leave of county employees, and must be read together as part of the same statutory scheme. “Statutes relating to the same matter or subject, although passed at different times and making no reference to each other, are *in pari materia* and should be read together to ascertain and effectuate if possible the legislative intent.” *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956) (syllabus, paragraph 2). *See* 1989 Op. Att’y Gen. No. 89-012 at 2-49 (“the definition [of anniversary date] provided by R.C. 9.44(A) applies to R.C. 325.19 as well”); 1988 Op. Att’y Gen. No. 88-089 at 2-429 (R.C. 325.19(A) and R.C. 9.44(B) appear to conflict, but both statutory provisions may be given effect by reading R.C. 9.44(B) as an exception to the

¹⁶ Opinions that were issued prior to the enactment of Am. Sub. S.B. 358, or which assumed that the appointing authority had no bargaining unit employees covered by a collective bargaining agreement varying the terms of divisions (C) and (E) of R.C. 325.19, had concluded that divisions (C) and (E), which require appointing authorities to pay employees for their unused vacation leave upon separation from county service or upon their death, restricted an appointing authority from paying employees for unused vacation leave at any other time. *See* 1989 Op. Att’y Gen. No. 89-012; 1987 Op. Att’y Gen. No. 87-063. *See also* 2005 Op. Att’y Gen. No. 2005-018; 1994 Op. Att’y Gen. No. 94-009; 1991 Op. Att’y Gen. No. 91-050. These opinions were qualified as to appointing authorities that employ both bargaining unit and non-bargaining unit employees in 2008 Op. Att’y Gen. No. 2008-004 at 2-52 to 2-53. *See also* note 25, *infra* (overruling or further modifying these opinions and others in light of Sub. H.B. 187, 126th Gen. A. (2006) (eff. July 1, 2007)).

prior service credit provisions of R.C. 325.19);¹⁷ 1985 Op. Att’y Gen. No. 85-035 at 2-126 (describing R.C. 9.44 and R.C. 325.19 as the “statutory scheme governing vacation benefits,” and reading them together to determine the accrual of vacation leave); 1983 Op. Att’y Gen. No. 83-077 at 2-316 (“[s]ince both R.C. 3319.084 [vacation leave for non-teaching school employees] and R.C. 9.44 concern vacation benefits for school district employees, they should be read together and, if possible, harmonized so as to give effect to the provisions of each statute”).

The objective of allowing appointing authorities to provide “for the equivalency of benefits” between its bargaining unit and non-bargaining unit employees is served by interpreting R.C. 325.19(F) and R.C. 9.44 together just as it is served by reading division (F) in conjunction with the other provisions of R.C. 325.19. *See* 1998 Op. Att’y Gen. No. 98-028 at 2-156 to 2-157, n.5. We concluded in 2008 Op. Att’y Gen. No. 2008-004 that the number of vacation hours is not the only vacation benefit that division (F) authorizes appointing authorities to vary, and we see no reason to limit the benefits that may be varied under division (F) to those found in R.C. 325.19 when R.C. 9.44 is so clearly a component of the same statutory scheme.

We conclude, therefore, that under R.C. 325.19(F), a county appointing authority, upon notification to the board of county commissioners, may adopt an alternative schedule of vacation leave that supersedes R.C. 9.44(C) and allows non-bargaining unit employees to include pre-retirement service credit in the computation of their vacation leave if at least one collective bargaining agreement covering the appointing authority’s bargaining unit employees provides that benefit.

You have asked what procedure an appointing authority must follow if it is authorized to grant non-bargaining unit employees pre-retirement service credit and elects to do so. While R.C. 325.19(F) refers to the establishment of “alternative schedules” of vacation leave, neither it nor any other statutory provision further defines what is meant by “alternative schedules” or specifies a method for establishing them. Thus, an appointing authority is free to exercise its discretion in establishing alternative schedules, so long as the procedure is reasonable, non-discriminatory, and otherwise lawful. *See State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 459, 166 N.E.2d 365 (1960); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915); 1981 Op. Att’y Gen. No. 81-062.

The precise method by which an appointing authority adopts alternative schedules will depend, of course, on the organizational structure of the appointing authority itself. For example, the process used by a single elected officeholder will differ from that of a multi-member board.

¹⁷ At the time 1988 Op. Att’y Gen. No. 88-089 was issued, R.C. 9.44(B) limited the eligible service credit of county employees who were hired on or after July 5, 1987 to prior service with a county, while R.C. 325.19(A) granted county employees credit for prior service with any political subdivision. *See* note 10, *supra*. *See also* 2000 Op. Att’y Gen. No. 2000-001 (setting forth the sequence of legislative changes to R.C. 9.44).

We see no reason why an appointing authority would be required to follow a procedure for adopting alternative schedules of vacation leave that differs from the procedure it uses to establish other benefits for employees. Although an alternative schedule must incorporate any criteria employees are required to meet in order to qualify for pre-retirement service credit under the collective bargaining agreement, the schedule must apply uniformly to all non-bargaining unit employees.

