

OPINION NO. 2011-046

Syllabus:

2011-046

1. Pursuant to R.C. 124.39(B), a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave may not receive credit under R.C. 124.38 for the amount of sick leave for which no cash payment was made when he is subsequently employed in the public service by a county in a non-bargaining unit position and no collective bargaining agreement or local policy grants him such a benefit.

2. Rule 123:1-32-10(B)(1)(b) does not authorize a county that employs a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave to grant him credit for the amount of sick leave for which no cash payment was made.

To: Ryan Styer, Tuscarawas County Prosecuting Attorney, New Philadelphia, Ohio

By: Michael DeWine, Ohio Attorney General, December 7, 2011

You have requested an opinion regarding the crediting of previously accrued, unused sick leave when a retired city police officer is subsequently employed by a county. You ask us to advise you whether a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave may receive credit for the amount of sick leave for which no cash payment was made when he is subsequently employed by a county in a non-bargaining unit position.¹

Background

In your letter, you explain that the following facts prompted your question:²

The employee in question was a former [city] Police Officer who retired. Under the terms of a collective bargaining agreement the employee was paid for 960 hours of his accrued but unused sick leave to a lump sum payment upon retirement. The employee had a balance of 2181 hours of sick leave upon retirement. The payment by the [city] was authorized by the collective bargaining agreement and presumably R.C. 124.39(B). The statute indicates that the payment “. . . eliminates all sick leave credit accrued but unused by the employee at the time payment is made”

Ohio Admin. Code 123:1-32-10(B)(1)(b) indicates that an employee shall upon reemployment in the public service have restored all unused sick leave credit which was not converted to a cash benefit where the employee is reemployed within ten years.

The employee has taken the position that a “balance” of 1,221

¹ Your question involves a city police officer who separated from active service with the city by taking a service retirement under the Ohio Police and Fire Pension Fund. *See* R.C. Chapter 742 (providing for the establishment and operation of the Ohio Police and Fire Pension Fund).

² An opinion of the Attorney General cannot make findings of fact or determinations regarding the particular rights of a retired city police officer who is subsequently employed by Tuscarawas County. *See* 2005 Op. Att’y Gen. No. 2005-020 at 2-188. We are able, however, by means of this opinion, to address in general terms the question presented by your request.

hours exists after the payment made by the [city], which must be carried over and recognized by the county upon his reemployment with the [county] under the provisions of Ohio Admin. Code 123:1-32-10(B)(1)(b). This position assumes that the “balance” of 1,221 hours, which was not converted to a cash payment, should be recognized by the county upon reemployment. In other words, the employee wishes to “carry over” what he feels is 1,221 hours of accrued, but unused sick leave credit. (Footnotes omitted.)

You have informed us further that at the time the city police officer retired, no collective bargaining agreement covering his wages, hours, and terms and conditions of employment permitted him to be paid for only a portion of his total accrued, unused sick leave and retain for possible future use the amount of sick leave that was not converted to a cash benefit and paid to him.³ See R.C. 4117.03; R.C. 4117.08; R.C. 4117.10; 2009 Op. Att’y Gen. No. 2009-009 at 2-78; 2000 Op. Att’y Gen. No. 2000-020 (syllabus, paragraph 3); 1987 Op. Att’y Gen. No. 87-041 at 2-272 and 2-273. Nor did the city have a policy conferring such a benefit. See R.C. 124.39(C); 2000 Op. Att’y Gen. No. 2000-020 (syllabus, paragraph 2). Also, the county appointing authority in question has not adopted pursuant to R.C. 124.38 an alternative schedule of sick leave granting the retired city police officer credit for his previously accrued, unused sick leave that was not converted to a cash benefit and paid to him when he retired.⁴ See 2009 Op. Att’y Gen. No. 2009-009 at 2-79 through 2-85. *But see* 2005 Op. Att’y Gen. No. 2005-020 at 2-200.

³ The collective bargaining agreement in question entitled a city police officer who retired from active service with the city to be “paid a conversion allowance of a sum equal to the accumulated and unused sick leave credit of such [officer], as provided in [the collective bargaining agreement], up to but not exceeding, an amount equal to nine hundred sixty (960) hours of pay, at the employee’s rate of pay at the time of retirement without premiums added.” A Labor Agreement Between the City of Dover and Fraternal Order of Police Lodge 4—Dover Division, Art. 19, § 19.1 (eff. Jan. 1, 2006 through Dec. 31, 2008). See *generally* 2009 Op. Att’y Gen. No. 2009-009 at 2-77 (“a collective bargaining agreement must, in order to preempt state statute, expressly address a benefit, by either affirmatively eliminating the benefit or specifically varying it”).

