OPINION NO. 98-028

Syllabus:

1. Pursuant to R.C. 124.38 and R.C. 325.19(F), a county appointing authority may not establish alternative schedules of sick leave or vacation leave and holidays for those of its employees for whom the State Employment Relations Board has not established an appropriate bargaining unit pursuant to R.C. 4117.06, unless there is a collective bargaining agreement covering other employees of that appointing authority.

2. In the establishment of alternative schedules of sick leave or vacation leave and holidays in accordance with R.C. 124.38 or R.C. 325.19(F), a county appointing authority may not provide less of such benefits than the minimums otherwise established by statute, and, if such schedules increase the benefits otherwise provided by statute, the schedules may not be inconsistent with the provisions of a collective bargaining agreement covering other employees of that appointing authority.

To: Jonathan P. Hein, Darke County Prosecuting Attorney, Greenville, Ohio
By: Betty D. Montgomery, Attorney General, August 24, 1998

You have requested an opinion concerning the power of county appointing authorities to establish alternative schedules of sick leave under R.C. 124.38 and vacation leave and holidays under R.C. 325.19. Your specific concerns are whether "the authority to establish alternative schedules only exist[s] where the appointing authority has some employees subject to a collective bargaining agreement and some who are not," and "[i]f not, does the terminology of [R.C. 124.38] and R.C. 325.19 grant unlimited discretion upon these issues to the appointing authorities, (subject, of course, to the notification to the Commissioners and deference to the provisions of a collective bargaining agreement covering other employees of the appointing authority), or are the statutory entitlements still minimums?" As mentioned in your opinion request, a number of prior Attorney General opinions have addressed various issues with respect to sick leave and vacation leave for county employees, but none have expressly addressed the circumstances in which, or the extent to which, county appointing authorities may "establish alternative schedules" for sick leave under R.C. 124.38 or for vacation leave and holidays under R.C. 325.19(F).

Let us begin with R.C. 124.38, part of which establishes sick leave benefits for, among others, county employees, 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:
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> (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;
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> ...
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> (C) .... Employees may use sick leave, upon approval of the responsible administrative officer of the employing unit, for absence due to personal illness, pregnancy, injury, exposure to contagious disease which could be communicated to other employees, and to illness, injury, or death in the employee's immediate family. Unused sick leave shall be cumulative without limit. When 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. 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 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. An 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....
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> This section does not interfere with existing unused sick leave credit in any agency of government where attendance records are maintained and credit has been given employees for unused sick leave.
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> *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, estab-

> lish *alternative schedules of sick 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], provided that the alternative schedules are not inconsistent with the provisions of a collective bargaining agreement covering other employees of that appointing authority. (Emphasis added.)

Your concerns arise out of the final paragraph of R.C. 124.38, which was added in Am. Sub. S.B. 358, 117th Gen. A. (1988) (eff. March 17, 1989), and authorizes county appointing authorities, notwithstanding R.C. 124.38 or any other statute, to "establish alternative schedules of sick leave" for those of its employees for whom the State Employment Relations Board has not established an appropriate bargaining unit under R.C. 4117.06, so long as such alternative schedules are not inconsistent with collective bargaining provisions applicable to other employees of that appointing authority.

R.C. 124.38 does not define the term "alternative schedules of sick leave," as used therein. Because R.C. 124.38 establishes not only the number of hours of sick leave to which employees are entitled, but also the rate at which benefits are earned, the permissible uses of sick leave, the accumulation of leave without limitation, the manner in which sick leave benefits are deducted from an employee's credit, the crediting of unused, unpaid sick leave benefits of persons who return to public service after separation, the transfer of unused sick leave benefits, and verification of illness or injury, it is unclear which of these provisions may be varied by an alternative schedule of sick leave. In addition, because a county appointing authority has the authority to establish such alternative sick leave schedules, "[n]otwithstanding [R.C. 124.38] or any other section of the Revised Code," it is unclear whether the General Assembly intended such schedules to encompass all aspects of the sick leave policy established by R.C. 124.38, as well as provisions outside R.C. 124.38 that address other aspects of sick leave, *e.g.*, R.C. 124.39 (payment to county employees for unused sick leave), or whether such schedules were intended to prescribe only different amounts of sick leave to which the appointing authority's employees will be entitled. The language defining the employees for whom the appointing authority may establish these alternative schedules, as well as the reference to a collective bargaining agreement covering other employees of the appointing authority, raises the additional question of the circumstances in which the appointing authority may establish such alternative schedules.