The Language of Collective Bargaining Agreements—R.C. 4117.10(A)

We turn now to your questions about the degree of specificity with which a collective bargaining agreement must address pre-retirement service credit before an appointing authority may adopt, consistently with the collective bargaining agreement, an alternative schedule allowing non-bargaining unit employees to include pre-retirement service credit. You have asked whether an appointing authority may supersede R.C. 9.44(C) if the pertinent collective bargaining agreement “does not authorize the employer to count prior service credit for purposes of calculating vacation accrual for individuals who return to employment by the county.” You ask the same question about a collective bargaining agreement that allows inclusion of “prior service credit,” without explicitly mentioning service credit earned prior to retirement.

An alternative schedule that allows inclusion of pre-retirement service credit will be “not inconsistent” with a collective bargaining agreement under R.C. 325.19(F) if, of course, the agreement grants that benefit to the employees covered thereunder. Whether the bargaining unit employees enjoy that benefit depends on the specific language of any particular agreement, and how the language is interpreted by the parties (and, if necessary, by arbitrators, the State Employment Relations Board, and the courts). The Attorney General cannot render an opinion as to the meaning of language in a specific collective bargaining agreement or the parties’ intent in including such language. 1991 Op. Att’y Gen. No. 91-065. “[D]isputes regarding the interpretation of the agreement must be settled as provided in R.C. Chapter 4117,” and the parties’ intent “must be determined from the context of the collective bargaining agreement itself by utilizing the dispute resolution mechanisms provided in R.C. Chapter 4117 and in the agreement.” *Id.* at 2-311, 2-314.

An examination of R.C. 4117.10 and the case law interpreting it, however, makes clear that a collective bargaining agreement that is silent as to prior service credit would not supersede R.C. 9.44(C), and strongly suggests that language in a collective bargaining agreement that refers generally to the inclusion of prior service credit, without mentioning service credit earned prior to retirement, would not be sufficiently specific to include the latter. Although we cannot opine on the meaning of specific language in a collective bargaining agreement, we will describe the case law interpreting R.C. 4117.10(A), and provide our analysis of the courts’ decisions in order to provide guidance on how the courts might address your questions.

R.C. 4117.10(A) reads in pertinent part: “An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement.... Where no agreement

exists or *where an agreement makes no specification about a matter*, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees.” (Emphasis added.) See R.C. 4117.01(M) (defining “wages” for purposes of R.C. Chapter 4117 to mean “hourly rates of pay, salaries, or other forms of compensation for services rendered”); note 14, *supra*. R.C. 4117.10 specifies a limited number of statutes that “prevail over conflicting provisions of agreements between employee organizations and public employers;” otherwise, R.C. Chapter 4117 “prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in this chapter or as otherwise specified by the general assembly.” See *State ex rel. Ohio Ass’n of Public School Employees v. Batavia Local School District Bd. of Education*, 89 Ohio St. 3d 191, 195, 729 N.E.2d 743 (2000) (“R.C. 4117.10(A) outlines the relationship between a collective bargaining agreement and all applicable state and local laws”).¹⁸ Since “R.C. 9.44 is clearly not included in R.C. 4117.10(A)’s list of laws which prevail over a conflicting bargaining agreement provision, R.C. 9.44 does not supersede [a] collective bargaining agreement.” *Jones v. Wilson*, 1995 Ohio App. LEXIS 1041 (Franklin County), at *10.

¹⁸ In *Streetsboro Education Ass’n v. Streetsboro City School District Bd. of Education*, 68 Ohio St. 3d 288, 291, 626 N.E.2d 110 (1994), the court provides its analysis for determining generally whether state statute or the provisions of a collective bargaining agreement prevail:

R.C. 4117.10(A) first provides that a collective bargaining agreement “governs the wages, hours, and terms and conditions of public employment covered by the agreement.” From this it logically follows that if no state or local law makes a specification about a matter (*i.e.*, if there is no conflict between the agreement and a law), then the agreement governs the parties as to that matter. Conversely, if a collective bargaining agreement makes no specification about a matter (*i.e.*, if there is no conflict between a law and the agreement), then R.C. 4117.10(A) further provides that state and local laws generally apply to a public employer and its public employees regarding “wages, hours and terms and conditions” of employment.

When a provision in a collective bargaining agreement addresses a subject also addressed by a state or local law, so that the two conflict, R.C. 4117.10(A) delineates whether the collective bargaining provision or the law prevails. To do this, R.C. 4117.10(A) specifies certain areas in which laws will prevail over conflicting provisions of collective bargaining agreements. Consequently, where a provision of a collective bargaining agreement is in conflict with a state or local law pertaining to a specific exception listed in R.C. 4117.10(A), the law prevails and the provision of the agreement is unenforceable. However, if a collective bargaining provision conflicts with a law which does not pertain to one of the specific exceptions listed in R.C. 4117.10(A), then the collective bargaining agreement prevails.

