

May 15, 2008

The Honorable Jeffrey Adkins
Gallia County Prosecuting Attorney
18 Locust Street, Room 1267
Gallipolis, Ohio 45631-1267

SYLLABUS:

2008-017

1. A board of health of a general health district may grant its employees vacation leave and sick leave as forms of compensation.
2. Should a general health district's vacation leave policy provide for differences in the amount of vacation leave an employee earns based upon the employee's number of years of prior service, R.C. 9.44(A) requires the general health district, in calculating the amount of an employee's vacation leave, to recognize the employee's prior service with the state or any political subdivision, unless R.C. 9.44(C) precludes the employee from receiving such prior service credit.
3. R.C. 124.38 does not entitle general health district employees to be credited with unused sick leave earned under R.C. 124.38 in previous employment with a county or city.
4. A general health district may establish a sick leave benefit policy that credits its employees with a certain number of sick leave hours, based upon the number of unused hours of sick leave benefits earned by the employees under R.C. 124.38 in prior employment with a county or city.
5. Absent a statute that confers upon general health district employees a minimum sick leave or vacation leave benefit, a board of health's prospective reduction of those benefits does not constitute a reduction in pay under R.C. 124.34.
6. A board of health has no authority to recoup from its employees sick leave or vacation leave benefits earned under board policies that were within the board's statutory power to adopt.



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OPINION NO. 2008-017

The Honorable Jeffrey Adkins
Gallia County Prosecuting Attorney
18 Locust Street, Room 1267
Gallipolis, Ohio 45631-1267

Dear Prosecutor Adkins:

You have requested an opinion of the Attorney General concerning certain sick leave and vacation leave benefits for employees of a general health district. You describe the circumstances of your request, in part as follows:

Please regard this as a request for a formal opinion regarding the authority, or obligation, of a non-unionized general health district, with regard to prior service credit for vacation, and the transfer of prior accrued sick leave.

As you know, a general health district is a "political subdivision" separate and apart from the county or township (see 2007 OAG 36, OAG 97-029, and OAG 91-016)

As you are also aware, employees of a general health district are not eligible for county statutory vacation, under R.C. 325.19; nor do they fall under "state" vacation, under R.C. 124.161 (see OAG 81-062, OAG 80-087, and OAG 65-121).

In that context, we also note that general health district employees are not entitled to statutory sick leave benefits, under R.C. 124.39.

Base upon the foregoing, you specifically ask:

1. Does a general health district have the power to create its own sick leave and vacation systems? If so, what is the source of that authority, and are there any limitations on it?

2. If a general health district has adopted/created a program for vacation, does R.C. 9.44 require the recognition of prior service time, so as to provide for an enhanced rate of vacation accrual?
3. If a general health district hires an employee who had, previously, been employed in a civil service position (city or county), does R.C. 124.38 apply to give that employee credit for previously earned, but unused, sick leave when “reemployed...in the public service” of a health district?
4. If a general health district is not required to recognize sick leave from prior public employment, can the health district voluntarily choose to do so?
5. If a general health district has adopted its own programs of vacation and sick leave mirroring those in R.C. 325.19, R.C. 124.38, and R.C. 124.39, can accrual rates or cash out provisions be reduced by the health district without giving rise to a “reduction in pay” appeal under R.C. 124.34?
6. If a general health district has, erroneously, allowed the accrual of too much vacation, or the carryover and use of unauthorized sick leave, can it be recouped from future paychecks without having been first reduced to judgment by a court?

General Health Districts

Because your questions concern the authority of a general health district, let us begin with a brief examination of the statutory framework governing the establishment and operation of such districts. The General Assembly has divided the state into health districts of various types. R.C. 3709.01. One type of health district is a “general health district,” which includes the townships and villages in each county. *Id.* As explained in 1991 Op. Att’y Gen. No. 91-016 at 2-80, “[t]he health districts are political subdivisions of the state, governed by state law, and are separate from any city, county, township or other local government.”

Within each general health district there is a board of health, R.C. 3709.02(A), and a district advisory council, R.C. 3709.03. As creatures of statute, the health district, its board, and its advisory council possess those powers and duties as are granted by the General Assembly. 1983 Op. Att’y Gen. No. 83-067 at 2-275 (“boards of health and district advisory councils of general health districts ... are creatures of statute and have only those powers which are expressly granted by statute, or necessarily implied therefrom”).

