August 30, 1994

OPINION NO. 94-054

The Honorable Alan R. Mayberry
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402

Dear Prosecutor Mayberry:

You have requested an opinion concerning the treatment of payments to members of boards of general health districts under R.C. 3709.02 for purposes of enrollment of these board members in the Public Employees Retirement System (PERS). You specifically ask:

1) Is the permissive payment - pursuant to Revised Code §3709.02 - of a "sum not to exceed eighty dollars a day" subject to PERS?

2) Was the mandatory payment - pursuant to former Revised Code §3709.02 - of "twenty dollars a day" subject to PERS?

3) If so, is PERS enrollment retroactive to the commencement of service on such board?

**Public Employees Retirement System Generally**

Pursuant to R.C. 145.03(A):

> A public employees retirement system is hereby created for the *public employees* of the state and of the several local authorities mentioned in [R.C. 145.01]. Except as provided in division (B) of this section, membership in the system is compulsory upon being employed and shall continue as long as public employment continues. (Emphasis added.)

In accordance with R.C. 145.47, each public employee who is a contributor to PERS shall contribute a certain percentage of his "earnable salary" to the employees' savings fund. *See* R.C. 145.23(A) (employees' savings fund). Pursuant to R.C. 145.48, the employer's contribution is also fixed as a certain percentage of the "earnable salary" of all contributors. *See generally* R.C. 145.01(F)

(defining "contributor" as "any person who has an account in the employees' savings fund created by [R.C. 145.23]").

**"Public Employees"**

For purposes of R.C. Chapter 145, the term "public employee" is defined as meaning, in part: "[a]ny person holding an office, not elective, under the state or any county, ... [or] health district ... or employed and paid in whole or in part by the state or any of the authorities named in this division in any capacity not covered by [R.C. 742.01, R.C. 3307.01, R.C. 3309.01, or R.C. 5505.01]." R.C. 145.01(A)(1). In those situations where the status of a person as a public employee is uncertain, however, "the public employees retirement board shall determine whether any person is a public employee, and its decision shall be final." *Id.*

**General Health District Board Members**

Members of the board of health of a general health district are appointed in accordance with R.C. 3709.03 and are to serve a fixed term. R.C. 3709.02. Thus a member of the board of health of a general health district, holding a non-elective office in a health district, appears to come within the definition of the term "public employee," as set forth in R.C. 145.01(A)(1).

**"Earnable Salary"**

The definition of "earnable salary," as used in R.C. Chapter 145, is set forth in R.C. 145.01(R), which states in part: "Except as otherwise provided in this division, _earnable salary_ means all salary, wages, and other earnings paid to a contributor by reason of his employment in a position covered by the retirement system." R.C. 145.01(R). R.C. 145.01(R)(2), however, lists certain items that are expressly excluded from the meaning of "earnable salary," such as:

> (c) Incidental benefits including lodging, food, laundry, parking, or services furnished by the employer, or use of the employer's property or equipment, or amounts paid by the employer to the contributor in lieu of providing such incidental benefits; [and]
> (d) Reimbursement for job-related expenses authorized by the employer including moving and travel expenses and expenses related to professional development.

**Payments to General Health District Board Members**

General health district board members are paid pursuant to R.C. 3709.02, which states in pertinent part:

> Each member of the board may be paid *a sum* not to exceed eighty dollars a day *and mileage* to and from the place of meeting at the rate established by the director of budget and management pursuant to [R.C. 126.31] to cover the actual and necessary *expenses incurred during his attendance at any meeting* of the board and not exceeding five meetings of board committees in any one year. (Emphasis added.)

As concluded in 1994 Op. Att'y Gen. No. 94-023, payments under R.C. 3709.02 are only for mileage travelled to and from the specified meetings in one's capacity as a member of the board, and for actual and necessary expenses other than mileage incurred by a board member in attending such meetings, again in one's capacity as a board member. Thus payments made under R.C. 3709.02 constitute "[r]eimbursement for job-related expenses authorized by the employer," and are, therefore, excluded from "earnable salary" by R.C. 145.01(R)(2)(d).