The question of whether collective bargaining agreements “made no specification” about prior service credit, such that R.C. 9.44 applied, was addressed in *State ex rel. Clark v. Greater Cleveland Regional Transit Authority*, 48 Ohio St. 3d 19, 548 N.E.2d 940 (1990). The court examined the relationship between what is now the language of R.C. 9.44(A), *see* note 6, *supra*, and collective bargaining agreements that included vacation eligibility provisions for employees of a transit authority. The collective bargaining agreements stated that employees who completed one year of “continuous service” with the transit authority were eligible for paid vacation, and the vacation received in subsequent years was based on an employee’s number of years of “continuous service” and the number of days worked by the employee in the previous calendar year.¹⁹ The issue before the court was whether employees covered by the collective bargaining agreements were entitled to include prior service credit in the computation of their vacation leave under what is now R.C. 9.44(A).

Finding that “the collective bargaining agreements make no specification about *prior* service credits in the computation of vacation leave” (despite the agreements’ references to “continuous service” with the transit authority), the court concluded that, under R.C. 4117.10(A), the employees remained subject to the provisions of R.C. 9.44.²⁰ 48 Ohio St. 3d at 22. Although the agreements included “a vacation eligibility provision,” they “*failed to specifically take the benefits* provided by R.C. 9.44 from [the employees] and, thus, they *retained their entitlement* to them.” (Emphasis added.) 48 Ohio St. 3d at 21, 23. The court reiterated in the decision’s syllabus: “R.C. 9.44 imposes a mandatory duty on any political subdivision of the state of Ohio to credit employees with prior service vacation credit, absent a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 which specifically excludes rights accrued under R.C. 9.44” (emphasis added).²¹

¹⁹ *State ex rel. Clark v. Greater Cleveland Regional Transit Authority*, 48 Ohio St. 3d at 21-22, n.4 (setting forth vacation eligibility language in collective bargaining agreements under consideration).

²⁰ *Cf. State ex rel. International Union of Operating Engineers v. Simmons*, 58 Ohio St. 3d 247, 249, 569 N.E.2d 886 (1991) (upholding on procedural grounds the decision of an arbitrator who found that language in a collective bargaining agreement entitling employees to vacation leave after “one year of continuous service with the Employer” and basing accrual “on their total service upon which their entitlement was based” “specifically limit[ed] vacation accrual rights to that of continuous service with the employer,” and superseded R.C. 9.44(A)).

²¹ *Accord State ex rel. Caspar v. City of Dayton*, 53 Ohio St. 3d 16, 19, 558 N.E.2d 49 (1990) (although the collective bargaining agreements provided supplementary vacation days to police officers with four or more years of *service with the city*, the court held that: “as in *Clark*, none of the agreements ‘specifically excludes’ the rights accrued under R.C. 9.44. Thus ... Dayton is under a duty to account for [the officers’] prior service in computing the amount of their supplemental vacation leave”); *State ex rel. Hadsell v. Springfield Township*, 92 Ohio App. 3d at 260 (“Ohio law is clear that R.C. 9.44 creates a mandatory duty on a political subdivision

Elsewhere in the opinion, the court speaks in terms of conflict between R.C. 9.44 and the collective bargaining agreements—finding there to be none because the agreements “*did not specifically address* the matter of prior service credit for purposes of computing vacation leave” (emphasis added). 48 Ohio St. 3d at 23. As Justice Holmes explains in his dissent, the majority “concludes that since this benefit [vacation credit resulting from prior public service under R.C. 9.44] *is not directly addressed* by the agreements’ provisions regarding vacation eligibility, the provisions did not conflict with the statute. In effect, this majority concludes that a conflict would exist only if the agreements *expressly excluded the benefit or provided a comparable benefit*” (emphasis added). 48 Ohio St. 3d at 24. See *Bemmerlin v. City of Eastlake*, 1996 Ohio App. LEXIS 3003 (Lake County), at *13 (“it is apparent that, by employing the phrase ‘specifically excluded’ in the syllabus, the *Clark* court merely sought to emphasize the point that the [collective bargaining] provision *must expressly address the issue of prior service credit before it will prevail over R.C. 9.44*”; the “significant issue” in *Clark* “was that ‘no conflict exists’” (emphasis added)). See also *State ex rel. Ohio Ass’n of Public School Employees v. Batavia Local School District Bd. of Education*, 89 Ohio St. 3d 191 (syllabus) (“[i]n order to negate statutory rights of public employees, a collective bargaining agreement must use language with such specificity as to explicitly demonstrate that the intent of the parties was to preempt statutory rights”).²²

to credit employees with prior service vacation credit absent a collective-bargaining agreement under R.C. Chapter 4117 which specifically excludes the R.C. 9.44 rights.... [From *Clark and Caspar*], it is clear that in order for the terms of a collective-bargaining agreement to supplant rights to accrued time under R.C. 9.44, the R.C. 9.44 rights must be specifically excluded”). Cf. *Bemmerlin v. City of Eastlake*, 1996 Ohio App. LEXIS 3003 (Lake County), at *13-14 (although the collective bargaining agreements did not specifically state that R.C. 9.44 did not apply, they “had a provision which not only expressly addressed the subject matter of R.C. 9.44, but, unlike *Clark*, set forth a *conflicting* rule concerning the determination of the prior service credit”; thus, the agreements controlled over R.C. 9.44(A)); *Jones v. Wilson*, 1995 Ohio App. LEXIS 1041 (Franklin County), at *4 (language in a collective bargaining agreement covering certain state employees that provided that, “only service with state agencies, i.e. agencies whose employees are paid by the Auditor of State, will be computed for the purpose of determining the rate of [vacation] accrual for new employees,” superseded R.C. 9.44).