Using nearly identical language, Am. Sub. S.B. 358 also amended R.C. 325.19 by adding division (F), which authorizes a county appointing authority, under the same conditions as pertain to the establishment of alternative schedules of sick leave, to establish "alternative schedules of vacation leave and holidays" for its employees. Again, the term "alternative schedules of vacation leave and holidays" is not defined by R.C. 325.19. Because R.C. 325.19 addresses not only the number of hours of vacation leave to which county employees are entitled, but also governs other aspects of vacation leave and holiday pay, *e.g.*, specifying the time when vacation leave hours are to be used, limitations on the accumulation of unused vacation leave, limitations on the carryover of such unused leave, payment for unused leave at the time of separation or death, and the days on which holidays are observed by county employees, R.C. 325.19(A)-(E), R.C. 325.19(F) is unclear as to the extent to which an appointing authority may vary the provisions that affect a county employee's vacation leave, whether located elsewhere within R.C. 325.19 or in any other statute, *e.g.*, R.C. 9.44 (prior service credit for purposes of vacation leave). As with the language added to R.C. 124.38, the language of R.C. 325.19(F) does not clearly establish the circumstances in which the appointing authority may establish such alternative schedules.

It is well settled that, in attempting to discern the intent of the General Assembly in the enactment of a statute, one must first look to the language of the statute itself. *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902) (syllabus, paragraph two). As is apparent from the foregoing, however, the sentence added to both R.C. 124.38 and R.C. 325.19 by Am. Sub. S.B. 358, when read within the framework of those statutes, does not expressly address the questions you raise. We must, therefore, resort to the rules of statutory construction in an attempt to discern the General Assembly's intent in the enactment of Am. Sub. S.B. 358. *See generally* R.C. 1.49(A) and (B) ("[i]f a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: ... [t]he object sought to be attained; [and] ... [t]he circumstances under which the statute was enacted"). Examination of the developments in the law governing the manner in which the compensation of county employees is determined may provide an understanding of the circumstances in which Am. Sub. S.B. 358 was enacted and, therefore, be of assistance in ascertaining the General Assembly's intention in its enactment.

Let us begin with the Ohio Supreme Court's decision in *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), which addressed the power of a county appointing authority, the board of mental retardation, to grant its employees sick leave credit in excess of that to which its employees, as county employees, were entitled under R.C. 124.38. In finding that a county board of mental retardation did possess such authority, the *Ebert* court noted that R.C. 124.38 established only a minimum number of sick leave hours to which employees of a county board of mental retardation were entitled, and stated further:

> Since we interpret R.C. 124.28 as conferring a minimum benefit upon the board's employees, it is necessary to look elsewhere to determine the extent of the board's authority to provide increased sick leave benefits. The express powers and duties of the county board of mental retardation are set forth in R.C. 5126.03(C), which authorizes the board to "[e]mploy such personnel and provide such services, facilities, transportation, and equipment as are necessary." In order for the power to employ to have any significance, it must, of necessity, include the power to fix the compensation of such employees. It should be obvious that sick leave credits, just as other fringe benefits, are forms of compensation. There being no provision in R.C. Chapter 5126 which would constrict the board's power to provide sick leave credits in excess of the minimum level of R.C. 124.38, this court finds that the board's adoption of its pre-1975 sick leave policy [granting its employees more sick leave than prescribed by R.C. 124.38] was a lawful exercise of its authority.

63 Ohio St. 2d at 33, 406 N.E.2d at 1100. Thus, the *Ebert* court concluded that the power to increase the number of hours of sick leave to which county mental retardation board employees were entitled under R.C. 124.38 was part of the board's power to fix its employees' compensation.

As a result of this decision, the statutes that prescribed various forms of compensation for county employees were no longer to be viewed as prescribing a fixed benefit for those employees. Instead, if a county appointing authority possessed the statutory authority to prescribe compensation for its employees, it could grant its employees fringe benefits, as part of their compensation, subject to any statutory limitations on the appointing authority's power to fix such compensation, *e.g.*, R.C. 325.17 (prohibiting the compensation fixed by certain county officers from exceeding, "in the aggregate, for each office, the amount fixed

by the board of county commissioners for such office"), and subject to any statutory limitations on the granting of the particular benefit, *e.g.*, R.C. 124.38 (providing a minimum number of hours of sick leave to which employees are entitled). *See generally* 1981 Op. Att'y Gen. No. 81-052.

Based upon the *Ebert* court's analysis and the decision in *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 391, 348 N.E.2d 692, 694 (1976), that "[f]ringe benefits, such as [payments for health insurance premiums], are valuable perquisites of an office, and are as much a part of the compensations of office as a weekly pay check," a number of courts and Attorney General opinions determined that the power of county appointing authorities to compensate their employees encompassed the power to provide various fringe benefits as well, subject to any statutory minimums.[1] See, e.g., *Cataland v. Cahill*, 13 Ohio App. 3d 113, 114, 468 N.E.2d 388, 390 (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"); 1983 Op. Att'y Gen. No. 83-042 (syllabus, paragraph six) (if a county prosecuting attorney authorizes payment of assistant prosecuting attorneys' Ohio Supreme Court registration fees as part of their compensation, a county may make such payments); 1982 Op. Att'y Gen. No. 82-071 (county appointing authorities, among others, may pay employee contributions to the Public Employees Retirement System).