⁴ It is not clear whether R.C. 124.38 authorizes a county appointing authority to adopt an alternative schedule of sick leave that grants a retired city police officer who is employed by the county appointing authority credit for previously accrued, unused sick leave that was not converted to a cash benefit and paid to him when he retired. Compare 2009 Op. Att’y Gen. No. 2009-009 at 2-79 through 2-85 (an alternative schedule of vacation leave adopted under R.C. 325.19(F) may alter benefits established under statutes other than R.C. 325.19), with 2005 Op. Att’y Gen. No. 2005-020 at 2-200 (an alternative schedule of sick leave adopted under R.C. 124.38 may not grant “payment for [accrued,] unused sick leave upon termination of employment other than retirement. Rather, benefits of this nature may be provided only pursuant to R.C. 124.39”). Because you have stated that no such alternative schedule of sick leave applies in your particular situation, we do not

Your question thus concerns a situation in which no collective bargaining agreement or local policy permits a retired city police officer who received a cash payment for only a portion of his total accrued, unused sick leave to receive credit for the amount of sick leave for which no cash payment was made if he is subsequently employed by a county. This means that the retired city police officer is subject to the statutes governing the future use of accrued, unused sick leave that was not converted to a cash benefit and paid to him when he retired. *See generally* 2005 Op. Att’y Gen. No. 2005-020 at 2-188 (“[u]nder Ohio law, the provision of a fringe benefit, such as sick leave or payment for accrued, unused sick leave, constitutes part of the compensation of a public employee. The entity with authority to fix an employee’s compensation is permitted to grant the employee fringe benefits in excess of the minimums provided by statute, subject to any statutory restrictions”); 1981 Op. Att’y Gen. No. 81-052 at 2-202 (“the authority to provide fringe benefits flows directly from the authority to set compensation and is circumscribed only by apposite statutory authority which either ensures a minimum benefit entitlement or otherwise constricts the employer’s authority *vis a vis* a particular fringe benefit”).

Authority of a County to Grant Credit for Previously Accrued, Unused Sick Leave under R.C. 124.38 and R.C. 124.39(B)

In order to address your question, it is necessary to examine R.C. 124.38 and R.C. 124.39(B) and the relationship between the two statutes with respect to granting credit for previously accrued, unused sick leave. R.C. 124.38 establishes sick leave benefits for county and city employees, *see* 2008 Op. Att’y Gen. No. 2008-017 at 2-189, and addresses the amount of sick leave granted, the manner in which and purposes for which sick leave may be used, the accumulation of sick leave, and the granting of credit for previously accrued, unused sick leave, 2005 Op. Att’y Gen. No. 2005-020 at 2-189. R.C. 124.38 provides, in pertinent part:

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

(A) Employees in the various offices of the county, municipal, and civil service township service, other than superintendents and management employees, as defined in [R.C. 5126.20], of county boards of developmental disabilities[.]

.....

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 that could be communicated to other employees, and 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 hour of absence from previously scheduled work.

consider whether a county appointing authority may adopt such a schedule under R.C. 124.38.

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. (Emphasis added.)

See 2 Ohio Admin. Code 123:1-32-10(B)(1)(b) (a public employee who accrued sick leave under R.C. 124.38 and separated from public service may, in certain circumstances, receive credit for accrued, unused sick leave "upon reemployment in the public service"). R.C. 124.38 thus requires a former city police officer to be credited, in certain circumstances, for previously accrued, unused sick leave when he is subsequently employed in the public service by a county. See 2008 Op. Att'y Gen. No. 2008-017 at 2-189; 1994 Op. Att'y Gen. No. 94-009 at 2-38 and 2-39 (modified, in part, on other grounds by 2009 Op. Att'y Gen. No. 2009-009 (syllabus, paragraphs 3 and 4)). See generally 1994 Op. Att'y Gen. No. 94-078 at 2-391 ("[i]ncluded within the meaning of 'public service,' as that term is used in R.C. 124.38(C), . . . is service with the . . . counties").

