OPINION NO. 83-060

Syllabus:

A general health district may formulate a policy concerning the payment of unused sick leave to its employees at retirement. The authority to adopt such a policy is not limited by R.C. 124.38-124.39 or any other statutory provision concerning the accumulation of or payment for sick leave benefits.

To: Gregory W. Happ, Medina County Prosecuting Attorney, Medina, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 21, 1983

I have before me your request for my opinion concerning the limitations, if any, on a general health district's authority to formulate a policy in regard to the payment of unused sick leave at retirement. More specifically, you wish to know whether a general health district's authority to formulate such a policy is limited by R.C. 124.38, R.C. 124.39, or any other statutory provisions.

In Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), the court faced the question of whether a board of mental retardation has the power to grant sick leave benefits in excess of the minimum amounts prescribed in R.C. 124.38. The court stated that because R.C. 5126.03(C)[1] granted boards of mental retardation the authority to "employ such personnel. . .as are necessary," such boards had the power to fix compensation--including fringe benefits--associated with the employment. The court held that this power to fix fringe benefits included the power to fix sick leave benefits in excess of the minimum amounts guaranteed by R.C. 124.38.

The rationale employed in Ebert was not limited to the particular facts of that case. In 1981 Op. Att'y Gen. No. 81-052, at 2-202, my predecessor had occasion to note:

> The court spoke in general, unlimited terms: fringe benefits are compensation; a legislative grant of power to employ necessarily includes the power to fix compensation, which includes fringe benefits. The rationale in Ebert, then, necessarily extends to any creature of statute and establishes the proposition that the power to employ includes the power to fix any fringe benefit--absent constricting statutory authority.

In applying the Ebert rationale to the question under consideration, it is clear that a general health district is a creature of statute, see R.C. 3709.01, which has been granted authority to employ such persons "as are necessary for the proper conduct of its work." R.C. 3709.13. A general health district also has authority to "determine the duties and fix the salaries of its employees." R.C. 3709.16. See also R.C. 3709.15. In 1980 Op. Att'y Gen. No. 80-087, my predecessor viewed these powers as being equivalent, in respect to the authority to grant fringe benefits, to the power to employ then granted to boards of mental retardation by R.C. 5126.03(C). He concluded, at 2-340, that, "therefore. . .a general health district also possesses the authority to determine the type and amount of fringe benefits--including sick leave, vacation, and overtime--to which its employees are entitled as part of their compensation, subject only to any limits imposed by statute." I concur with that conclusion.

It also is clear that the payment of unused sick leave is a fringe benefit. In Madden v. Bower, 20 Ohio St. 2d 135, 137, 254 N.E.2d 357, 359 (1969), the court stated that a fringe benefit is merely something provided at the expense of the

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[1] Former R.C. 5126.03(C) has been amended and renumbered by Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 21, 1980).

employer to induce an employee to continue his employment. See also State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 391, 348 N.E.2d 692, 693-94 (1976); 1982 Op. Att'y Gen. No. 82-037 at 2-110. The payment of unused sick leave obviously is an expense to an employer and an inducement to an employee to continue his employment. Therefore, I conclude that the power to employ, granted to a general health district by R.C. 3709.13, 3709.15, and 3709.16, includes the authority to formulate policies for the payment of unused sick leave at retirement. I next turn to the question of whether such authority is limited by statute.