The statutory scheme governing the compensation of county and other public employees was changed substantially with the enactment of R.C. Chapter 4117 in 1983-1984 Ohio Laws, Part I, 336 (Am. Sub. S.B. 133, eff., in part, Oct. 6, 1983, and in part, April 1, 1984), which authorized collective bargaining between public employers and public employees, including certain county employees. *See generally* R.C. 4117.01 (defining "public employer" and "public employee"). Among the rights extended to public employees by the adoption of R.C. Chapter 4117 were the right to be represented by an employee organization and the right to bargain collectively with their employers over such matters as wages, hours, and terms and conditions of employment. R.C. 4117.03(A). *See generally* R.C. 4117.01(M)(defining wages, for purposes of R.C. Chapter 4117, as "hourly rates of pay, salaries, or other forms of compensation for services rendered"); R.C. 4117.08 (subjects

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[1] In applying the court's analysis in *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), to questions of compensation for county employees generally, it is necessary to bear in mind that, with certain exceptions, the county officer or entity with the power to appoint employees also has the power to fix its employees' compensation. *See* 1984 Op. Att'y Gen. No. 84-092. *See, e.g.*, R.C. 325.17 (authorizing county auditor, county treasurer, sheriff, county engineer, and county recorder, among others, to fix the compensation of his employees with the limitation that "[s]uch compensation shall not exceed, in the aggregate, for each office, the amount fixed by the board of county commissioners for such office"); R.C. 5126.05(A)(7) (county board of mental retardation and developmental disabilities shall "[a]uthorize all positions of employment, establish compensation, including but not limited to salary schedules and fringe benefits for all board employees, approve contracts of employment for management employees that are for a term of more than one year, employ legal counsel under [R.C. 309.10], and contract for employee benefits"). *Cf.* R.C. 329.02 (stating in part, "[the county director of human services], with the approval of the board of county commissioners, shall appoint all necessary assistants and superintendents of institutions under the jurisdiction of the department, and all other employees of the department," with certain exceptions).

appropriate for collective bargaining); R.C. 4117.10(A).[2] R.C. 4117.06 imposed upon the State Employment Relations Board a duty to determine appropriate units for purposes of representation by an exclusive representative designated under R.C. 4117.05. 1987 Op. Att'y Gen. No. 87-094 at 2-612. Pursuant to R.C. 4117.04(B), if an exclusive representative is designated under R.C. 4117.05, the public employer has a duty to bargain collectively with that representative.

The authorization of public employee collective bargaining in R.C. Chapter 4117 thus created yet another source by which a county employee's compensation might be determined. After the enactment of R.C. Chapter 4117, in order to ascertain the amount and types of compensation to which a county employee was entitled, it became necessary to determine whether the employee was subject to a collective bargaining agreement and whether the agreement addressed the particular benefit. If so, the terms of the agreement, with certain limited exceptions, prevailed over any statutory provisions regarding that benefit. *See generally* R.C. 4117.08; R.C. 4117.10(A); *Streetsboro Educ. Ass'n v. Streetsboro City School Dist. Bd. of Educ.*, 68 Ohio St. 3d 288, 291, 626 N.E.2d 110, 113 (1994) ("[w]hen 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

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[2] R.C. 4117.10(A) states 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. Laws pertaining to civil rights, affirmative action, unemployment compensation, workers' compensation, the retirement of public employees, and residency requirements, the minimum educational requirements contained in the Revised Code pertaining to public education ... , and the minimum standards promulgated by the state board of education pursuant to [R.C. 3301.07(D)] prevail over conflicting provisions of agreements between employee organizations and public employers. The law pertaining to the leave of absence and compensation provided under [R.C. 5923.05] prevails over any conflicting provisions of such agreements if the terms of the agreement contain benefits which are less than those contained in that section or the agreement contains no such terms and the public authority is ... another entity listed in [R.C. 4117.01(B)] that elects to provide leave of absence and compensation as provided in [R.C. 5923.05]. Except for [R.C. 306.08, R.C. 306.12, R.C. 306.35, and R.C. 4981.22] and arrangements entered into thereunder ... this chapter 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.

in R.C. 4117.10(A), then the collective bargaining agreement prevails"); *City of Cincinnati v. Ohio Council 8, AFSCME, AFL-CIO*, 61 Ohio St. 3d 658, 576 N.E.2d 745 (1991). In the absence of a collective bargaining agreement governing the provision of that benefit for the employee, it remained necessary to utilize the *Ebert* court's analysis to determine a county employee's right to the benefit at issue.[3] See *generally State ex rel. Chavis v. Sycamore City*