Board of Health’s Power to Fix Compensation of Health District Employees

Let us turn to your first question, which asks whether a general health district may establish sick leave and vacation leave benefits for its employees. To answer this question, we

must examine the statutory framework governing the appointment and compensation of general health district employees.¹

We begin by noting that the power to appoint employees for a general health district is vested in its board of health. *See, e.g.*, R.C. 3709.13 (board of health’s authority to appoint necessary employees); R.C. 3709.15 (appointment of sanitarians and nurses). In addition, R.C. 3709.16 requires the board of health of a general health district to “determine the duties and *fix the salaries* of its employees.” (Emphasis added.) *See Franklin v. Gallia County Health Comm’r*, No. 99AP-216, 2000 Ohio App. Lexis 1245 (Franklin County 2000) (finding that R.C. 3709.16 authorizes the Gallia County Board of Health to determine the duties, job classifications, and salaries of its employees).

In examining the scope of the powers vested in boards of health with respect to the appointment and compensation of health district employees by R.C. 3709.13, R.C. 3709.15, and R.C. 3709.16, 1980 Op. Att’y Gen. No. 80-087 noted the analysis of the court in *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), which concluded, in part, that a county board’s power to employ necessarily includes the power to fix compensation, subject to any statutory restrictions on the exercise of the latter power.² Applying the *Ebert* court’s analysis to the powers vested in a board of health by R.C. 3709.13, R.C. 3709.15, and R.C. 3709.16, 1980 Op. Att’y Gen. No. 80-087 concluded, at 2-340 to 2-341:

[T]he board of health of a general health district also possesses the authority to determine the type and amount of fringe benefits—including sick leave, vacation, and overtime—to which its employees are entitled as part of their compensation, *subject only to any limits imposed by statute*. *See, e.g., State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 391, 348 N.E.2d 692, 694 (1976) (“payments for fringe benefits may not constitute ‘salary,’ in the strictest sense of that word, but they are compensation”); *State ex rel. Artmayer v. Board of Trustees*, 43 Ohio St.

¹ You have referred to the general health district as “non-unionized.” We will presume, therefore, that there is no collective bargaining agreement applicable to any health district employees that addresses the vacation or sick leave benefits to which such employees are entitled. *See generally, e.g.*, 2005 Op. Att’y Gen. No. 2005-020 at 2-188 (stating, in part: “collective bargaining agreements [applicable to public employees] may vary fringe benefits (such as sick leave or payment for unused sick leave) from the amounts provided by statute, increasing or decreasing the benefits granted to the employees”).

² The court in *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), found that, although a county board of mental retardation possessed the power to employ personnel, R.C. 124.38 granted board personnel a minimum sick leave benefit that constricted the board’s power to fix its employees’ compensation by preventing the board from decreasing the minimum sick leave benefit guaranteed its employees by R.C. 124.38.

2d 62, 330 N.E.2d 684 (1975) (“salary” and “compensation” are synonymous as used in Ohio Const. art. II, § 20). (Emphasis added.)

We concur with the analysis of 1980 Op. Att’y Gen. No. 80-087, and conclude that the board of health of a general health district has authority to establish the compensation, including sick leave and vacation leave,³ of the health district’s employees, but only to the extent that no statute constricts the board’s power with respect to granting a particular benefit. *See, e.g., note 2, supra.*

In answer to your first question, therefore, we conclude that a board of health of a general health district may grant its employees vacation leave and sick leave as forms of compensation.⁴

Effect of R.C. 9.44 on a General Health District’s Grant of Vacation Leave Benefits

Your second question asks whether the board of health of a general health district is limited by R.C. 9.44 in establishing vacation leave for its employees. In terms of the *Ebert* court’s analysis of the power to fix compensation, your concern is whether R.C. 9.44 constricts the power of the board of health to grant health district employees vacation leave as part of their compensation.

R.C. 9.44 states, in pertinent part:

(A) 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, 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....*

....

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

³ *See, e.g., Cataland v. Cahill*, 13 Ohio App. 3d 113, 468 N.E.2d 388 (Franklin County 1984) (in part, finding that sick leave and vacation leave are forms of compensation).

⁴ Part of your first question asks, assuming that a board of health may grant its employees sick leave and vacation leave benefits, whether there are any limitations on the board’s authority to grant those benefits. Your remaining questions specifically address potential limitations on a board of health’s power to grant its employees these benefits. We will address such limitations in the course of answering those questions.