R.C. 124.39(B) addresses sick leave benefits for city and county employees that are related to, but different from, the sick leave benefits outlined in R.C. 124.38. While R.C. 124.38 provides for the accrual and use of sick leave, R.C. 124.39(B) addresses payment for accrued, unused sick leave. See 2005 Op. Att'y Gen. No. 2005-020 at 2-191. R.C. 124.39(B) states:

Except as provided in division (C) of this section, an employee of a political subdivision covered by [R.C. 124.38 or R.C. 3319.141] may elect, at the time of retirement⁵ from active service with the political subdivision, and with ten or more years of service

⁵ For purposes of R.C. 124.39, the term "retirement" means "disability or service retirement under any state or municipal retirement system in this state." R.C. 124.39; see also *Kanieski v. Village of Northfield*, C.A. No. 13096, 1987 Ohio App. LEXIS 9075, at *3 (Summit County Oct. 7, 1987) (the term "retirement," as used in R.C. 124.39, denotes "the withdrawal from one's position or occupation under a formal procedure"); 1974 Op. Att'y Gen. No. 74-022 at 2-108 ("[r]etirement specifically denotes the termination of employment after a certain number of years of service, according to a formal procedure"). A city police officer who separated from active service with the city by taking a service retirement under the Ohio Police and Fire Pension Fund has retired from the active service of a political subdivision for purposes of R.C. 124.39(B). See generally R.C. Chapter 742 (setting forth the eligibility standards, processing requirements, and benefits associated with the Ohio Police and Fire Pension Fund); 2003 Op. Att'y Gen. No. 2003-038 at 2-317 (for purposes of R.C. 124.39, "the act of taking service retirement or disability retirement is a statutorily defined and legally significant event vesting certain rights and obligations in both the retiring employee and the retirement system").

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 and footnote added.)

See also R.C. 124.38(A) (providing sick leave benefits to city and county employees).

Pursuant to R.C. 124.39(B), a city police officer who retires from the active service of the city and elects to receive a cash payment for only a portion of his total accrued, unused sick leave has all sick leave for which no cash payment was made eliminated.⁶ In other words, if a city police officer retires from active service with the city and elects to receive a cash payment for only a portion of his total accrued, unused sick leave, R.C. 124.39(B) does not allow him to receive credit for the amount of sick leave for which no cash payment was made when he is subsequently employed by a county.

Reading R.C. 124.38 and R.C. 124.39(B) together, 1994 Op. Att'y Gen. No. 94-009 determined that the provisions outlined in R.C. 124.38 for the crediting of accrued, unused sick leave apply when a person retires from the public service and is subsequently employed in the public service by a county, provided the person did not elect to receive payment under R.C. 124.39(B) for accrued, unused sick leave and the subsequent employment occurs within 10 years of his retirement from public service. *See generally State ex rel. Comm. for the Proposed Ordinance to Repeal Ordinance No. 146-02, West End Blight Designation v. City of Lakewood*, 100 Ohio St. 3d 252, 2003-Ohio-5771, 798 N.E.2d 362, at ¶20 (2003) (statutes relating to the same subject matter should be construed together and harmonized so as to give full application to the statutes). In reaching this conclusion, the opinion stated at 2-38 and 2-39:

⁶ R.C. 124.39(B) does not require a city police officer who retires from active service with the city to be paid in cash for accrued, unused sick leave upon retirement in lieu of having such leave placed to his credit if subsequently employed in the public service in accordance with R.C. 124.38. *See* 2003 Op. Att'y Gen. No. 2003-038 at 2-316 n.1; 1994 Op. Att'y Gen. No. 94-009 at 2-38 and 2-39 (modified, in part, on other grounds by 2009 Op. Att'y Gen. No. 2009-009 (syllabus, paragraphs 3 and 4)); *see also* R.C. 124.38; 2000 Op. Att'y Gen. No. 2000-020. *See generally* 2005 Op. Att'y Gen. No. 2005-020 at 2-192 n.5 (pursuant to R.C. 124.39(B), 'a qualified employee has the option of deciding whether to be paid for unused sick leave credit upon retirement. A decision to be paid may affect the employee's ability to have unused sick leave placed to the employee's credit upon reemployment in public service' (citations omitted)).

The word “separated,” as used in R.C. 124.38, is not defined by statute. As used in R.C. 325.19, concerning county employees’ vacation leave, however, the word “separation” has been interpreted as including such employment actions as: leaving county employment to become employed by another county, 1983 Op. Att’y Gen. No. 83-074; leaving employment with one county appointing authority to become employed by a different appointing authority within the same county, 1981 Op. Att’y Gen. No. 81-001; and leaving county employment to serve as an officer of the county, 1980 Op. Att’y Gen. No. 80-057. An element common to these three situations is a termination of one’s employment. Because both R.C. 325.19 and R.C. 124.38 relate to fringe benefits of county employees, it is reasonable to conclude that those employment actions that constitute a separation from employment for purposes of R.C. 325.19 also constitute a separation from employment under R.C. 124.38. Thus, a termination of county employment constitutes a separation for purposes of R.C. 124.38.