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[3] Following the enactment of R.C. Chapter 4117, the General Assembly began making various other changes in compensation for county employees who were not receiving compensation in accordance with a collective bargaining agreement. One such change was made by the General Assembly in 1985-1986 Ohio Laws, Part I, 270, 273 (Am. S.B. 96, eff. July 18, 1985), which authorized the board of county commissioners to adopt pay supplements for county human services employees. Prior to the enactment of Am. S.B. 96, the salaries of county human services employees, unlike those of other county employees, were prescribed by the salary schedule set forth in R.C. 124.15. Am. S.B. 96 amended former R.C. 124.14(F) (analogous provisions now at R.C. 124.14(E)) to authorize the board of county commissioners to grant pay supplements, in addition to the salary the employees were to receive under R.C. 124.15, to those employees of the county human services department who were not governed by a collective bargaining agreement. *See generally* 1984 Op. Att'y Gen. No. 84-076 (because county human services employees are appointed by the county director of human services, with the approval of the board of county commissioners, the director may, with the approval of the board of county commissioners and subject to any statutory limitations, fix the compensation of the department's employees).

The authority granted to the county commissioners by former R.C. 124.14(F) to prescribe such wage supplements was limited, however, by the following language: "The provisions of this division do not apply to employees for whom the state employment relations board establishes appropriate bargaining units pursuant to [R.C. 4117.06]." 1985-1986 Ohio Laws, Part I, at 273. This language was interpreted in 1986 Op. Att'y Gen. No. 86-052 at 2-280 through 2-281, as follows:

> [I]t appears that the prohibition in R.C. 124.14(F) against granting a wage supplement to employees after SERB has established an appropriate bargaining unit is intended to guard against a board of county commissioners using a wage supplement as a means of discouraging employees from exercising their rights to choose an exclusive representative and collectively bargain. Thus, I believe that the prohibition in R.C. 124.14(F) applies to employees who have been placed in a bargaining unit but who have not yet voted in a representation election or who have voted and chosen an exclusive bargaining representative. Where an appropriate unit fails, however, to elect an exclusive representative, the employer has no duty to collectively bargain with the employees in that unit. Since the appropriate bargaining unit is determined by SERB for purposes of collective bargaining should an exclusive representative be elected, when no representative is chosen, the purpose for having an appropriate bargaining unit is dissolved. Thus, the county is free to grant employees in that unit a wage supplement without interfering with the collective bargaining process. *See generally* R.C. 4117.07(C)(6).
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> I note, as a final matter that it is an axiom of statutory interpretation that statutes must be construed to avoid unreasonable or absurd consequences. R.C. 1.47(C); *Canton v. Imperial Bowling Lanes*, 16 Ohio St. 2d 47, 242 N.E.2d 566 (1968); *State ex rel. Cooper v. Savord*, 153 Ohio St. 367, 92

> N.E.2d 390 (1950). If it were the intention of the General Assembly to prohibit the establishment of a wage or salary supplement for employees who were included in a bargaining unit which voted for "no representative," it would mean that once an appropriate unit is defined, the county could never institute wage or salary supplements for employees within the unit even though those employees vote against representation. This could result in unreasonable consequences in that employees of a county human services department who have been defined as members of an appropriate bargaining unit but who vote not to select an exclusive representative and enter collective bargaining, and who, thus, are in a similar situation as employees who were never formed into a bargaining unit, would be at a disadvantage in that they may not engage in collective bargaining as a unit for at least one year, nor could they receive a wage or salary supplement under R.C. 124.14(F). (Various citations omitted.)

The amendment of former R.C. 124.14(F) in Am. S.B. 96 thus expanded the power of each board of county commissioners to grant additional pay to the employees of its county's department of human services, but only to the extent that such benefits were not in conflict with those received by employees of the department who were subject to a collective bargaining agreement.

In 1987, the General Assembly, in apparent recognition of the differences that were occurring in compensation of public employees as a result of the implementation of collective bargaining, made significant changes in the compensation of many types of public employees. 1987-1988 Ohio Laws, Part II, 2564, 2571 (Am. Sub. H.B. 178, eff. June 24, 1987). With respect to the compensation of county human services employees, Am. Sub. H.B. 178, in language similar to, but more expansive than, that subsequently added to R.C. 124.38 and R.C. 325.19 by Am. Sub. S.B. 358, again expanded the authority of the board of county commissioners. Added to former R.C. 124.14(F) by Am. Sub. H.B. 178 was the following:

> Notwithstanding any other section of the Revised Code, a board of county commissioners may, for employees of the county department of human services:
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> (1) *supplement* the sick leave, vacation leave, personal leave, and other benefits; *and*
>
> (2) establish *alternative schedules of sick leave, vacation leave, personal leave, or other benefits* not inconsistent with the provisions of a collective bargaining agreement covering the affected employees. (Emphasis added.)

