

OPINION NO. 81-056**Syllabus:**

1. Once an appointing authority or his designee has, with the approval of the Director of Administrative Services, designated a position as exempt from the overtime provisions of R.C. 124.18, the appointing authority may not authorize payment or compensatory time in any amount for overtime hours worked by an employee in such exempted position.
2. Regardless of how an exemption list is entitled, exemption of a position from the overtime provisions of R.C. 124.18 operates to exempt such position from all the provisions of that section concerning overtime compensation, including the granting of compensatory time.
3. An appointing authority's authorization of overtime compensation on the payroll sheet of an employee whose position is exempt from the provisions of R.C. 124.18 does not override the overtime exemption of such position.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, September 23, 1981

I have before me your request for my opinion concerning the following questions relating to R.C. 124.18. Your questions read as follows:

1. May the appointing authority or his designee authorize compensatory time for a state employee who has been formally exempted by or through the Department of Administrative Services from the overtime provisions of Section 124.18, Revised Code?
2. Would the answer to Question One be different if the exemption list sent to the Department of Administrative Services was entitled "Overtime and Compensatory Exempt"?
3. If a state employee is overtime and compensatory time exempt, can the appointing authority or his designee authorize compensatory time on a hour per hour worked overtime basis instead of on a one and one-half hour per hour worked overtime basis?
4. If the appointing authority specifically authorizes overtime on an overtime and compensatory time exempt employee's payroll sheet, does this override the exemption list sent to the Department of Administrative Services?

Your questions have arisen as a result of the actions of directors of state departments and agencies or their designees in authorizing overtime pay or compensatory time off for employees whose positions have been exempted from the overtime provisions of R.C. 124.18.

The initial question involves the power of appointing authorities or their designees to authorize compensatory time for state employees whose positions have been exempted from the overtime provisions of R.C. 124.18. Pursuant to R.C.

124.18,¹ forty hours is the standard work week for all employees whose salary or wage is paid in whole or in part by the state. If an employee is required to be in active pay status for more than forty hours in one week, he is entitled to overtime compensation. R.C. 124.18 provides generally for such an employee to be compensated for overtime at one and one-half times his base rate of pay, or at the rate equivalent to pay range 33, step 1, whichever is lesser, with certain exceptions. Such employee may, however, elect to take compensatory time off in lieu of overtime pay on a time and one-half basis.

Concerning exemption from the provisions of the statute, R.C. 124.18 states:

The appointing authority of each agency may designate, with the approval of the director of administrative services, specific positions within his agency with a starting rate of not less than a rate equivalent to pay range 9, step 1, salary schedule A or pay range 29, step 2, salary schedule B, the duties of which are professional, administrative, or executive in nature, and such positions shall be exempt from all the provisions of this section regarding overtime compensation. (Emphasis added.)

This paragraph authorizes an appointing authority to exempt certain positions from the overtime provisions of R.C. 124.18. When such a position is exempted, however, it is, by the express terms of R.C. 124.18, exempted from all the provisions of R.C.

¹R.C. 124.18 provides in pertinent part:

Forty hours shall be the standard work week for all employees whose salary or wage is paid in whole or in part by the state. When any employee is required by an authorized administrative authority to be in an active pay status more than forty hours in any calendar week, he shall be compensated for such time over forty hours, except as otherwise provided in this section, at one and one-half times his base rate of pay, or at the rate equivalent to pay range 33, step 1, whichever is the lesser, unless the provisions of the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 201, as amended, are applicable. A flexible hours employee is not entitled to compensation for overtime work unless his authorized administrative authority requires him to be in active pay status for more than forty hours in a calendar week, regardless of the number of hours he works on any day in the same calendar week.

The authorized administrative authority shall be designated by the appointing authority to the director of the department of administrative services. Such compensation for overtime work shall be paid no later than at the conclusion of the next succeeding pay period.

If the employee elects to take compensatory time off in lieu of overtime pay, for any overtime worked, such compensatory time shall be granted by his administrative superior, on a time and one-half basis, at a time mutually convenient to the employee and the administrative superior within one hundred eighty days after the overtime is worked except that in the case of employees of the state school for the blind and the state school for the deaf whose positions require them to be on duty at all times that school residents are not attending classes the compensatory time may be granted within one year after the overtime is worked.