As stated by the clerk of courts, the employee about whom you ask terminated her employment in order to retire under [the Public Employees Retirement System]. Even though this individual became reemployed on the first day of the month following the termination of her employment, she already had “been separated from the public service” within the meaning of R.C. 124.38(C). Thus, if this employee did not elect to receive payment under R.C. 124.39(B), because her reemployment occurred within ten years of her last termination from public service, R.C. 124.38 entitles her to receive credit in her new employment for the unused sick leave she accumulated in her county employment prior to her separation.

As clarified in 1994 Op. Att’y Gen. No. 94-009, if a city or county employee does not elect to take a cash payment for accrued, unused sick leave when he retires from the city or county, respectively, R.C. 124.39(B) does not apply and the employee may receive credit under R.C. 124.38 for his previously accrued, unused sick leave when he is subsequently employed in the public service by a county, provided the subsequent employment occurs within 10 years of the employee’s retirement from public service with the city or county, respectively. *See* 1994 Op. Att’y Gen. No. 94-009 (syllabus, paragraph 4). Conversely, if a city or county employee retires from active service with the city or county, respectively, and elects to receive a cash payment for only a portion of his total accrued, unused sick leave, R.C. 124.39(B) does not allow him to receive credit under R.C. 124.38 for the amount of sick leave for which no cash payment was made when he is subsequently employed in the public service by a county. *See id.* In such a situation, R.C. 124.39(B) eliminates the sick leave for which no cash payment was made.

This means that, unless R.C. 124.39(B)’s directive that payment of accrued, unused sick leave “eliminates all sick leave credit accrued but unused by the employee at the time payment is made” is expressly superseded as provided by law, a city police officer who retired from active service with the city and elected to receive

a cash payment for only a portion of his total accrued, unused sick leave may not receive credit under R.C. 124.38 for the amount of sick leave for which no cash payment was made when he is subsequently employed in the public service by a county. Therefore, pursuant to R.C. 124.39(B), a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave may not receive credit under R.C. 124.38 for the amount of sick leave for which no cash payment was made when he is subsequently employed in the public service by a county in a non-bargaining unit position and no collective bargaining agreement or local policy grants him such a benefit.⁷

Applicability of 2 Ohio Admin. Code 123:1-32-10(B)(1)(b) when a Retired City Police Officer Is Subsequently Employed by a County

In your letter you state that it has been suggested that, notwithstanding R.C. 124.39(B), rule 123:1-32-10(B)(1)(b) authorizes a county that employs a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave to grant him credit for the amount of sick leave for which no cash payment was made. Rule 123:1-32-10(B)(1)(b) provides:

An employee who had previously accumulated sick leave credit under the provisions of [R.C. 124.38] shall upon reemployment in the public service have restored all unused sick leave credit which was not converted to a cash benefit under any policies or provisions established by the employee's employing agency or political subdivision provided the employee is reemployed within ten years. (Emphasis added.)

A city police officer is entitled to accrue sick leave credit under R.C. 124.38(A). *See* 2008 Op. Att'y Gen. No. 2008-017 at 2-189. For this reason, rule 123:1-32-10(B)(1)(b) requires a former city police officer to be credited, in certain circumstances, for previously accrued, unused sick leave when he is subsequently employed in the public service by a county.⁸

In determining the instances in which rule 123:1-32-10(B)(1)(b) applies, we

⁷ In your particular situation, neither the city nor county has taken appropriate action to supersede R.C. 124.39(B)'s command that payment of accrued, unused sick leave "eliminates all sick leave credit accrued but unused by the employee at the time payment is made." In the absence of such action, R.C. 124.39(B) applies and a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave may not receive credit under R.C. 124.38 for the amount of sick leave for which no cash payment was made when he is subsequently employed in the public service by Tuscarawas County.

⁸ The Ohio Administrative Code does not define the term "public service" for purposes of 2 Ohio Admin. Code 123:1-32-10(B)(1)(b). However, as explained later in this opinion, rule 123:1-32-10(B)(1)(b) is to be construed in light of R.C. 124.38.

are guided by the fundamental principle that the purpose of an administrative rule is to facilitate and put into effect policy set forth by the General Assembly in legislative enactments. *See State ex rel. Am. Legion Post 25 v. Ohio Civil Rights Comm'n*, 117 Ohio St. 3d 441, 2008-Ohio-1261, 884 N.E.2d 589, at ¶14 (2008); *Hoffman v. State Med. Bd. of Ohio*, 113 Ohio St. 3d 376, 2007-Ohio-2201, 865 N.E.2d 1259, at ¶17 (2007). As a result, an administrative rule may not add to, or subtract from, legislative enactments. *State ex rel. Am. Legion Post 25 v. Ohio Civil Rights Comm'n*, at ¶14; *Hoffman v. State Med. Bd. of Ohio*, at ¶17. If it does so, the administrative rule conflicts with legislation enacted by the General Assembly, and the rule is invalid and unenforceable to the extent of the conflict. *State ex rel. Am. Legion Post 25 v. Ohio Civil Rights Comm'n*, at ¶14; *Hoffman v. State Med. Bd. of Ohio*, at ¶17. Accordingly, rule 123:1-32-10(B)(1)(b) must be applied in a manner that is consistent with the legislation that it is to effectuate.