1987-1988 Ohio Laws, Part II, at 2574. With this amendment, county commissioners were able to grant county human services department employees not only additional wages, but also additional sick leave, vacation leave, personal leave, and other fringe benefits. Am. Sub. H.B. 178 further increased the county commissioners' power to compensate human services employees by authorizing the county commissioners to establish "alternative schedules of" benefits for county human services employees, so long as such schedules were "not inconsistent with provisions of a collective bargaining agreement covering the affected employees." *Id.* The General Assembly granted this authority to the county commissioners "[n]otwithstanding any other section of the Revised Code." *Id.*

School Dist. Bd. of Educ., 71 Ohio St. 3d 26, 29, 641 N.E.2d 188, 192 (1994) ("[a] collective bargaining agreement does not prevail over conflicting laws where it either does not specifically cover certain matters, or no collective bargaining agreement is in force" (various citations omitted)).

It was in this setting that the General Assembly amended R.C. 124.38 and R.C. 325.19 in Am. Sub. S.B. 358, 117th Gen. A. (1988) (eff. March 17, 1989), which authorized all county appointing authorities to establish alternative schedules of sick leave, vacation leave, and holidays under the circumstances described therein. It is because of the manner in which the law governing county employee compensation has developed that many of the ambiguities found in Am. Sub. S.B. 358 arise. As will be discussed below, however, we believe that the amendments to R.C. 124.38 and R.C. 325.19 by Am. Sub. S.B. 358 were 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 sick leave, 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. *Cf.* R.C. 124.14(E) (authorizing county commissioners not only to supplement the sick leave, vacation leave, personal leave, and other benefits of county human services employees, but also to "establish alternative schedules" of such benefits "not inconsistent with the provisions of a collective agreement covering the affected employees").

Your first concern is whether the existence of a collective bargaining agreement covering some of a county appointing authority's employees is a prerequisite to a county appointing authority's adoption of alternative schedules under R.C. 124.38 or R.C. 325.19(F). Let us begin by noting that R.C. 124.38 and R.C. 325.19(F) authorize a county appointing authority to adopt such alternative schedules only for those of its employees "for whom the state employment relations board has not established an appropriate bargaining unit pursuant to [R.C. 4117.06], provided that the alternative schedules are not inconsistent with the provisions of a collective bargaining agreement covering other employees of that appointing authority." Aside from the question of the manner in which one determines whether such alternative schedules are inconsistent with a collective bargaining agreement, the above-quoted phrase raises the question whether there must be a collective bargaining agreement in place that covers some of the appointing authority's employees before the appointing authority may establish such alternative schedules.

That the General Assembly intended to authorize county appointing authorities to adopt alternative schedules of sick leave or vacation leave and holidays only if some of the appointing authority's employees are covered by a collective bargaining agreement becomes apparent when one considers the unreasonable results that might occur under a contrary reading of R.C. 124.38 and R.C. 325.19(F). *See generally* R.C. 1.47 ("[i]n enacting a statute, it is presumed that: ... (C) A just and reasonable result is intended"); R.C. 1.49(E) (authorizing consideration of the consequences of a particular reading when attempting to discern the

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Interestingly, Am. Sub. H.B. 178 also established a number of new benefits for certain *state* employees who were exempted from collective bargaining under R.C. Chapter 4117. Unlike most county appointing authorities, state appointing authorities had been, for the most part, without authority to fix their employees' compensation, including fringe benefits. Rather, state employees' compensation and fringe benefits were determined by statute. *See* 1988 Op. Att'y Gen. No. 88-015 (discussing the statutory scheme governing salary and fringe benefits for state employees). *See also* note six, *infra*.

legislative intent in the enactment of an ambiguous statute). For example, pursuant to the collective bargaining scheme established by R.C. Chapter 4117, it could occur that all of an appointing authority's employees were employees "for whom the state employment relations board has not established an appropriate bargaining unit pursuant to [R.C. 4117.06]." R.C. 124.38; R.C. 325.19(F). As such, all of the employees would appear to qualify as employees for whom the appointing authority could adopt alternative schedules of sick leave, vacation leave, and holidays under R.C. 124.38 and R.C. 325.19(F). In such a situation, however, if none of the employees were in an appropriate bargaining unit, there would be no collective bargaining agreement covering other employees of that appointing authority. As a result, the appointing authority would be unrestrained by the terms of any collective bargaining agreement in formulating its alternative schedules. Moreover, because an appointing authority's power to establish alternative schedules under R.C. 124.38 and R.C. 325.19(F) is modified by the phrase, "[n]otwithstanding this section or any other section of the Revised Code," an appointing authority's power to adopt such alternative schedules would be unrestrained by any statutory provisions governing that benefit. Therefore, simply because none of the employees of an appointing authority had been placed in a bargaining unit, the appointing authority would be able to reduce the sick leave and vacation leave benefits that have been judicially recognized as guaranteeing public employees certain minimum statutory benefits, *see, e.g., Ebert v. Stark County Bd. of Mental Retardation* (R.C. 124.38); *Cataland v. Cahill* (R.C. 325.19).[4]