You specifically ask whether R.C. 124.38 constricts the authority of a general health district to establish a sick leave payment policy for its employees. In Op. No. 80-087, my predecessor considered whether R.C. 124.38, as worded at the time, applied to employees of a general health district. When Op. No. 80-087 was issued, R.C. 124.38 prescribed minimum levels of sick leave benefits for "each employee, whose salary or wage is paid in whole or in part by the state, each employee in the various offices of the county, municipal, and civil service township service, and each employee of any board of education for whom sick leave is not provided by [R.C. 3319.14]." 1974 Ohio Laws 693, 700 (Am. H.B. 513, eff. Aug. 9, 1974). My predecessor, overruling 1976 Op. Att'y Gen. No. 76-018, concluded, on the basis that a general health district is a distinct political subdivision, that the provisions of R.C. 124.38 did not apply. Subsequent to the issuance of Op. No. 80-087, the coverage of R.C. 124.38 was narrowed. That section now establishes sick leave benefits for "[e]ach employee in the various offices of the county, municipal, and civil service township service, each employee of any state college or university, and each employee of any board of education for whom sick leave is not provided by [R.C. 3319.141]." Although the legislature has amended R.C. 124.38 since issuance of Op. No. 80-087, it has not extended the benefits of R.C. 124.38 to general health district employees. Moreover, the only arguable basis for including general health districts within the purview of R.C. 124.38 was the language covering employees "whose salary or wage is paid in whole or in part by the state." See Op. No. 80-087, at 2-341 to 2-342. That language has been eliminated in the amended version of R.C. 124.38.[2] Thus, under existing law, I reassert the conclusion reached in Op. No. 80-087 that R.C. 124.38 does not restrict the capacity of a general health district to establish sick leave benefits.

I next turn to the issue of the applicability of R.C. 124.39 to general health districts. It is obvious that divisions (A), (B), and (D) do not apply to general health districts.[3] Division (C) authorizes a "political subdivision" to adopt a policy allowing a larger payment of unused sick leave than set forth in division (B), allowing a lesser number of years of service before payment may be made than set forth in division (B), permitting more than one payment per employee, or permitting payment upon termination other than retirement. Division (C) does not prescribe a minimum level of sick leave benefits. It does constrict the authority of a political subdivision to adopt a sick leave payment policy which differs from that set forth in R.C. 124.39(B) in ways other than those specifically authorized by R.C. 124.39(C). See Op. No. 81-052, at 2-204. This limitation is applicable only to political subdivisions to which R.C. 124.39(B) applies, for division (C) is superfluous

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2 Sick leave for state employees is now covered by R.C. 124.382. The provisions of R.C. 124.382 apply to "all employees whose salary or wage is paid directly by warrant of the auditor of state." R.C. 124.382(B). It is clear that this language does not include employees of general health districts, because R.C. 3709.31 provides that the auditor of the county which constitutes all or a major portion of a general health district shall act as the auditor for and pay the expenses of a general health district. For the same reasons, the provisions of R.C. 124.383-.386 do not apply to employees of general health districts.

3 Division (A) applies to "[a]n employee of a state college or university." Division (B) applies to "an employee of a political subdivision covered by section 124.38 or 3319.141 of the Revised Code." Division (D) applies "[i]n case of death of an employee whose salary or wage was paid directly by warrant of the auditor of state."

unless it is read with reference to division (B). As my predecessor had occasion to state in 1981 Op. Att'y Gen. No. 81-015, at 2-58:

> I believe that the legislature intended that R.C. 124.39(B) and (C) be read in pari materia, so that "political subdivision," as used in R.C. 124.38(C), is modified by the words, "covered by section 124.38 or 3319.141 of the Revised Code," the language used to describe the types of political subdivisions covered by R.C. 124.39(B). If a subdivision is not bound by the minimums established by R.C. 124.39(B), there is no need to authorize such subdivision to grant sick leave benefits in excess of those minimums. Thus, the only type of political subdivision which is authorized to formulate a policy for payment for unused sick leave pursuant to R.C. 124.39(C) is a "political subdivision covered by section 124.38 or 3319.141 of the Revised Code." (Footnote omitted.)

For this reason, division (C) cannot be construed as limiting a general health district's power to fix fringe benefit levels.

Based upon the foregoing, I conclude that a general health district's authority to formulate a policy concerning the payment of unused sick leave at retirement is not limited by R.C. 124.38 or 124.39. I am not aware of any other statute limiting such authority.

Therefore, it is my opinion, and you are so advised, that a general health district may formulate a policy concerning the payment of unused sick leave to its employees at retirement. The authority to adopt such a policy is not limited by R.C. 124.38-124.39 or any other statutory provision concerning the accumulation of or payment for sick leave benefits.