November 23, 2010

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

SYLLABUS: 2010-030

1. For purposes of R.C. 124.39(B), a "day" is equal to the number of hours an employee regularly is scheduled to work in an ordinary work day.

2. A county appointing authority may not have a policy that requires payment of accrued, unused sick leave to full-time, non-bargaining unit employees in an amount less than that specified in R.C. 124.39(B).

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

November 23, 2010

OPINION NO. 2010-030

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

Dear Prosecutor Baxter:

You have requested an opinion concerning R.C. 124.39(B) and the meaning of the phrase "the value of thirty days of accrued but unused sick leave" for the purpose of determining the proper maximum payments to retiring employees for the value of their accrued, unused sick leave credit. You have informed us that your question involves only full-time, non-bargaining unit employees, and thus this opinion addresses the law as it applies to those employees only. Your two specific questions are summarized here:

1. Does the phrase "the value of thirty days of accrued but unused sick leave" require pay-out of thirty 8-hour days, thirty 7.2-hour days, or thirty 24-hour days since a "day" is defined as a "calendar day" pursuant to 2 Ohio Admin. Code 123:1-47-01(A)(25)?[1]

2. May the county have a policy that requires a sick time pay-out of less than the amount required by R.C. 124.39(B)?

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[1] You have informed us that several of the county appointing authorities in Erie County maintain a schedule for their employees consisting of 7.2 work hours per work day. Such an alternative schedule is permissible pursuant to the authority granted by R.C. 325.17. *See also* 1975 Op. Att'y Gen. No. 75-078.

For the reasons that follow, we conclude that for purposes of R.C. 124.39(B), a "day" is equal to the number of hours an employee regularly is scheduled to work in an ordinary work day. Further, a county appointing authority may not have a policy that requires payment of accrued, unused sick leave to full-time, non-bargaining unit employees in an amount less than that specified in R.C. 124.39(B).

Your first question concerns the precise meaning of the phrase "the value of thirty days of accrued but unused sick leave," and particularly the meaning of the word "day," for purposes of determining the appropriate payment of accrued, unused sick leave, pursuant to R.C. 124.39(B), upon the retirement of a county employee. R.C. 124.39(B) provides that,

> [e]xcept as provided in [R.C. 124.39(C)], an employee of a political subdivision covered by [R.C. 124.38 or R.C. 3319.141] 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*. (Emphasis added.)

You note that "[d]ays," as provided by 2 Ohio Admin. Code 123:1-47-01(A)(25), "[m]eans calendar days unless specified otherwise," and you ask whether this requires use of a 24-hour day in R.C. 124.39(B) calculations.

"Day" is not defined by statute for purposes of R.C. 124.39, and "[w]here the General Assembly has not provided or attached a specific meaning to a term, the common or plain meaning of the term is used." 1989 Op. Att'y Gen. No. 89-091 at 2-434. *Accord* R.C. 1.42; *State v. Dorso*, 4 Ohio St. 3d 60, 62, 446 N.E.2d 449 (1983). One common definition of "day" is "the time established by usage or law for work, school, or business." *Merriam-Webster's Collegiate Dictionary* 317 (11th ed. 2007). Obviously, "day" also is defined as "the mean solar day of 24 hours beginning at mean midnight." *Id*. But applying the rule 123:1-47-01(A)(25) definition in the most literal sense of a calendar day being composed of 24 hours is erroneous for the following reasons.

To begin, since "validly adopted administrative regulations have the same force and effect as legislative enactments, such regulations are subject to the principles of construction ordinarily applied to statutory provisions. One such principle is that statutory provisions that address the same subject matter or employ the same terms […] should be construed together and harmonized if at all possible." 1991 Op. Att'y Gen. No. 91-038, at 2-211 to 2-212 (citations omitted). *See generally, e.g.*, *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St. 3d 46, 554 N.E.2d 97 (1990) (syllabus, paragraph one) ("[a]dministrative rules enacted pursuant to a

specific grant of legislative authority are to be given the force and effect of law"); *Bobb v. Marchant*, 14 Ohio St. 3d 1, 3, 469 N.E.2d 847 (1984) (related provisions should be construed *in pari materia* and the legislature is presumed to have been cognizant of all previously enacted sections of the Revised Code). Thus, every attempt should be made to construe the definition of "[d]ays" provided by rule 123:1-47-01(A)(25) in concert with the intended use of the word "days" in R.C. 124.39(B).

These two uses of the word "days" are reconcilable. Rule 123:1-47-01(A)(25) provides that "[d]ays" "[m]eans calendar days unless specified otherwise." A "calendar day" may consist of 24 hours in total, but the better understanding of "calendar day" for purposes of applying R.C. 124.39(B) is the notion of a calendar day's worth of work or a calendar day's worth of sick leave. That is, for purposes of a statute dealing with the sick leave benefits of county employment, we should consider the number of hours typically worked or the number of hours of sick leave used in a given calendar day, not the total number of hours that make up a whole calendar day.