The requirement that at least some of an appointing authority's employees be subject to a collective bargaining agreement in order for the appointing authority to establish alternative schedules of sick leave, vacation leave, and holidays for its non-bargaining unit employees also avoids the potential problem explained in 1986 Op. Att'y Gen. No. 86-052. As explained in that opinion, where the bargaining unit employees are not yet represented by an

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[4] The courts have also consistently found various public employee benefit statutes to establish minimum benefits that withstand attempted changes by municipalities under their constitutional powers of home rule. *See, e.g., State ex rel. Clark v. Greater Cleveland Regional Transit Authority*, 48 Ohio St. 3d 19, 548 N.E.2d 940 (1990) (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"); *Fraternal Order of Police, Lodge 39 v. City of East Cleveland*, 64 Ohio App. 3d 421, 581 N.E.2d 1131 (Cuyahoga County 1989) (city may not, pursuant to its home rule power, alter the sick leave payment provisions of R.C. 124.39); *South Euclid Fraternal Order of Police, Lodge 80 v. D'Amico*, 13 Ohio App. 3d 46, 468 N.E.2d 735 (Cuyahoga County 1983) (syllabus, paragraph one) ("R.C. 124.38 is a law of general nature and has uniform operation throughout Ohio under Section 26, Article II of the Ohio Constitution"); *see also State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 431 N.E.2d 311 (1982) (syllabus) ("Ohio's prevailing wage law, R.C. 4115.03 through R.C. 4115.15, which: (1) manifests a genuine statewide concern for the integrity of the collective bargaining process in the building and construction trades through a comprehensive statutory plan of worker rights and remedies, and (2) has significant extraterritorial effects, beyond the scope of any municipality's local self-government or police powers, preempts any conflicting local ordinance"); *Wray v. City of Urbana*, 2 Ohio App. 3d 172, 440 N.E.2d 1382 (Champaign County 1982) (R.C. 4111.03, concerning overtime compensation, cannot be varied by a municipal ordinance); *but see Civil Service Personnel Ass'n, Inc. v. City of Akron*, 20 Ohio App. 3d 282, 485 N.E.2d 775 (Summit County 1984) (finding that transfer of unused sick leave is a term within R.C. 124.38 that may be varied by a city under its home rule powers).

employee organization, the appointing authority's establishment of alternative sick leave or vacation leave and holiday schedules might interfere with the collective bargaining process by "discouraging employees from exercising their rights to choose an exclusive representative and collectively bargain." 1986 Op. Att'y Gen. No. 86-052 at 2-280.

Another potential problem with reading Am. Sub. S.B. 358 as authorizing an appointing authority to establish alternative schedules of sick leave or vacation leave and holidays, whether or not there is a collective bargaining agreement covering some of the appointing authority's employees, arises in the situation where a group of an appointing authority's employees who have been placed in a bargaining unit decide not to be represented by an employee organization. In such a situation, there would be bargaining unit and non-bargaining unit employees in the same appointing authority and, although neither group would be covered by a collective bargaining agreement, the appointing authority could establish alternative schedules under R.C. 124.38 or R.C. 325.19(F) for its non-bargaining unit employees. Because R.C. 124.38 and R.C. 325.19(F) authorize an appointing authority to establish alternative schedules only for those of its employees who are not in a bargaining unit, however, the employees in the bargaining unit, although not covered by a collective bargaining agreement, would not be entitled to the benefits prescribed by the alternative schedules. Rather, the bargaining unit employees would be entitled to receive the benefits prescribed by R.C. 124.38 and R.C. 325.19 for county employees generally, whether such benefits were greater or less than those prescribed by the alternative schedules for the non-bargaining unit employees, who, absent the alternative schedules, would also receive such benefits pursuant to R.C. 124.38 and R.C. 325.19. In such a situation, the alternative schedules would serve only to provide non-bargaining unit employees sick leave or vacation leave and holiday benefits different from those received by the bargaining unit employees.

Finally, we must consider the situation in which a portion of the appointing authority's employees, although included in a bargaining unit, have not yet entered into a collective bargaining agreement. Until there is a collective bargaining agreement covering some of the appointing authority's employees, any alternative schedules adopted under R.C. 124.38 or R.C. 325.19(F) would be established without consideration of the benefits to which the bargaining unit employees may eventually be entitled under their collective bargaining agreement. The establishment of alternative schedules for non-bargaining unit employees without regard to the corresponding benefits eventually prescribed by a collective bargaining agreement for the appointing authority's bargaining unit employees is wholly inconsistent with the General Assembly's apparent intention to authorize county appointing authorities to grant equivalent sick leave, vacation leave, and holiday benefits to their employees whether or not the employees receive those benefits pursuant to a collective bargaining agreement.