²² See *State ex rel. Ohio Ass’n of Public School Employees v. Batavia Local School District Bd. of Education*, 89 Ohio St. 3d 191, 200-201, 729 N.E.2d 743 (2000) (Lundberg Stratton, J., dissenting) (“I am equally distressed at the depth of explicit detail that will now be required of drafters of collective bargaining agreements because of the majority’s syllabus. I believe that the majority’s mandate that collective bargaining must be extremely specific in order to bring an issue within its coverage will ultimately do the collective bargaining process a disservice.... I do not believe that the law requires that we interpret collective bargaining agreements as narrowly as the majority dictates”).

Under *Clark*, therefore, a collective bargaining agreement must, in order to preempt state statute, expressly address a benefit, by either affirmatively eliminating the benefit or specifically varying it. Although *Clark* addressed prior service credit as a statutory entitlement, we find its analysis applicable to the limitation on service credit imposed by R.C. 9.44(C). As we have mentioned, the statutory scheme governing county vacation leave includes a number of components or features, such as the number of hours to which employees are entitled, rates of accrual, when leave must be used, maximum accumulation, carry-over of hours, payment for unused leave, and of course, prior service credit. See 1998 Op. Att’y Gen. No. 98-028 at 2-157, n.5 (“[a]ccording to the reasoning in *Clark*, it appears that, at least for purposes of collective bargaining, the crediting of prior service for public employees under R.C. 9.44, although also a matter subject to collective bargaining, is a matter separate from other aspects of the vacation leave benefit”). And, as we have discussed, some statutory provisions addressing vacation leave are minimum entitlements and others, such as R.C. 9.44(C), are limitations on benefits. We read *Clark* broadly to mean that, if a particular feature or component of a benefit, including a limitation thereon, is governed by statute, the statutory feature or component will apply to employees covered by a collective bargaining agreement, unless the agreement explicitly and directly excludes that particular feature or component or includes specific language that otherwise varies that feature or component. If the agreement does not exclude, or otherwise address the feature or component, then the agreement “makes no specification about” the matter, and employees are subject to the applicable statutory provisions. If the agreement does exclude, or makes other provision for, the feature or component, then the agreement and state law conflict, and the agreement prevails. See 1998 Op. Att’y Gen. No. 98-028 at 2-156 to 2-157 (under R.C. 4117.10(A), “if sick leave, vacation leave, and holidays, or a particular aspect of these benefits as defined by the statutes under which the benefits are provided, are not specified in the collective bargaining agreement, persons covered by the agreement are subject to any ‘state or local laws or ordinances’ governing that benefit” (emphasis added)).

The exclusion of pre-retirement service credit is one such aspect of vacation leave that is addressed by statute, and thus must be explicitly eliminated or otherwise varied in a collective bargaining agreement if the parties intend to preempt the limitation imposed by R.C. 9.44(C). Courts could reasonably assume that parties to an agreement are aware of division (C) of R.C. 9.44, and would eliminate the limitation, or provide some variation of its provisions, if they intended to render it inapplicable.²³ See *State ex rel. Ohio Ass’n of Public School Employees v. Batavia Local School District Bd. of Education*, 89 Ohio St. 3d at 197 (“[h]ad there been a mutual intent to preempt the job security protections in R.C. 3319.081, the parties could have easily specified that intent in the collective bargaining agreement”). See generally *Eastwood*

²³ For example, the agreement could provide that R.C. 9.44(C) does not apply or could state affirmatively that pre-retirement service credit is includable in calculations of vacation leave. Or, an agreement could provide some variation on division (C), providing, for example, that only one-half of pre-retirement service or only pre-retirement service earned with that appointing authority or political subdivision is eligible for inclusion in computing vacation leave. In these examples, the agreement and R.C. 9.44(C) would conflict, and the agreement would prevail.

Local School District Bd. of Education v. Eastwood Education Ass'n, 172 Ohio App. 3d 423, 2007-Ohio-3563, 875 N.E.2d 139 (Wood County), at ¶ 27 (reviewing R.C. 4117.10(A), and stating that “[e]xcept where a contrary intent is evident, the parties to a contract are deemed to have contracted with reference to existing law”).