No overtime, as described in this section, can be paid unless it has been authorized by the authorized administrative authority.

124.18 regarding overtime compensation, including those allowing an employee to take compensatory time off.² It is clear, therefore, that once an appointing authority exempts a position from the overtime provisions in R.C. 124.18, that section does not empower the appointing authority to authorize overtime compensation in any other manner for an employee in such position. Whether an appointing authority may allow an employee whose position has been exempted from all the provisions of R.C. 124.18 to receive compensatory time for overtime work depends, therefore, on whether the appointing authority has power outside of R.C. 124.18 to authorize overtime compensation.

You have indicated that you are referring to directors or authorized administrative heads of the various state departments and agencies when you speak of appointing authorities. It is well established that directors or administrative heads of the state departments and agencies are responsible for employing such employees as are necessary to carry out the duties and responsibilities of the departments and agencies. See R.C. 121.14 ("[e]ach department may employ. . .the necessary employees. . .").

Although such appointing authorities may employ necessary employees, they do not have specific authority to fix their employees' compensation.³ The General Assembly has created a statutory scheme pursuant to which state employees are

²R.C. 4111.03 reads in part as follows:

(A) An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one workweek, in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the "Federal Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 207, 213, as amended.

As used in this section, "employer" includes the state of Ohio. R.C. 4111.01(D). Thus, R.C. 4111.03 requires the state to pay an "employee," as defined in R.C. 4111.01(E), at a rate of one and one-half the employee's wage rate for hours worked in excess of forty hours in one workweek. R.C. 4111.03 is, however, subject to the exemptions set forth in 29 U.S.C. §213. That provision exempts from most of the provisions of 29 U.S.C. §206 (minimum wage) and §207 (maximum hours in workweek) "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. §213(a)(1). It appears, therefore, that, because a position may be exempted from the overtime provisions of R.C. 124.18 only if the duties of that position are professional, administrative, or executive in nature, an employee in such position would also be exempt from the overtime provisions of R.C. 4111.03. See generally National League of Cities v. Usery, 426 U.S. 833 (1976) (holding that amendments to the Federal Fair Labor Standards Act which extended minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions were not within the authority granted Congress by U.S. Const. art. I, §8, cl. 3 (the commerce clause)).

³R.C. 121.14 reads in part as follows: "Each department [enumerated in R.C. 121.02, see R.C. 121.01(A)] may employ, subject to the civil service laws in force at the time the employment is made, the necessary employees, and, if the rate of compensation is not otherwise fixed by law, fix their compensation" (emphasis added). R.C. 121.14, therefore, gives state departments authority to fix the compensation of employees where the rate of compensation is not otherwise fixed by law, e.g., where a state department compensates an employee in accordance with Schedule C of R.C. 124.15, the department may fix the employee's pay anywhere between the minimum and maximum rates established for each range. This section, however, must be read in conjunction with the statutory scheme of compensation for state employees, discussed elsewhere in this opinion.

compensated. See, e.g., R.C. 121.161 (vacation leave for "[e]ach full-time state employee"); R.C. 124.15 (salary for "all employees working for the state or any of the several departments, commissions, bureaus, boards, or councils of the state," except certain employees of either the state school for the deaf or the state school for the blind); R.C. 124.38 (sick leave for "[e]ach employee, whose salary or wage is paid in whole or in part by the state"); R.C. 124.81 (life insurance for "all state employees who are paid directly by warrant of the state auditor, including elected state officials"); R.C. 124.82 (health, medical, hospital, dental, or surgical benefits for "state employees who are paid directly by warrant of the auditor of state, including elected state officials"). The salary and fringe benefits of state employees are, therefore, expressly regulated by statute. 1977 Op. Atty Gen. No. 77-090.

R.C. 124.14(C), concerning changes in salary and other fringe benefits of state employees, reads as follows:

On or before the first day of November in each even-numbered year, the director of administrative services shall report to the state employee compensation board whether the pay ranges and the steps contained in section 124.15 of the Revised Code should be adjusted by a uniform percentage to reflect increases or decreases in the wages of non-public employees in Ohio or other states in order to maintain the competitive status of state employment. The director shall at the same time report whether sick leave, holidays, health or life insurance, vacation, leave, or other fringe benefits of state employees should be changed for such reasons. The board shall make recommendations on such adjustments to the general assembly and governor by the first day of January in each odd-numbered year. (Emphasis added.)