In summary, the circumstances defined by R.C. 124.38 and R.C. 325.19(F) in which an appointing authority may establish such alternative schedules, as well as the many unreasonable consequences that might arise under a contrary reading, suggests that, in the enactment of Am. Sub. S.B. 358, the General Assembly intended to authorize county appointing authorities to provide their non-bargaining unit employees sick leave, vacation leave, and holiday benefits equivalent to those obtained by their bargaining unit employees pursuant to a collective bargaining agreement. In answer to your first question, we conclude, therefore, that, in order for a county appointing authority to adopt alternative schedules of sick leave or vacation leave and holidays under R.C. 124.38 or R.C. 325.19(F), at least some of the appointing authority's employees must be covered by a collective bargaining agreement entered into in accordance with R.C. Chapter 4117.

Your second concern is whether the alternative schedules adopted under R.C. 124.38 and R.C. 325.19(F) may reduce the minimum benefits otherwise established by those statutes. This question appears to arise from the introductory language, "[n]otwithstanding this section or any other section of the Revised Code," which modifies the power of county appointing authorities under R.C. 124.38 and R.C. 325.19(F) to establish alternative schedules of sick leave and vacation leave and holidays. One might argue that the inclusion of this phrase was intended to address a specific aspect of the *Ebert-Parsons* compensation analysis, *i.e.*, the issue of statutory minimums to which appointing authorities are subject in establishing compensation. *See generally Cataland v. Cahill.* Under such a theory, the inclusion of this phrase would authorize a county appointing authority to establish alternative schedules under R.C. 124.38 and R.C. 325.19(F) and thereby abolish the statutory minimums otherwise guaranteed by R.C. 124.38 and R.C. 325.19. In addition, a literal reading of the phrase "[n]otwithstanding ... any other section of the Revised Code" would arguably authorize the terms of such schedules to prevail, not only over the provisions of R.C. 124.38 and R.C. 325.19, but also over those of R.C. 124.39 concerning payment for unused sick leave, R.C. 9.44 concerning prior service credit for purposes of computing vacation leave, or any other statute.

That the General Assembly did not intend such unreasonable results becomes apparent upon examination of the collective bargaining scheme pursuant to which sick leave, vacation leave, and holidays may be determined for employees covered by a collective bargaining agreement. Because fringe benefits such as sick leave and vacation leave constitute "wages," as defined in R.C. 4117.01(M), they are matters subject to bargaining. *See* R.C. 4117.08(A). Accordingly, employees within a bargaining unit may well accept a reduction in any of these benefits, below the minimums established by statute, in exchange for other wages, hours, or terms and conditions of employment. In such a case, because alternative schedules of sick leave or vacation leave adopted under R.C. 124.38 or R.C. 325.19(F) may not be "inconsistent with the provisions of a collective bargaining agreement covering other employees of that appointing authority," it might be argued that if the appointing authority were to establish such alternative schedules for its non-bargaining unit employees, such schedules could provide no more sick leave or vacation leave than prescribed by the collective bargaining agreement, regardless of the other benefits received under the bargaining agreement in exchange for a reduction of the statutory minimums. A reading of the amendments to R.C. 124.38 and R.C. 325.19 that would allow such a result serves no apparent purpose other than to penalize the appointing authority's non-bargaining unit employees. *See generally* note three, *supra*.

In this regard, let us also note that, pursuant to R.C. 4117.10(A), "[w]here 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."[5] Thus, if sick leave, vacation leave, and holidays, or a particular aspect of these

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[5] The operation of this portion of R.C. 4117.10(A) was explained by the court in *State ex rel. Clark v. Greater Cleveland Regional Transit Authority*, 48 Ohio St. 3d 19, 548 N.E.2d 940 (1990) (syllabus), in which the court held that "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.) In considering whether R.C. 9.44 applied to the employees covered by the collective bargaining agreement, the court reasoned as follows:

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. Pursuant to R.C. 4117.10(A), even where no agreement exists, the employees are subject to state or local laws governing benefits. Outside the realm of any alternative schedules authorized by R.C. 124.38 and R.C. 325.19(F), therefore, public employees covered by R.C. 124.38 or R.C. 325.19 will receive less than the minimum benefits prescribed by those statutes only if a collective bargaining agreement to which they are subject specifically provides for such reductions. In our opinion, it seems unreasonable to conclude that all employees subject to R.C. 124.38 or R.C. 325.19, except those for whom a county appointing authority may establish alternative schedules of sick leave or vacation leave and holidays, would, absent a provision in a collective bargaining agreement specifically changing such benefits, be entitled to the minimum benefits guaranteed by those statues, while persons receiving such benefits under alternative schedules authorized by R.C. 124.38 or R.C. 325.19(F) would have no guaranteed minimums. *See* note four, *supra*.