R.C. 9.44(A) thus entitles, among others, political subdivision employees who are currently earning vacation credits to receive credit for prior service with the state or a political subdivision for purposes of computing the amount of vacation leave to which they are entitled.⁵

A general health district is a political subdivision. 2007 Op. Att’y Gen. No. 2007-036 at 2-366 (“[e]ach health district is a political subdivision separate from any county, township, or municipality”). A general health district’s employees are, subject to the exception set forth in R.C. 9.44(C), entitled to the benefit prescribed by R.C. 9.44(A). Specifically, R.C. 9.44(A) entitles a general health district employee who is currently earning vacation credits to receive credit for prior service with the state or any political subdivision of the state for purposes of determining the amount of vacation leave to which the employee is entitled, unless the employee is precluded by R.C. 9.44(C) from receiving such prior service credit. Accordingly, in answer to your second question, should a general health district’s vacation leave policy provide for differences in the amount of vacation leave an employee earns based upon the employee’s number of years of prior service, R.C. 9.44(A) requires the general health district, in calculating the amount of an employee’s vacation leave, to recognize the employee’s prior service with the state or any political subdivision of the state, unless R.C. 9.44(C) precludes the employee from receiving such prior service credit.

R.C. 124.38 Sick Leave

Your third question asks whether R.C. 124.38 requires a general health district to allow a health district employee to use sick leave benefits that were earned, but not used, by the employee during prior employment with a county or city. R.C. 124.38 establishes sick leave benefits for certain public employees, in part, as follows:

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 section 5126.20 of the Revised Code, 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 section 3319.141 of the Revised Code.

....

⁵ Statutes that prescribe vacation leave benefits for various public employees commonly increase the amount of vacation leave to which an employee is entitled as the employee’s years of service increase. *See, e.g.*, R.C. 124.13 (vacation leave for certain state employees and employees of county departments of job and family services); R.C. 124.134 (vacation leave for certain state employees who are exempt from collective bargaining); R.C. 325.19 (vacation leave for employees in the county service).

The previously accumulated sick leave of an employee who has been separated from the public service shall be placed to the employee's credit upon the employee's *re-employment in the public service*, provided that the re-employment takes place within ten years of the date on which the employee was last terminated from public service. This ten-year period shall be tolled for any period during which the employee holds elective public office, whether by election or by appointment.

An employee who transfers from one *public agency* to another shall be credited with the unused balance of the employee's accumulated sick leave up to the maximum of the sick leave accumulation permitted in the public agency to which the employee transfers.

The appointing authorities of the various offices of the county service may permit all or any part of a person's accrued but unused sick leave acquired during service with any regional council of government established in accordance with Chapter 167. of the Revised Code to be credited to the employee upon a transfer as if the employee were transferring from one public agency to another under this section. (Emphasis added.)

R.C. 124.38 thus establishes sick leave benefits for certain public employees, but not for general health district employees. 1983 Op. Att'y Gen. No. 83-060; 1980 Op. Att'y Gen. No. 80-087.

Your question concerns the portion of R.C. 124.38 that entitles an employee described in division (A), (B), or (C), to have placed to the employee's credit, upon "re-employment in the public service" within a certain time period, sick leave previously earned in the "public service." In finding that service with a general health district is not "public service," for purposes of R.C. 124.38, 1994 Op. Att'y Gen. No. 94-078 interpreted the term "public service" as referring to service with a "public agency," as that term is used in R.C. 124.38. As explained by the 1994 opinion:

Based upon the legislative history of R.C. 124.38, as discussed in Op. No. 85-075, 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.

Because a general health district is not named in either R.C. 124.38 or R.C. 124.382, its employees do not accrue sick leave benefits under either statute. A general health district is not, therefore, a "public agency" for purposes of R.C. 124.38. Accordingly, R.C. 124.38(C) does not entitle a person to have sick leave benefits previously accrued under R.C. 124.38 placed to his credit upon his transfer to employment with a general health district.

....

. . . [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.

Because a general health district is not a “public agency,” as that term is used in R.C. 124.38(C), employment with a general health district does not constitute “public service” for purposes of R.C. 124.38(C).

1994 Op. Att’y Gen. No. 94-078 at 2-391. *See* 1981 Op. Att’y Gen. No. 81-062 (in order for a person currently employed by a public entity to be entitled to credit for sick leave previously earned under R.C. 124.38, the current employer must be a “public agency” for purposes of R.C. 124.38).⁶

Although R.C. 124.38(A) entitles city and county employees to the sick leave benefits prescribed by that statute, R.C. 124.38 entitles such employees to receive credit in other public employment for unused sick leave earned under that statute only when transferring to another “public agency” or upon “re-employment in the public service.” Because a general health district is not a “public agency” for purposes of R.C. 124.38, employment by a general health district is not employment “in the public service” for purposes of R.C. 124.38. Accordingly, employment by a general health district following employment by a county or city is not “re-employment in the public service,” as that phrase is used in R.C. 124.38.