Rule 123:1-32-10(B)(1)(b) concerns the granting of credit for previously accrued, unused sick leave to a person who accrued sick leave under R.C. 124.38 and separated from public service when the person is again employed in the public service. Rule 123:1-32-10(B)(1)(b) thus was adopted and promulgated to effectuate the provisions of R.C. 124.38 mandating the granting of credit for previously accrued, unused sick leave to a person who separates from public service and is again employed in the public service.

As we determined earlier, a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave may not receive credit under R.C. 124.38 for the amount of sick leave for which no cash payment was made when he is subsequently employed in the public service by a county. In other words, R.C. 124.38 does not authorize a county that employs a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave to grant him credit for the amount of sick leave for which no cash payment was made.

In the absence of such authority in R.C. 124.38, rule 123:1-32-10(B)(1)(b) may not be interpreted as authorizing a county that employs a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave to grant him credit for the

R.C. 124.38 entitles city and county employees to the sick leave benefits prescribed by that statute, including the crediting of previously accrued, unused sick leave when a former city or county employee is subsequently employed in the public service. *See* 2008 Op. Att'y Gen. No. 2008-017 at 2-189. 1994 Op. Att'y Gen. No. 94-078 examined the language of R.C. 124.38 conferring this benefit and interpreted the term "public service," as used therein, as meaning service with the state, counties, municipalities, civil service townships, and boards of education. 1994 Op. Att'y Gen. No. 94-078 at 2-391; *see also* 2008 Op. Att'y Gen. No. 2008-017 at 2-188 and 2-189. Accordingly, the term "public service," as used in R.C. 124.38 and rule 123:1-32-10(B)(1)(b), includes service with a county.

amount of sick leave for which no cash payment was made. *See State ex rel. Am. Legion Post 25 v. Ohio Civil Rights Comm'n*, at ¶14; *Hoffman v. State Med. Bd. of Ohio*, at ¶17. If rule 123:1-32-10(B)(1)(b) were construed to authorize the granting of such sick leave credit, the rule would impermissibly add to the language of R.C. 124.38 by requiring the county to grant sick leave credit in situations in which R.C. 124.38 does not authorize the county to do so. *See State ex rel. Am. Legion Post 25 v. Ohio Civil Rights Comm'n*, at ¶14; *Hoffman v. State Med. Bd. of Ohio*, at ¶17.

Moreover, a construction of rule 123:1-32-10(B)(1)(b) requiring a county that employs a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave to grant him credit for the amount of sick leave for which no cash payment was made would conflict with R.C. 124.39(B). As stated previously, if a city police officer retires from active service with the city and elects to receive a cash payment for only a portion of his total accrued, unused sick leave, R.C. 124.39(B) does not allow him to receive credit for the amount of sick leave for which no cash payment was made when he is subsequently employed by a county. Thus, to the extent that an administrative rule may not conflict with legislation enacted by the General Assembly, rule 123:1-32-10(B)(1)(b) may not be construed as authorizing a county that employs a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave to grant him credit for the amount of sick leave for which no cash payment was made. *See State ex rel. Am. Legion Post 25 v. Ohio Civil Rights Comm'n*, at ¶14; *Hoffman v. State Med. Bd. of Ohio*, at ¶17. Therefore, since rule 123:1-32-10(B)(1)(b) may not be interpreted in a manner that adds to the language of R.C. 124.38 or conflicts with R.C. 124.39(B), it follows that rule 123:1-32-10(B)(1)(b) does not authorize a county that employs a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave to grant him credit for the amount of sick leave for which no cash payment was made.

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. Pursuant to R.C. 124.39(B), a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave may not receive credit under R.C. 124.38 for the amount of sick leave for which no cash payment was made when he is subsequently employed in the public service by a county in a non-bargaining unit position and no collective bargaining agreement or local policy grants him such a benefit.
2. Rule 123:1-32-10(B)(1)(b) does not authorize a county that employs a city police officer who retired from active service with the city and elected to receive a cash payment for only a portion of his total accrued, unused sick leave to grant him credit for the amount of sick leave for which no cash payment was made.