Turning to your questions, we conclude that an agreement that is silent as to prior service credit would leave division (C) (and divisions (A) and (B)) of R.C. 9.44 intact. Furthermore, we advise that a collective bargaining agreement that authorizes the inclusion of prior service credit in the computation of vacation leave, without mentioning service credit earned prior to retirement, is not sufficiently explicit to preempt the limitation in division (C) of R.C. 9.44. Employees covered by such a collective bargaining agreement would remain subject to the limitation in division (C) since R.C. 9.44(C) and the agreement would not conflict. Therefore, an appointing authority with employees covered by a collective bargaining agreement that is silent as to *pre-retirement* service credit would have no power under R.C. 325.19(F) to provide pre-retirement service credit to its non-bargaining unit employees, who, like the bargaining unit employees, would remain subject to the limitations of R.C. 9.44(C).

We reiterate, however, that a collective bargaining agreement, as interpreted, delineates the extent to which the appointing authority may vary a statutory feature or component of vacation leave for its non-bargaining unit employees—any determination of whether an agreement provides a particular benefit, and the limitations thereon, initially rests with the parties. *See* 1991 Op. Att’y Gen. No. 91-065.

Appointing Authorities with Non-Bargaining Unit Employees Only—Sub. H.B. 187 (2007)

We turn now to your question whether county appointing authorities that employ only non-bargaining unit employees are authorized under R.C. 325.19(F) to credit reemployed retirees with the service they earned prior to retirement for purposes of computing their vacation leave. The first sentence of R.C. 325.19(F) obviously does not apply to appointing authorities with only non-bargaining employees since it assumes the existence of at least one collective bargaining agreement. *See* 1999 Op. Att’y Gen. No. 99-039; 1998 Op. Att’y Gen. No. 98-028. The second sentence of R.C. 325.19(F), however, is applicable. The second sentence was enacted in Sub. H.B. 187, 126th Gen. A. (2006) (eff. July 1, 2007), which amended division (F) of R.C. 325.19 as follows:

Notwithstanding this section or any other section of the Revised Code, any appointing authority of a county office, department, commission, board, or body may, upon notification to the board of county commissioners, establish alternative schedules of vacation leave and holidays for employees of the appointing authority for whom the state employment relations board has not established an appropriate bargaining unit pursuant to section 4117.06 of the Revised Code, ~~provided that~~ as long as the alternative schedules are not inconsistent with the provisions of a at least one collective bargaining agreement covering other

employees of that appointing authority, if such an agreement exists. If no such collective bargaining agreement exists, an appointing authority, upon notification to the board of county commissioners, may establish an alternative schedule of vacation leave and holidays for its employees that does not diminish the vacation leave and holiday benefits granted by this section. (Emphasis added.)

Because no collective bargaining agreement will “exist” where an appointing authority employs only non-bargaining unit employees, the second sentence of division (F) clearly applies to such appointing authorities.²⁴

In determining the scope of authority that the second sentence of R.C. 325.19(F) affords appointing authorities with no bargaining unit employees, we take into account that R.C. 325.19(F), as first enacted by Am. Sub. S.B. 358 in 1989, had no effect on the *Ebert* power of appointing authorities, which employed only non-bargaining unit employees, to fix the vacation benefits of their employees. *See* 1999 Op. Att’y Gen. No. 99-039 at 2-247; 1998 Op. Att’y Gen. No. 98-026. Because appointing authorities with only non-bargaining unit employees continued to enjoy the power to increase the minimum statutory entitlements provided their employees after the enactment of Am. Sub. S.B. 358, we must read Sub. H.B. 187 as affecting their power to provide vacation benefits in some other way. *See* R.C. 1.47(B) (“[i]n enacting a statute, it is

²⁴ Although it is obvious that no collective bargaining agreement will exist where an appointing authority employs only non-bargaining unit employees, there may be instances where no collective bargaining agreement exists even though some or all of the appointing authority’s employees are in a bargaining unit. For example, in an election conducted by SERB for the selection of a bargaining unit’s exclusive bargaining representative, employees in the bargaining unit have the option to vote for “no representative.” R.C. 4117.07(C)(4). *See also, e.g., State ex rel. Municipal Construction Equipment Operators’ Labor Council v. City of Cleveland*, 113 Ohio St. 3d 480, 2007-Ohio-2452, 866 N.E.2d 1065 (two years elapsed between certification of a collective bargaining representative and the time when a collective bargaining agreement became effective). Read literally, the second sentence of R.C. 325.19(F) could govern not only appointing authorities that employ only non-bargaining unit employees, but also appointing authorities that employ—either exclusively or in conjunction with non-bargaining unit employees—bargaining unit employees who are not subject to a collective bargaining agreement.

Arguments may be made both for and against adoption of this literal reading of the second sentence of R.C. 325.19(F); however, we decline to resolve the ambiguity at this time. You have not specifically asked about these situations, and we are particularly reluctant to address the issue in the absence of a given set of facts since there may be instances where an appointing authority’s inclusion of bargaining unit employees in an alternative schedule constitutes an unfair labor practice under R.C. 4117.11(A). *See* 1986 Op. Att’y Gen. No. 86-052 at 2-280 (a board of county commissioners may not use “a wage supplement as a means of discouraging employees from exercising their rights to choose an exclusive representative and collectively bargain”).

presumed that ... The entire statute is intended to be effective”); *Lynch v. Gallia County Bd. of Commissioners*, 79 Ohio St. 3d 251, 257-58, 680 N.E.2d 1222 (1997) (“[a] legislative amendment must be presumed to change the effect and operation of the law”).