⁶ Support for the conclusion that employment by a general health district is not “public service” for purposes of R.C. 124.38 arises from the amendment of that statute in 1999-2000 Ohio Laws, Part III, 6128, 6131 (Sub. H.B. 544, eff. June 14, 2000), which, among other things, added to R.C. 124.38 the following:

The appointing authorities of the various offices of the county service may permit all or any part of a person’s accrued but unused sick leave acquired during service with any regional council of government established in accordance with Chapter 167. of the Revised Code to be credited to the employee upon a transfer *as if the employee were transferring from one public agency to another* under this section. (Emphasis added.)

Concerning the addition of the foregoing to R.C. 124.38, the Legislative Service Commission’s Final Analysis of Sub. H.B. 544 states that, under R.C. 124.38, “‘public agency,’ although not statutorily defined, has been consistently construed to mean those agencies that are required by law to accumulate sick leave under section 124.38, so that one public agency is not bound to accept a more generous sick leave time accumulated elsewhere. Thus, in order for a person to receive credit under section 124.38 for accumulated sick leave, either upon transfer to or re-employment with another public agency, the leave must have accrued while the employee was in the service of those entities governed by the statute.” (Various citations omitted.) *See generally Meeks v. Papadopulos*, 62 Ohio St. 2d 187, 404 N.E.2d 159 (1980) (although Legislative Service Commission analyses of bills are not binding, they may be helpful in construing statutes).

In answer to your third question, we conclude, therefore, that R.C. 124.38 does not entitle general health district employees to be credited with unused sick leave earned under R.C. 124.38 in previous employment with a county or city.

Authorizing Use of Sick Leave Benefits Earned in Prior Public Service

Your next question asks: “If a general health district is not required to recognize sick leave from prior public employment, can the health district voluntarily choose to do so?” For purposes of answering this question, we assume that the “sick leave from prior public employment” to which your question refers are those unused sick leave benefits that were earned by a city or county employee under R.C. 124.38 prior to beginning employment with the general health district.

As discussed above, sick leave benefits of general health district employees are not fixed by statute. In addition, the board of health may, by virtue of its authority to fix its employees’ salaries, establish sick leave benefits as a component of the employees’ compensation, without regard to the requirements of R.C. 124.38 or R.C. 124.39. *See* 1983 Op. Att’y Gen. No. 83-060 (syllabus). Thus, a general health district may establish a sick leave policy that includes a number of hours based upon the number of hours of unused sick leave earned by an employee under R.C. 124.38 in prior employment.

We caution, however, that the general health district’s sick leave policy has no effect on the entitlement granted to such an employee should he return to employment in the service of a public agency whose employees accumulate sick leave under R.C. 124.38. Rather, the rights of employees who earn sick leave under R.C. 124.38 are set forth in R.C. 124.38 and R.C. 124.39, which detail, among other things, the purposes for which sick leave benefits earned under R.C. 124.38 may be used, the right to preserve unused sick leave benefits for use by the employee if subsequently employed “in the public service” within a specified period of time, the right to transfer such benefits from one “public agency” to another,⁷ as well as the disposition of such unused leave.⁸ Neither R.C. 124.38 nor R.C. 124.39, however, authorizes a county or city

⁷ R.C. 124.38 also authorizes county appointing authorities, in certain circumstances, to adopt alternative schedules of sick leave and vacation leave “for employees of the appointing authority for whom the state employment relations board has not established an appropriate bargaining unit pursuant to [R.C. 4117.06].” *See generally* 2005 Op. Att’y Gen. No. 2005-020 (discussing the manner in which county appointing authorities may establish alternative schedules of sick leave and vacation leave). Because you have not mentioned that any of the previously earned sick leave benefits were accumulated under an alternative schedule authorized by R.C. 124.38, this opinion will not address the potential restriction on the uses of sick leave by virtue of such alternative schedule.

⁸ R.C. 124.39 states, in pertinent part:

employee who earns sick leave under R.C. 124.38 to transfer that unused sick leave to employment with a general health district. Moreover, we find no authority for a general health district to vary the sick leave use options prescribed by R.C. 124.38 or payment options prescribed by R.C. 124.39 for unused sick leave earned under R.C. 124.38. Thus, although a general health district may establish a sick leave benefit policy that credits its employees with a certain number of sick leave hours, based upon the number of unused hours of sick leave benefits

As used in this section, “retirement” means disability or service retirement under any state or municipal retirement system in this state.

....