To afford the word "day," for purposes of R.C. 124.39(B), with a value of 24 hours would produce a result both unreasonable and inconsistent with other provisions of law. *See generally* R.C. 1.47 ("[i]n enacting a statute, it is presumed that … [a] just and reasonable result is intended"). For example, consider that if an employee missed one "day" of work because of illness, it would be absurd for the employee to be required to use 24 hours of sick leave for a single "day" of missed work. Rather, "[w]hen sick leave is used, it shall be deducted from the employee's credit on the basis of one hour for every one hour of absence from previously scheduled work." R.C. 124.38. "Employees shall be charged sick leave only for the days and hours for which they would have otherwise been regularly scheduled to work. Sick leave shall not exceed the amount of time an employee would have been regularly scheduled to work in any pay period." 2 Ohio Admin. Code 123:1-32-03. These provisions contemplate sick leave as a benefit that should be accounted for precisely as it is earned and used. Specifically, employees should be neither permitted nor required to use sick leave for hours they were not regularly scheduled to work. This concept carries over to the provision in question in R.C. 124.39(B). In determining what is the precise "value of thirty days" of sick leave, we conclude that one "day" is equal to the number of hours an employee is regularly scheduled to work in an ordinary work day. Thus, for a county employee who works an alternative schedule consisting of 7.2 hours of work per work day, "the value of thirty days of accrued but unused sick leave," pursuant to R.C. 124.39(B), is 216 hours.

Before turning to your second question, we briefly review the powers of county officers and specifically those persons holding the office of county commissioner, as created in R.C. 305.01. It is well established that a board of county commissioners is a creature of statute that may exercise only those powers explicitly conferred by statute or necessarily implied by those powers that are expressly granted. *State ex rel. Shriver v. Bd. of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947); 1986 Op. Att'y Gen. No. 86-083. *See also Elder v. Smith*, 103 Ohio St. 369, 370, 133 N.E. 791 (1921) (a "board of county commissioners has such powers and jurisdiction, and only such, as are conferred by statute"); *Schultz v. Erie County Metro. Park Dist. Bd.*, 26

Ohio Misc. 68, 269 N.E.2d 72 (C.P. Erie County 1971). The authority to employ county personnel includes the power to fix their compensation, including fringe benefits, subject to any statutory restrictions on that power.[2] 2008 Op. Att'y Gen. No. 2008-012, at 2-137. *See Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 33, 406 N.E.2d 1098 (1980). *See also* 2007 Op. Att'y Gen. No. 2007-012, at 2-103 ("[t]he statutory authority to fix 'compensation' includes the authority to establish both salary and fringe benefits, such as medical insurance, life insurance, and paid leave, in the absence of any statute that constricts such authority, and so long as such benefits are in excess of any minimum levels established by statute").

In response to your second question, a county appointing authority may not have a policy that requires payment of accrued, unused sick leave to full-time, non-bargaining unit employees in an amount less than that specified in R.C. 124.39(B). It is well established that "[a]n employer … may not provide to its employees fewer fringe benefits than those established by statute as minimum entitlements." 2009 Op. Att'y Gen. No. 2009-009, at 2-61 to 2-62. *See Ebert v. Stark County Bd. of Mental Retardation* at 32 ("R.C.124.38 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*"). Additionally, R.C. 124.39(C) explicitly allows for variations in the application of R.C. 124.39(B) that will *increase* the benefits to employees. R.C. 124.39(C) provides:

> 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.

Thus, if a county wishes to provide a benefit to its employees, pursuant to R.C. 124.39(B), which will provide the employees with more than "the value of thirty days of accrued but unused sick leave," the county may do so pursuant to R.C. 124.39(C), by "adopt[ing] 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."

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[2] A board of county commissioners has authority to appoint and determine the compensation of certain employees, *see, e.g.*, R.C. 305.13 (clerk); R.C. 305.14 (legal counsel); R.C. 305.15 (engineer), but most county employees are appointed by other county officers. Those officers set the compensation of any employees they appoint. *See* R.C. 325.17 (authorizing the county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer, and county recorder to "employ the necessary … employees for their respective offices" and "fix the compensation of those employees").

R.C. 124.39(C) (emphasis added). *See also* 1981 Op. Att'y Gen. No. 81-052, at 2-204 to 2-205. But the county may not implement a policy that provides lower benefits than those provided for in R.C. 124.39(B).

The current language of R.C. 124.39(B) and (C) is largely the result of a 1978 amendment to the law that "eliminate[d] the ability of political subdivisions to adopt sick leave conversion policies with higher eligibility requirements or lower benefits." Ohio Legislative Service Comm'n, Analysis, Sub. H.B. 179 (as reported by Senate Ways & Means) (Mar. 14, 1978). "The bill [allows] political subdivisions to adopt their own sick leave conversion policies—so long as the policies impose *lower* eligibility requirements or grant *higher* benefits than those otherwise imposed by the bill." *Id.* *See also* 1990 Op. Att'y Gen. No. 90-074 (syllabus) ("[o]nly in the manner set forth in R.C. 124.39(C) may a county appointing authority establish a policy concerning payment for unused sick leave for its employees who are not covered by a collective bargaining agreement, where such policy differs from R.C. 124.39(B) or from a policy established by the board of county commissioners pursuant to R.C. 124.39(C)"); 1984 Op. Att'y Gen. No. 84-061 (syllabus) ("a county appointing authority … may adopt a sick leave payment policy for his employees, provided that the policy affords his employees benefits equal to or greater than any sick leave payment benefits to which such employees are entitled by R.C. 124.39(B) or by action of the county commissioners, pursuant to R.C. 124.39(C)"). In sum, a county appointing authority may not have a policy that requires payment of accrued, unused sick leave to full-time, non-bargaining unit employees in an amount less than that specified in R.C. 124.39(B).

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

1. For purposes of R.C. 124.39(B), a "day" is equal to the number of hours an employee regularly is scheduled to work in an ordinary work day.

2. A county appointing authority may not have a policy that requires payment of accrued, unused sick leave to full-time, non-bargaining unit employees in an amount less than that specified in R.C. 124.39(B).

Respectfully,

RICHARD CORDRAY
Ohio Attorney General