As discussed above, earlier opinions advised that, although an appointing authority could grant employees more vacation hours than provided in R.C. 325.19(A), they were constricted, under an *Ebert* analysis, from varying the terms of division (C) of R.C. 325.19. See note 16, *supra*. We have concluded that the first sentence of division (F) of R.C. 325.19 empowers an appointing authority with both bargaining unit and non-bargaining unit employees to adopt alternative schedules superseding the limitations on benefits in R.C. 325.19(C) and R.C. 9.44(C) to the extent that a collective bargaining agreement covering its bargaining unit employees does so. We interpret Sub. H.B. 187 now as likewise according appointing authorities with no bargaining unit employees the power to supersede the limitations in R.C. 325.19(C).²⁵

The second sentence of R.C. 325.19(F), however, is unclear whether a county appointing authority may vary the vacation leave provisions that appear in statutes other than R.C. 325.19. The first sentence provides that an appointing authority may adopt alternative schedules “notwithstanding this section or any other section of the Revised Code”—thus indicating that an alternative schedule may address benefits governed in statutes other than R.C. 325.19. This “notwithstanding” language does not appear in the second sentence of division (F).²⁶

²⁵ As noted above, 2008 Op. Att’y Gen. No. 2008-004 qualified, as to appointing authorities that employ both bargaining unit and non-bargaining unit employees, 2005 Op. Att’y Gen. No. 2005-018, 1994 Op. Att’y Gen. No. 94-009, 1991 Op. Att’y Gen. No. 91-050, 1989 Op. Att’y Gen. No. 89-012, and 1987 Op. Att’y Gen. No. 87-063, which had found division (C) of R.C. 325.19 to be constricting authority on the power of appointing authorities to fix the compensation of their employees. *Id.* at 2-52 to 2-53. See note 16, *supra*. 2008 Op. Att’y Gen. No. 2008-004 also questioned the continued reliability of these opinions in light of Sub. H.B. 187. *Id.* at 2-53. We now overrule or modify these opinions as to appointing authorities that employ only non-bargaining unit employees. Appointing authorities with only non-bargaining unit employees may vary the terms of R.C. 325.19(C) if done so in accordance with the second sentence of R.C. 325.19(F).

We also clarify 1998 Op. Att’y Gen. No. 98-026, modify 1999 Op. Att’y Gen. No. 99-039, and overrule, in part, 1998 Op. Att’y Gen. No. 98-028, in light of the amendment of R.C. 325.19(F) by Sub. H.B. 187.

²⁶ We examined whether the “notwithstanding” clause should be read as part of the second sentence as well as the first sentence, and concluded that it should not. The first sentence of R.C. 325.19(F) conditions an appointing authority’s adoption of alternative schedules on notification thereof to the board of county commissioners. The second sentence also requires notification to the board of county commissioners. The conditions under which appointing authorities may act are thus imposed independently under the first and second sentences. We conclude that, if the

Nonetheless, we read the second sentence as authorizing an appointing authority with only non-bargaining unit employees to adopt an alternative schedule of vacation leave that supersedes the terms of R.C. 9.44, including the constricting authority in division (C), as well as R.C. 325.19. We adopt this interpretation because it is consistent with the proposition that R.C. 325.19 and R.C. 9.44 are part of the same statutory scheme and must be read *in pari materia*, and because it is most faithful to the Civil Service Review Commission's Report to the Ohio General Assembly, Dec. 31, 2001, (Report) which was relied upon by the General Assembly in enacting Sub. H.B. 187.²⁷

Written after the enactment of Am. Sub. S.B. 358, but prior to the enactment of Sub. H.B. 187, the Report states with regard to the alternative schedules language of R.C. 325.19(F) (and R.C. 124.38, governing sick leave):

General Assembly had intended to subject the second sentence to the "notwithstanding" clause, it would have explicitly included the clause in the second sentence, as it did with the notification requirement.

²⁷ The Civil Service Review Commission was legislatively created in 2000. 1999-2000 Ohio Laws, Part V, 10858, 10867-68 (Am. S.B. 210, eff. Sept. 22, 2000). After providing for membership on the Commission, section 4 of Am. S.B. 210 reads:

(B) The Commission shall review civil service laws and practice under those laws in Ohio. In conducting the review, the Commission shall conduct a comprehensive analysis of Ohio's civil service laws as set forth in the Revised Code and associated rules, including an analysis of how the laws and any associated rules are applied in practice by public entities across Ohio. Additionally, the Commission may review decisions of the Personnel Board of Review created in section 124.05 of the Revised Code or other administrative and judicial bodies to determine how decisions of the Board or those other bodies influence the interpretation or application of civil service laws. The Commission also may review practices and innovations of public entities in other states. The Commission may call witnesses and review any other information that it determines to be appropriate and may consider recommendations of the Governor's Management Improvement Commission.