(B) Except as provided in division (C) of this section, an employee of a political subdivision covered by section 124.38 or 3319.141 of the Revised Code may elect, at the time of retirement from active service with the political subdivision, and with ten or more years of service with the state, any political subdivisions, or any combination thereof, to be paid in cash for one-fourth the value of the employee’s accrued but unused sick leave credit. The payment shall be based on the employee’s rate of pay at the time of retirement and eliminates all sick leave credit accrued but unused by the employee at the time payment is made. An employee may receive one or more payments under this division, but the aggregate value of accrued but unused sick leave credit that is paid shall not exceed, for all payments, the value of thirty days of accrued but unused sick leave.

(C) A political subdivision may adopt a policy allowing an employee to receive payment for more than one-fourth the value of the employee’s unused sick leave or for more than the aggregate value of thirty days of the employee’s unused sick leave, or allowing the number of years of service to be less than ten. The political subdivision may also adopt a policy permitting an employee to receive payment upon a termination of employment other than retirement or permitting more than one payment to any employee.

Notwithstanding section 325.17 or any other section of the Revised Code authorizing any appointing authority of a county office, department, commission, or board to set compensation, any modification of the right provided by division (B) of this section, and any policy adopted under division (C) of this section, shall only apply to a county office, department, commission, or board if it is adopted in one of the following ways:

(1) By resolution of the board of county commissioners for any office, department, commission, or board that receives at least one-half of its funding from the county general revenue fund;

(2) By order of any appointing authority of a county office, department, commission, or board that receives less than one-half of its funding from the county general revenue fund. Such office, department, commission, or board shall provide written notice to the board of county commissioners of such order.

(3) As part of a collective bargaining agreement.

earned by the employees under R.C. 124.38 in prior employment with a county or city, those employees retain any rights to which they may be entitled by R.C. 124.38 or R.C. 124.39 with respect to those sick leave benefits previously earned under R.C. 124.38.

In answer to your question, we conclude, therefore, that a general health district may establish a sick leave benefit policy that credits its employees with a certain number of sick leave hours, based upon the number of unused hours of sick leave benefits earned by the employees under R.C. 124.38 in prior employment with a county or city.

Decrease in Vacation and Sick Leave Benefits as a Reduction in Pay under R.C. 124.34

Your next question asks us to assume that a general health district has adopted a vacation leave policy similar to that set forth in R.C. 325.19 and a sick leave accrual and payment policy similar to that established by R.C. 124.38 and R.C. 124.39. You then ask whether the health district's adoption of vacation leave and sick leave plans that reduce the rates of accrual or cash payment options for unused leave constitutes a reduction in pay for purposes of R.C. 124.34.

To answer this question, we begin by examining R.C. 124.34(A), which describes the tenure of classified civil service employees, in pertinent part, as follows:

The tenure of every officer or employee in the *classified service* of the state and the counties, civil service townships, cities, city health districts, *general health districts*, and city school districts of the state, holding a position under this chapter, shall be during good behavior and efficient service. No officer or employee shall be *reduced in pay* or position, fined, suspended, or removed, or have the officer's or employee's longevity reduced or eliminated, *except* as provided in section 124.32 of the Revised Code,⁹ and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony. The denial of a one-time pay supplement or a bonus to an officer or employee is not a reduction in pay for purposes of this section. (Emphasis and footnote added.)

Accordingly, classified employees of general health districts, among others, are entitled to retain their positions during good behavior and efficient service.¹⁰ R.C. 124.34(A) also sets forth

⁹ R.C. 124.32 (transfers and reinstatements of classified employees).

¹⁰ Employees, other than the commissioner, of the board of health of a general health district, are "in the classified service of the state." R.C. 3709.13.

certain employment actions, *e.g.*, reduction in pay or suspension, that an appointing authority may pursue against a classified employee for the reasons, *e.g.*, incompetency or neglect of duty, listed therein. *See generally, e.g., Harden v. Ohio Attorney General*, 101 Ohio St. 3d 137, 2004-Ohio-382, 802 N.E.2d 1112, at ¶15 (“a public employer may discipline an employee in an R.C. 124.34 action by deducting vacation leave that accrues after a disciplinary order”).¹¹

You specifically question whether a board of health’s reduction in the amount of vacation and sick leave its employees may accrue in the future, as well as a reduction in the options available to its employees with respect to unused sick and vacation leave, is a “reduction in pay,” as that term is used in R.C. 124.34. In the situation you describe, the general health district employees have been receiving sick leave and vacation leave benefits in accordance with a policy implemented by the board of the health that mirrored R.C. 124.38, R.C. 124.39, and R.C. 325.19. We have concluded, however, that none of these statutes apply to general health district employees. Because the board of health is not limited by these statutes in granting its employees sick leave and vacation leave benefits as part of their compensation, it is considering the adoption of a new sick leave and vacation leave policy that grants fewer hours of both types of leave and that will have fewer options for the disposition of such unused leave than were granted under the board’s previous policy. The board questions whether the implementation of the proposed policy would constitute a “reduction in pay,” as that term is used in R.C. 124.34.