**Payments under Prior Version of R.C. 3709.02**

Your second question asks whether the payment of twenty dollars per day under a prior version of R.C. 3709.02 was subject to PERS contributions. Your third question asks, in the event that payments under the prior version of R.C. 3709.02 were subject to contributions under R.C. Chapter 145, whether a board member should have been a member of PERS from the time of receipt of such payment. Prior to its amendment in Am. S.B. 297, 119th Gen. A. (1992) (eff. April 16, 1993), R.C. 3709.02 stated in pertinent part:

> Each member of the board shall be paid twenty dollars a day and mileage at the rate of fifteen cents a mile to and from the place of meeting to cover the actual and necessary expenses incurred during his attendance at any meeting of the board and not exceeding five meetings of board committees in any one year.

1977-1978 Ohio Laws, Part II, 3701 (H.B. 1009, eff. March 8, 1979). Thus R.C. 3709.02 formerly provided that each board member receive, in addition to mileage, twenty dollars per day "to cover the actual and necessary expenses" incurred in attending certain meetings. Although the amount paid to a board member was changed in Am. S.B. 297, the nature of the payment as reimbursement rather than salary remained unchanged.

During the period since the amendment of R.C. 3709.02 in H.B. 1009, there have also been a number of changes in the statutory scheme governing PERS. A significant change was made in 1985-1986 Ohio Laws, Part III, 4668 (Am. H.B. 502, eff. April 24, 1986), in which the definition of "earnable salary" was amended to expressly include and exclude certain items, e.g., R.C. 145.01(R)(2)(d) (excluding reimbursements for job-related expenses from earnable salary).

Prior to its amendment in Am. H.B. 502, R.C. 145.01(S) defined "[s]alary earnable" as meaning:

> salary or wages receivable during a payroll period for personal services plus such allowance for maintenance as are certified by the heads of departments. Fees and commissions, paid to employees for special services, over and above regular salary payments or fees and commissions paid as sole compensation for services, shall not be used in computing "final average salary."

1965 Ohio Laws 130 (Am. Sub. H.B. 225, eff. Nov. 13, 1965). Included as "salary earnable" were salary or wages received for personal services. Because payments made to general health district board members under former R.C. 3709.02 were not payments of salary or wages, but rather reimbursements "to cover ... actual and necessary expenses," such payments were neither "salary earnable," as that term was defined in Am. Sub. H.B. 225, nor "earnable salary," as defined in H.B. 502.

**PERS Discretion Concerning Questions of Membership**

As a final matter, it must be remembered that Ohio law gives the Public Employees Retirement Board certain discretion over questions of membership and what may be included in "earnable salary." *See, e.g.*, R.C. 145.01(A)(1) ("[i]n all cases of doubt, the public employees retirement board shall determine whether any person is a public employee, and its decision shall be final");[1] R.C. 145.01(R)(3) ("[t]he retirement board shall determine by rule whether any compensation not enumerated in this division is earnable salary, and its decision shall be final"). Thus, in any instance where there may be doubt about whether particular payments received by an individual constitute "earnable salary" for purposes of R.C. Chapter 145, or whether a particular individual qualifies for membership in PERS, it should be recognized that the final determination of such matter ultimately falls within the statutory purview of the Public Employees Retirement Board.

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[1] *See, e.g.*, 1989 Op. Att'y Gen. No. 89-063 (employees of regional council of governments); 1975 Op. Att'y Gen. No. 75-075 (syllabus, paragraph three) ("[i]n those cases in which an individual does not fit squarely within one of the several classes described therein, R.C. 145.01 expressly provides that the public employees retirement board shall determine whether any person is a public employee").

**Conclusion**

Based on the foregoing, it is my opinion, and you are hereby advised that a general health district board member who receives payment under R.C. 3709.02, as amended in Am. S.B. 297, 119th Gen. A. (1992) (eff. April 16, 1993), receives no "earnable salary," as that term is defined in R.C. 145.01(R), for purposes of R.C. Chapter 145.

Respectfully,

LEE FISHER
Attorney General

August 30, 1994

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SYLLABUS: 94-054

A general health district board member who receives payment under R.C. 3709.02, as amended in Am. S.B. 297, 119th Gen. A. (1992) (eff. April 16, 1993), receives no "earnable salary," as that term is defined in R.C. 145.01(R), for purposes of R.C. Chapter 145.