(C) Upon completion of its review under division (B) of this section, but not later than nine months after all of the appointments have been made under division (A) of this section, the Commission shall issue a report to the President of the Senate and the Speaker of the House of Representatives. The report shall identify current statutes, rules, practices, and procedures and shall make recommendations for changes to those statutes, rules, practices, and procedures that the Commission determines necessary to improve them. Upon issuance of the report under this division, the Commission ceases to exist.

Recommendation

Appointing authorities should be allowed to establish leave policies and holiday schedules for non-union employees that vary from the state model. However, the establishment and structure of alternative leave systems along with how benefits may or may not be affected when employees transfer from one appointing authority to another should be further reviewed. In addition, the Ohio Council of County Officials is urged to continue its efforts in reviewing this matter relative to counties and forward a recommendation to legislative leadership. In the meantime, Sections 124.38 and 325.19 of the Revised Code should be changed to allow appointing authorities within a county to develop alternative schedules that vary from the state model but are not inconsistent with the provisions of at least one collective bargaining agreement covering county employees. If no bargaining unit exists in the county, then a county may establish an alternative schedule for leave policies, if such policies do not diminish the benefit level currently provided in law.

Background

The current design is overly rigid and provides little flexibility for public employers to create universal leave programs to promote better service and efficiency in the 21st Century. County governments are restricted in how they can structure their leave schedules, while the state and cities have very different plans based on local needs.

(Emphasis added.)

The Civil Service Review Commission's Report thus recommends greater flexibility for county appointing authorities to establish, based on local needs, leave benefits that vary from (but do not diminish) the "state model."

As set forth in the title of Sub. H.B. 187, the legislation was enacted "to implement recommendations of the Civil Service Review Commission and to make other changes to the civil service laws."²⁸ The Legislative Service Commission reiterates this in its Final Analysis of the bill ("Overview of the Act," p. 3): "The act implements recommendations made by the Commission in its report. Additionally, it makes other changes to the civil service laws." Although the title and LSC analysis are not determinative or conclusive, they may aid us in

²⁸ Sub. H.B. 187 is comprehensive legislation that encompasses more than vacation and sick leave benefits. As summarized by the Legislative Service Commission in its Final Analysis of the bill, Sub. H.B. 187 includes changes to the statutory provisions "concerning workforce reduction; employee discipline; employee categories and classification; employee compensation and benefits; appointment, testing, hiring, promotion, and temporary and permanent transfers of positions; appeals and due process; and other civil service employment-related matters." "Overview of the Act," p. 3.

interpreting the ambiguous language added to division (F) of R.C. 325.19 by Sub. H.B. 187.²⁹ Both indicate a legislative intent to follow the recommendations of the Civil Service Review Commission, and liberalize, rather than restrict, the power of a county appointing authority to fix the leave benefits of its employees, while protecting statutory minimums.

As a final matter, we recognize that, because the second sentence of R.C. 325.19(F) explicitly bars an appointing authority from diminishing the benefits “granted by this section,” while the first sentence does not, and because R.C. 9.44 has no similarly explicit bar against the diminution of benefits provided thereunder, it is arguable that an appointing authority may diminish the benefits of R.C. 9.44—by excluding prior service with the State, for example. We are not required to resolve this issue for purposes of analyzing division (C) of R.C. 9.44. We view such an interpretation, however, as inconsistent with our interpretation of the first sentence, which has the broader “notwithstanding” language, that an appointing authority may not diminish the statutory vacation leave benefits of its non-bargaining unit employees even where a collective bargaining agreement provides fewer benefits and diminution would equalize benefits among the appointing authority’s employees. *See also* note 15 and accompanying text, *supra*. The interpretation also would be inconsistent with the Civil Service Review Commission Report, which, while advocating for the flexibility of county appointing authorities to establish employee benefits, recommends that the appointing authorities “not diminish the benefit level currently provided in law.”

Furthermore, the interpretation would be inconsistent with judicial decisions—rendered in different contexts—interpreting R.C. 9.44. As discussed above, in *State ex rel. Clark v. Greater Cleveland Regional Transit Authority*, 48 Ohio St. 3d at 23, the court ruled that the inclusion of service credit under R.C. 9.44 is an entitlement that must be explicitly preempted in a collective bargaining agreement—employees bring “with them pockets filled with benefits to which they are entitled under Ohio law”—the “collective bargaining agreements failed to specifically take the benefits provided by R.C. 9.44 from [the employees] and, thus, they retained their entitlement to them.” And, in *State ex rel. Adkins v. Sobb*, 26 Ohio St. 3d 46, 496 N.E.2d 994 (1986), the court held that even a municipality with its constitutional home rule powers may