The term “reduction in pay,” as used in R.C. 124.34, is not defined by statute. However, the Personnel Board of Review (PBR), which has a duty to hear appeals of employees in the classified state service from, among other things, “final decisions of appointing authorities . . . relative to reduction in pay or position,” R.C. 124.03(A),¹² has defined the term “reduction in

¹¹ As explained in *Harris v. Lewis*, 69 Ohio St. 2d 577, 580, 433 N.E.2d 223 (1982), under R.C. 124.34, “reductions in pay can only be made for one of the reasons set forth in the statute.” As further explained by the *Harris* court, the reasons listed in R.C. 123.34 are commonly referred to as “disciplinary.” 69 Ohio St. 2d at 580 n.5. *See, e.g., Franklin County Sheriff v. Frazier*, 174 Ohio App. 3d 202, 2007-Ohio-7001, 881 N.E.2d 345 (Franklin County 2007); *Gottfried v. Dep’t of Rehab. & Corr.*, 2005-Ohio-1783, 2005 Ohio App. LEXIS 1723 (Crawford County 2005).

¹² R.C. 124.03 describes the Personnel Board of Review’s powers and duties, in part, as follows:

(A)The state personnel board of review shall exercise the following powers and perform the following duties:

(1) Hear appeals, as provided by law, of employees in the classified state service from final decisions of appointing authorities or the director of administrative services relative to *reduction in pay* or position, job abolishments, layoff, suspension, discharge, assignment or reassignment to a new or different position classification, or refusal of the director, or anybody authorized to perform

pay” as meaning, in pertinent part, “an action which diminishes an employee’s pay.” 2 Ohio Admin. Code 124-1-02(Y). The term “pay” is defined as meaning either:

(1) The annual, *non-overtime compensation due* an employee including, when applicable, the cost of the appointing authority’s insurance or other contributions, longevity pay, supplemental pay and hazard pay, divided by the product of the number of regularly scheduled hours in a workweek times fifty-two; or

(2) The *annual compensation* assigned to a position including, when applicable, the cost of the appointing authority’s insurance, or other contributions, longevity pay, supplemental pay and hazard pay.

2 Ohio Admin. Code 124-1-02(Q) (emphasis added). These administrative definitions do not, however, expressly define the various elements of an employee’s compensation that constitute “pay” for purposes of R.C. 124.34.

As a general rule, compensation includes fringe benefits such as sick leave and vacation leave. *See, e.g., Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d at 33 (“[i]t should be obvious that sick leave credits, just as other fringe benefits, are forms of compensation”); *Cataland v. Cahill*, 13 Ohio App. 3d 113, 114, 468 N.E.2d 388 (Franklin County 1984) (“[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”). *See generally State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 391, 348 N.E.2d 692 (1976) (“[f]ringe benefits ... are valuable prerequisites of an office, and are as much a part of the compensations of office as a weekly pay check”); *Madden v. Bower*, 20 Ohio St. 2d 135, 137, 254 N.E.2d 357 (1969) (“[t]he purpose of an employer, whether public or private, in extending ‘fringe benefits’ to an employee is to induce that employee to continue his current employment”).

In *State ex rel. Bassman v. Earhart*, 18 Ohio St. 3d 182, 480 N.E.2d 761 (1985), the court narrowed the concept of compensation in the context of appeals to PBR of reductions in pay under R.C. 124.03. In that case, the appointing authority, in order to reduce costs, had discontinued free parking for its employees. The employees brought an action in mandamus to compel PBR to assume jurisdiction over their appeal of the appointing authority’s action. In rejecting the employees’ assertion that the discontinuation of free parking was an impermissible “reduction in pay” for purposes of R.C. 124.03, the *Bassman* court explained:

the director’s functions, to reassign an employee to another classification or to reclassify the employee’s position with or without a job audit under division (D) of section 124.14 of the Revised Code. As used in this division, “discharge” includes disability separations. (Emphasis added.)

In the instant case, appellees are unable to unearth a *legislative enactment* whereby they are to be provided free parking privileges. Absent a minimum benefit conferred upon appellees by *legislative enactment*, no legally cognizable “reduction” occurred over which the board possessed jurisdiction. *Cf. State, ex rel. Belknap, v. Lavelle* (1985), 18 Ohio St.3d 180.