As I stated in Op. No. 77-090, at 2-304, "[t]he plain meaning of this provision is to reserve in the General Assembly the power to grant or alter fringe benefits for state employees. . . A state agency does not have the authority to grant additional fringe [benefits] to its employees."⁴ It appears, from the comprehensive nature of the statutory scheme governing state employees' compensation, that the legislature contemplated a uniform system for compensating all state employees.

In response to your first question, I conclude, therefore, that appointing authorities at the state level have no independent power to change the compensation of their employees from that prescribed by statute. Thus, once a position is exempt from the overtime provisions of R.C. 124.18, the appointing authority may not authorize compensatory time for an employee in that position, either on the basis set forth in R.C. 124.18 or on any other basis. Specifically, in response to your third question, the appointing authority, for the reasons set forth above, may not compensate an employee in an exempt position on an hour per hour worked overtime basis.

In reviewing your second question, I have been unable to find any reason why my answer to your initial question would be different if the exemption list sent to the Department of Administrative Services were entitled "Overtime and Compensatory Exempt." It is my opinion, based upon the language of R.C. 124.18, that the provisions of that section apply fully to payment for overtime as well as to

⁴In Ebert v. Stark County Bd. of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), the court stated that a county board of mental retardation had the power to employ, and that such power necessarily implied the power to fix its employees' compensation. In that situation, however, unlike a situation involving employment with the state, there were no statutory provisions establishing the salary of board employees, nor was there a statutory scheme similar to R.C. 124.14(C) for the adjustment of fringe benefits.

the granting of compensatory time. Thus, any exemption list sent to ODAS would include the exemption of certain positions from the payment of money for overtime as well as the granting of time off as compensatory time. In regard to this matter, R.C. 124.18 states, in pertinent part, that the professional, administrative, or executive positions designated as exempt "shall be exempt from all the provisions of this section regarding overtime compensation." As noted above, there are provisions in R.C. 124.18 which refer to payment for overtime work as well as the provision of compensatory time. Because of the language in R.C. 124.18 which exempts individuals on the exemption list from "all the provisions" of that section regarding overtime compensation, it is clear that the exemption list would apply fully to overtime pay as well as to compensatory time as compensation for overtime. Thus, my answer to the initial question would not change if the exemption list sent to the Department of Administrative Services were entitled "Overtime and Compensatory Exempt."

Your final inquiry concerns whether the appointing authority's authorization of payment for overtime on the payroll sheet of an employee whose position is overtime and compensatory time exempt overrides the exemption list sent to the Department of Administrative Services. I must conclude that the appointing authority's authorization does not override the exemption list. Once the appointing authority designates, with the approval of the Director of Administrative Services, those positions which are to be exempt from the requirements of R.C. 124.18, the individuals employed in such positions shall be exempt from all provisions of R.C. 124.18 regarding overtime compensation. See R.C. 124.18. It stands to reason that in order for the exemption list to be changed, the appointing authority would have to remove from the list, with the approval or knowledge of the Director of Administrative Services, the positions held by the exempted individuals. Therefore, it is my opinion that until the appointing authority informs the Director of Administrative Services of his desire to remove certain positions from the exemption list, the exemption list is not changed.

It is, therefore, my opinion, and you are advised, that:

1. Once an appointing authority or his designee has, with the approval of the Director of Administrative Services, designated a position as exempt from the overtime provisions of R.C. 124.18, the appointing authority may not authorize payment or compensatory time in any amount for overtime hours worked by an employee in such exempted position.
2. Regardless of how an exemption list is entitled, exemption of a position from the overtime provisions of R.C. 124.18 operates to exempt such position from all the provisions of that section concerning overtime compensation, including the granting of compensatory time.
3. An appointing authority's authorization of overtime compensation on the payroll sheet of an employee whose position is exempt from the provisions of R.C. 124.18 does not override the overtime exemption of such position.