

March 28, 1995

OPINION NO. 95-003

The Honorable Kevin J. Baxter  
Erie County Prosecuting Attorney  
2900 Columbus Avenue  
Sandusky, Ohio 44870

Dear Prosecutor Baxter:

You have submitted a request for an opinion on the following question: "Whether §124.38 of the Ohio Revised Code permits transfer of prior accrued sick leave in an out of state public employer to a public employee in county service?" According to your letter, certain county employees have asked that sick leave that they accumulated during prior public employment in other states be placed to their credit in their current employment with Erie County. Your letter also states that the Erie County Board of Commissioners has no policy concerning the crediting of sick leave earned in another state. This opinion will assume that you are asking only about the operation of R.C. 124.38 with respect to credit for sick leave benefits accumulated during service with another state, and not whether a particular county employee may be entitled to receive credit for such sick leave in accordance with the terms of an applicable collective bargaining agreement.

**Statutory Right to Credit for Previously Accumulated Sick Leave**

R.C. 124.38, which creates a statutory entitlement to sick leave for certain public employees, states in pertinent part:

Each of the following shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay:

- (A) *Employees in the various offices of the county*, municipal, and civil service township *service*, other than superintendents and management employees, as defined in [R.C. 5126.20], of county boards of mental retardation and developmental disabilities;
- (B) Employees of any state college or university;
- (C) Employees of any board of education for whom sick leave is not provided by [R.C. 3319.141]. (Emphasis added.)

County employees are, therefore, entitled to receive sick leave benefits in accordance with R.C. 124.38. *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980); 1992 Op. Att'y Gen. No. 92-079.

Pursuant to R.C. 124.38(C), "[a]n employee who transfers from one *public agency* to *another* shall be credited with the unused balance of his accumulated sick leave up to the maximum of the sick leave accumulation permitted in the *public agency* to which the employee transfers." (Emphasis added.) As recently stated in 1994 Op. Att'y Gen. No. 94-078 at 2-391: "Based upon the legislative history of R.C. 124.38, ... it is clear that *public agency*, as used in R.C. 124.38, refers to those agencies named in R.C. 124.38 or R.C. 124.382, *i.e.*, agencies of the state, counties, municipalities, civil service townships, and boards of education." Op. No. 94-078 relied upon the analysis set forth in 1985 Op. Att'y Gen. No. 85-075, which traced the legislative history of R.C. 124.38 and R.C. 124.382,<sup>1</sup> and concluded that only those public employers whose employees accumulate sick leave under either of those statutes constitute public agencies for purposes of R.C. 124.38 and R.C. 124.382. Because no other states' employees receive sick leave benefits under either R.C. 124.38 or R.C. 124.382, an agency of a state other than Ohio does not constitute a "public agency" for purposes of R.C. 124.38 or R.C. 124.382.

Accordingly, employment by a state other than Ohio is not employment by a "public agency" for purposes of R.C. 124.38. Thus, although the county employees about whom you ask are currently employed in a "public agency" for purposes of R.C. 124.38, they were not employed by a "public agency" within the meaning of R.C. 124.38 while they were employed by other states. Upon leaving employment with another state to become a county employee, the persons you describe were not transferring from one "public agency" to another within the meaning of R.C. 124.38(C). Thus, the transfer provision of R.C. 124.38(C) does not entitle county employees to receive credit in their county employment for sick leave benefits that they accumulated during prior employment with a state other than Ohio.

In addition to the transfer provision of R.C. 124.38(C), there is also a provision for the crediting of previously accumulated sick leave upon reemployment in the public service. In this regard, R.C. 124.38(C) states: "The previously accumulated sick leave of an employee who has been separated from the *public service* shall be placed to his credit upon his re-employment in the

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<sup>1</sup> In 1981-1982 Ohio Laws, Part II, 3460 (Am. Sub. H.B. 694, eff., in part, Nov. 15, 1981), the General Assembly removed from the coverage of R.C. 124.38 an "employee, whose salary or wage is paid in whole or in part by the state," and added "each employee of any state college or university." In the same bill the General Assembly enacted R.C. 124.382 to provide sick leave benefits for "all employees whose salary or wage is paid directly by warrant of the auditor of state." Based upon the legislative origin of R.C. 124.382 in R.C. 124.38 and the parallel provisions in both statutes concerning the transfer of unused sick leave from one public agency to another, 1985 Op. Att'y Gen. No. 85-075 concluded that the term "public agency" has the same meaning in both statutes and "refers to agencies of the state, the counties, municipalities, civil service townships, and boards of education." *Id.* at 2-294 to 2-295.

*public service*, provided that such re-employment takes place within ten years of the date on which the employee was last terminated from *public service*." (Emphasis added.) As concluded in Op. No. 94-078 at 2-391:

[T]he references in R.C. 124.38(C) to separation from, and reemployment in, the "public service" clearly refer to service with those entities that constitute "public agencies" for purposes of that statute. Included within the meaning of "public service," as that term is used in R.C. 124.38(C), therefore, is service with the state, counties, municipalities, civil service townships, or boards of education.

Thus, under the terms of R.C. 124.38(C), in order for a county employee to receive credit in his current employment for previously accumulated sick leave benefits, the employee must have been previously separated from service with a public agency in which he accumulated the sick leave for which he seeks credit, and his reemployment with a public agency must occur within ten years of the date on which he last terminated public service. The employees about whom you ask, however, seek credit in their current county employment for sick leave benefits accumulated during employment by another state. Again, because employment by another state does not constitute service with a "public agency" for purposes of R.C. 124.38(C), such prior service does not constitute "public service" for purposes of that statute. Thus, the portion of R.C. 124.38(C) that allows for the crediting of previously accumulated sick leave upon "re-employment in the public service" does not entitle a county employee to receive credit for sick leave benefits accumulated while employed by a state other than Ohio.

As an aside, I would observe that interpreting R.C. 124.38(C) to require Ohio agencies to credit employees with sick leave accumulated in another state would have the effect of requiring the taxpayers of Ohio to fund employment benefits for employees of other states. Such an absurd result could not have been intended by the General Assembly. *See generally* R.C. 1.47(C) (it is presumed that the General Assembly, in enacting a statute, intended a just and reasonable result).

### **Conclusion**

It is, therefore, my opinion, and you are hereby advised that, R.C. 124.38 does not entitle a county employee to receive credit for sick leave benefits that were earned in employment with a state other than Ohio.

Respectfully,

BETTY D. MONTGOMERY  
Attorney General

March 28, 1995

The Honorable Kevin J. Baxter  
Erie County Prosecuting Attorney  
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SYLLABUS:

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R.C. 124.38 does not entitle a county employee to receive credit for sick leave benefits that were earned in employment with a state other than Ohio.