In essence, then, while the free parking provided by the welfare department could be characterized in a broad sense as a “fringe benefit,” for purposes of appealability to the board of review the parking privileges were, *absent a legislative promulgation* requiring that they be provided, a *gratuity*. As such, we conclude that the *cessation of a gratuity does not rise to the level of a reduction in pay*, position or compensation, and therefore the board properly dismissed appellees’ appeal for lack of jurisdiction under R.C. 124.03(A).

18 Ohio St. 3d at 184-85 (emphasis added). The *Bassman* court thus acknowledged that free parking fit within the broad concept of a fringe benefit, but that, in the absence of a legislatively established minimum entitlement to free parking, the discontinuation of free parking was not a reduction in pay over which PBR had jurisdiction.

Following *Bassman*, the Ohio Supreme Court determined that deduction of an employee’s statutorily prescribed minimum vacation leave benefit, earned after the employee’s disciplinary order, is a “reduction in pay” that R.C. 124.34 authorizes an appointing authority to impose as a disciplinary measure, *Harden v. Ohio Attorney General*, and that, unless a statute establishes a minimum entitlement to a particular benefit, a reduction in that benefit does not constitute an impermissible “reduction in pay,” *State ex rel. Belknap v. Lavelle*, 18 Ohio St. 3d 180, 480 N.E.2d 758 (1985) (appointing authority’s payment of a lesser percentage of employee health care cost was not a reduction in pay because governing statute made provision of health care optional and authorized appointing authority to determine amount of cost, if any, it would pay).¹³

In the situation you describe, the old and new sick and vacation leave policies are not prescribed by statute, but are, instead, policies established by the board of health in the exercise of its power to fix its employees’ compensation. Although certain actions of public employers in the establishment of employee compensation have been described as a type of legislative action,¹⁴ nothing in *Bassman* or other judicial decisions indicates that the act of a board of health

¹³ See *State ex rel. Vukovich v. Youngstown Civil Service Comm’n*, 69 Ohio St. 2d 16, 430 N.E.2d 452 (1982) (finding that an emergency ordinance that temporarily reduced the work hours for which city employees would be paid was a reduction in pay for purposes of R.C. 124.34).

¹⁴ See, e.g., 2005 Op. Att’y Gen. No. 2005-031 (syllabus, paragraph 2) (“[b]ecause the action taken by a board of county commissioners under R.C. 305.171 in designing a health care plan for county personnel is a type of legislative action, it ‘must be memorialized by a duly

of a general health district in fixing its employees' compensation constitutes a type of legislative action that establishes a portion of the pay of classified employees for purposes of R.C. 124.34.¹⁵

As discussed above, the vacation and sick leave provisions of R.C. 325.19, R.C. 124.38, and R.C. 124.39 have no application to general health district employees. Moreover, no other statutes establish these benefits for health district employees. In accordance with *Bassman*, we conclude that, in the absence of a statute that grants general health district employees a minimum sick leave or vacation leave benefit, the board's prospective reduction of those benefits does not constitute a reduction in pay under R.C. 124.34.

Previously Earned Sick Leave and Vacation Leave Benefits

Your final question asks: "If a general health district has, erroneously, allowed the accrual of too much vacation, or the carryover and use of unauthorized sick leave, can it be recouped from future paychecks without having been first reduced to judgment by a court." You have not specified what you mean by the erroneous accrual or use of too much vacation or sick leave. Based upon your series of questions, we will assume that this question arises from the board of health's erroneous assumption that its employees were entitled to earn and use vacation leave in accordance with R.C. 325.19 and to earn and use sick leave in accordance with R.C. 124.38 and R.C. 124.39. Having learned that these statutes do not apply to general health district employees, the board of health now wishes to establish its own schedules of vacation and sick leave that authorize the accrual of fewer hours of leave or that provide fewer payment options for unused leave than those authorized by R.C. 325.19, R.C. 124.38, or R.C. 124.39. Not only does the board wish to adopt such new schedules to apply prospectively, but it also would like to recoup from its employees vacation leave and sick leave benefits the employees previously earned or for which the employees have already been paid.

To answer this question we again return to the case of *Ebert v. Stark County Bd. of Mental Retardation*, which addressed the authority of an appointing authority to alter its employees' compensation, in part, as follows:

While the board's statutory authority includes the power to modify its sick leave policy and reduce the benefits to the level prescribed by R.C. 124.38, such reduction could only operate in a prospective manner. The *sick leave credits once earned became a vested right of plaintiffs. Such accrued credits could not be*

enacted ... resolution and may have prospective effect only.' 1982 Op. Att'y Gen. No. 82-006 (syllabus, paragraph four)").