Upon examination of the potential consequences of a literal reading of the phrase "[n]otwithstanding this section or any other section of the Revised Code" in R.C. 124.38 and R.C. 325.19(F), we conclude that the addition of this phrase was intended to address another aspect of the compensation theory established by the *Ebert* and *Parsons* cases, *i.e.*, that a county appointing authority's power to vary its employees' statutorily prescribed fringe benefits arises from its power to establish its employees' compensation. By authorizing a county appointing authority to adopt such alternative schedules, "[n]otwithstanding this

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> There is no question that the collective bargaining agreements at issue include a vacation eligibility provision for individuals employed by the GCRTA. This general provision does not mean, however, that it is the exclusive or last word involving all matters of vacation. This is so because R.C. 4117.10(A) provides that when an agreement makes *no specification* about a matter pertaining to wages, hours and terms and conditions of employment, the parties are governed by all state or local laws or ordinances addressing such terms and conditions of employment. Not *specifically* addressed by the collective bargaining agreements in question is the prior service credit an individual is entitled to receive pursuant to R.C. 9.44. (Footnote omitted.)

Id. at 21-22, 548 N.E.2d at 942-43. Accordingly, the *Clark* court concluded that, "pursuant to R.C. 4117.10(A), the parties to these agreements are subject to the provisions of R.C. 9.44 since the collective bargaining agreements make no specification about *prior* service credits in the computation of vacation leave." *Id.* at 22, 548 N.E.2d at 943.

According to the 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. Because prior service credit and other aspects of vacation leave may be addressed separately in a collective bargaining agreement, it would be consistent with the General Assembly's apparent objective of authorizing county appointing authorities to equalize sick leave, vacation leave, and holidays for its non-bargaining unit employees with those of its bargaining unit employees to read the authority granted to county appointing authorities by Am. Sub. S.B. 358 to address all aspects of those benefits in establishing alternative schedules of those benefits, while maintaining the statutory minimums otherwise provided by statute.

section or any other section of the Revised Code," the General Assembly intended simply to authorize county appointing authorities, whether or not they have the statutory authority to prescribe their employees' compensation, to establish alternative schedules of sick leave, vacation leave, or holiday benefits for their non-bargaining unit employees equivalent to those received by their employees who are covered by a collective bargaining agreement, while assuring the non-bargaining unit employees the minimum benefits to which those employees are otherwise entitled by R.C. 124.38 and R.C. 325.19.[6]

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

1. Pursuant to R.C. 124.38 and R.C. 325.19(F), a county appointing authority may not establish alternative schedules of sick leave or vacation leave and holidays for those of its employees for whom the State Employment Relations Board has not established an appropriate bargaining unit pur-

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[6] The General Assembly has made similar, although more extensive, provision in R.C. 124.15(D) for the equalization of benefits for certain state employees who are exempt from collective bargaining under R.C. Chapter 4117. *See* 1989-1990 Ohio Laws, Part IV, 5670, 5681 (Am. H.B. 552, eff. July 14, 1989). R.C. 124.15(D) states in pertinent part:

> The director of administrative services may review collective bargaining agreements entered into under [R.C. Chapter 4117] that cover state employees and determine whether certain benefits or payments provided to state employees covered by those agreements should also be provided to "exempt employees" as defined in [R.C. 124.152]. On completing the review, the director of administrative services, with the approval of the director of budget and management, may provide to some or all exempt employees any payment or benefit, except for salary, contained in such a collective bargaining agreement even if a similar payment or benefit is already provided by law to some or all of these exempt employees. Any payment or benefit so provided shall not exceed the highest level for that payment or benefit specified in such a collective bargaining agreement. The director of administrative services shall not provide, and the director of budget and management shall not approve, any payment or benefit to an exempt employee under this division unless the payment or benefit is provided pursuant to a collective bargaining agreement to a state employee who is in a position with similar duties as, supervised by, or employed by the same appointing authority as, the exempt employee to whom the benefit or payment is to be provided.
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> As used in this division, a payment or benefit provided by law means bereavement, personal, vacation, administrative, and sick leave, disability benefits, wages, holiday pay, and pay supplements provided to exempt employees under the Revised Code.

See generally R.C. 124.152(F) ("'exempt employee' means a permanent full-time or permanent part-time employee paid directly by warrant of the auditor of state whose position is included in the job classification plan established under [R.C. 124.14(A)] but who is not considered a public employee for the purposes of [R.C. Chapter 4117] ... [and] also includes a permanent full-time or permanent part-time employee of the secretary of state, auditor of state, treasurer of state, or attorney general who has not been placed in an appropriate bargaining unit by the state employment relations board").

suant to R.C. 4117.06, unless there is a collective bargaining agreement covering other employees of that appointing authority.

2. In the establishment of alternative schedules of sick leave or vacation leave and holidays in accordance with R.C. 124.38 or R.C. 325.19(F), a county appointing authority may not provide less of such benefits than the minimums otherwise established by statute, and, if such schedules increase the benefits otherwise provided by statute, the schedules may not be inconsistent with the provisions of a collective bargaining agreement covering other employees of that appointing authority.