²⁹ *See Commercial Credit Co. v. Schreyer*, 120 Ohio St. 568, 574, 166 N.E. 808 (1929) (“[w]hile the title is no part of the substantive law, it is proper to look to the title to ascertain the legislative purpose and intent, and, if the body of the act contains no language which is in conflict with that expressed purpose, the inquiry is greatly facilitated. The force to be given to a title as a factor in interpretation of a statute in the state of Ohio surpasses that to be given in some of the states, because Section 16, Article II, of our Constitution [now Ohio Const. art. II, §15(D)], requires: ‘No bill shall contain more than one subject, which shall be clearly expressed in its title’”); *Collings-Taylor Co. v. American Fidelity Co.*, 96 Ohio St. 123, 136, 117 N.E. 158 (1917) (“[t]he general assembly having solemnly declared [in the title] that it was the purpose and intent in passing this act to make the laws relating to minors conform with the laws relating to compulsory education, a court should hesitate to ignore the intention of the legislature, expressed in clear and explicit language”).

not avoid (what is now division (A) of) R.C. 9.44. *See also State ex rel. Villari v. City of Bedford Heights*, 11 Ohio St. 3d 222, 225, 465 N.E.2d 64 (1984) (R.C. 9.44 manifests a general and statewide concern “for the security and protection of public employees, and at the same time presents only a minimal intrusion into matters of traditionally local concern”).

In response to your question, we conclude, therefore, that an appointing authority that employs only non-bargaining unit employees is empowered by the second sentence of R.C. 325.19(F) (Sub. H.B. 187) to supersede R.C. 9.44(C) and, upon notification to the board of county commissioners, may adopt an alternative schedule that grants its employees credit for pre-retirement service in computing their vacation leave.³⁰

In addition to the advice rendered above concerning the procedure an appointing authority must follow if it elects to adopt alternative schedules, we note that the terms of the alternative schedules must apply uniformly to all non-bargaining unit employees. Although an appointing authority may establish criteria for the award of benefits, the appointing authority must exercise its discretion reasonably, and have a rational basis for distinctions in benefits it makes among employees. *See* 2006 Op. Att’y Gen. No. 2006-026; 1984 Op. Att’y Gen. No. 84-086; 1981 Op. Att’y Gen. No. 81-082.

Conclusions

In conclusion, it is my opinion, and you are hereby advised as follows:

1. A county appointing authority may not, under its general power to fix the compensation of its employees, supersede R.C. 9.44(C) and grant pre-retirement service credit to employees for purposes of computing their vacation leave under R.C. 9.44(A) and R.C. 325.19. (1990 Op. Att’y Gen. No. 90-104, overruled in part. 1992 Op. Att’y Gen. No. 92-066, syllabus, paragraph 2, questioned. 2003 Op. Att’y Gen. No. 2003-021, modified.)
2. Under the first sentence of R.C. 325.19(F), a county appointing authority that employs both bargaining unit and non-bargaining unit employees may adopt an alternative schedule of vacation leave that supersedes R.C. 9.44(C), and allows its non-bargaining unit employees to include pre-retirement service credit in the computation of their vacation leave, only if at least one collective bargaining agreement covering the appointing

³⁰ We accordingly modify paragraph 6 of the syllabus of 1994 Op. Att’y Gen. No. 94-009, which states: “Pursuant to R.C. 9.44(C), a county employee who has retired in accordance with the provisions of R.C. Chapter 145, governing the Public Employees Retirement System, and who is employed by a county on or after June 24, 1987, “shall not have his prior service with the state or any political subdivision of the state counted for the purpose of computing vacation leave.”

authority's bargaining unit employees explicitly provides that same pre-retirement service credit benefit to the employees covered by the agreement, and only upon the appointing authority's notification to the board of county commissioners.

3. A county appointing authority that employs only non-bargaining unit employees has the power under the second sentence of R.C. 325.19(F) to adopt an alternative schedule, upon notification to the board of county commissioners, that increases the minimum vacation benefits to which its employees are entitled, and that supersedes statutory limitations, such as those in R.C. 325.19(C), on such benefits. (2005 Op. Att'y Gen. No. 2005-018, syllabus, paragraph 3; 1998 Op. Att'y Gen. No. 98-028, syllabus, paragraph 1; and, 1991 Op. Att'y Gen. No. 91-050, overruled. 2005 Op. Att'y Gen. No. 2005-018, syllabus, paragraphs 1 and 2; 1999 Op. Att'y Gen. No. 99-039; 1994 Op. Att'y Gen. No. 94-009, syllabus, paragraph 5; 1989 Op. Att'y Gen. No. 89-012, syllabus, paragraphs 1 and 2; and, 1987 Op. Att'y Gen. No. 87-063, syllabus, paragraph 2, modified. 1998 Op. Att'y Gen. No. 98-026, syllabus, paragraph 2, clarified.)
4. A county appointing authority that employs only non-bargaining unit employees has the power under the second sentence of R.C. 325.19(F) to adopt an alternative schedule, upon notification to the board of county commissioners, that supersedes R.C. 9.44(C), and grants its employees, who previously retired under a plan offered by the State, service credit earned prior to retirement for purposes of calculating their vacation leave. (1994 Op. Att'y Gen. No. 94-009, syllabus, paragraph 6, modified.)

Respectfully,



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