¹⁵ *But see Landsberger v. East Palestine City School Dist.*, No. 83-C-6, 1984 Ohio App. LEXIS 9311 at *4 (Columbiana County April 5, 1984) ("[t]he reductions in hours of employment for appellants imposed by the board of education [through adoption of a resolution], creating reductions in pay for non-disciplinary reasons, are unlawful partial layoffs not in compliance with civil service law").

retroactively revoked. The trial court, therefore, correctly found that plaintiffs were entitled to reimbursement for credits and wages lost as a result of the board's attempted recomputations.

63 Ohio St. 2d at 33-34 (emphasis added; footnote omitted). The *Ebert* court thus found that the appointing authority's power to fix its employees' compensation encompassed authority to reduce the hours of sick leave to which the employees were thereafter entitled, subject to the minimum to which the employees were entitled by R.C. 124.38. The court further found that the newly reduced benefit could operate only in a prospective manner; the appointing authority had no power to revoke any hours of sick leave that its employees had already earned. Similarly, in the situation you describe, although a board of health possesses authority to reduce the amount of sick leave and vacation leave to which its employees will thereafter be entitled, the board is without authority to revoke sick leave or vacation leave that its employees previously earned in accordance with the board's prior sick leave and vacation leave schedules.

As a final matter, we address the portion of your last question that refers to the erroneous crediting of sick leave and vacation leave to the general health district's employees. Your question suggests that the error to which you refer is the board's action in granting its employees sick leave and vacation leave benefits in accordance with the schedules established by R.C. 124.38, R.C. 124.39, and R.C. 325.19, based upon the board's mistaken belief that its employees were subject to those statutes. We note, however, that the board's decision to grant its employees sick leave and vacation leave in the same manner as outlined in R.C. 124.38, R.C. 124.39, and R.C. 325.19, regardless of the board's reason for so doing, was within the board's authority to fix its employees' compensation. Because the board did not exceed its authority when it granted its employees those benefits in the same amount and manner as those described in the above-cited statutes, we find no basis for the board to recoup from its employees benefits that the employees earned under policies that were within the board's authority to adopt.¹⁶ In answer to your final question, we conclude, therefore, that a board of health has no authority to recoup from its employees sick leave or vacation leave benefits earned under board policies that were within the board's statutory power to adopt.

¹⁶ Whether, in a particular situation, a portion of an employee's compensation may be recovered depends, in part, upon the facts surrounding such payments and cannot be determined through a formal opinion of the Attorney General. 2007 Op. Att'y Gen. No. 2007-010 at 2-78 to 2-81 (discussing various factors to be considered in determining whether payments to public officials are recoverable). Compare *City of Hubbard ex rel. Creed v. Sauline*, 74 Ohio St. 3d 402, 659 N.E.2d 781 (1996) (syllabus) (stating, in part, "[a] public official who accepts compensation contrary to statute is under no legal duty to repay the compensation where it is subsequently determined that the official received the compensation in good faith and under color of law") with *State v. Hale*, 60 Ohio St. 3d 62, 573 N.E.2d 46 (1991) (authorizing recovery of compensation paid on straight salary basis, in contravention of statute that authorized payment for only those days of regular or special meetings).

Conclusions

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

1. A board of health of a general health district may grant its employees vacation leave and sick leave as forms of compensation.
2. Should a general health district's vacation leave policy provide for differences in the amount of vacation leave an employee earns based upon the employee's number of years of prior service, R.C. 9.44(A) requires the general health district, in calculating the amount of an employee's vacation leave, to recognize the employee's prior service with the state or any political subdivision, unless R.C. 9.44(C) precludes the employee from receiving such prior service credit.
3. R.C. 124.38 does not entitle general health district employees to be credited with unused sick leave earned under R.C. 124.38 in previous employment with a county or city.
4. A general health district may establish a sick leave benefit policy that credits its employees with a certain number of sick leave hours, based upon the number of unused hours of sick leave benefits earned by the employees under R.C. 124.38 in prior employment with a county or city.
5. Absent a statute that confers upon general health district employees a minimum sick leave or vacation leave benefit, a board of health's prospective reduction of those benefits does not constitute a reduction in pay under R.C. 124.34.
6. A board of health has no authority to recoup from its employees sick leave or vacation leave benefits earned under board policies that were within the board's statutory power to adopt.

Respectfully,



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