November 16, 1993

OPINION NO. 93-036

The Honorable Thomas E. Ferguson
Auditor of State
88 East Broad Street
Columbus, Ohio 43266-1140

Dear Auditor Ferguson:

You have requested an opinion regarding disability benefits under the Public Employees Retirement System (PERS) or the Police and Firemen's Disability and Pension Fund (PFDPF). Your questions relate to the ability of a member of the system to remain on active pay status while the member's application for a disability benefit is being considered.

Application for a Disability Benefit from PERS

Your first question is whether PERS "may consider a member's application for disability while that member is still being compensated for services performed on behalf of his employer or is still on active pay status." The term "active pay status" means "the conditions under which an employee is eligible to receive pay, and includes, but is not limited to, vacation leave, sick leave, personal leave, bereavement leave, and administrative leave." R.C. 124.382(A)(3) (defined for purposes of R.C. 124.382, .383, .386, .387, .388); *see also* 2 Ohio Admin. Code 123:1-47-01(A)(2). This term contrasts with "no pay status," which refers to the conditions under which an employee is ineligible to receive pay, including leave without pay, leave of absence, and disability leave. R.C. 124.382(A)(4), (5); *see also* 2 Ohio Admin. Code 123:1-47-01(A)(31), (48), (51).

The procedure for applying for a disability benefit under PERS is prescribed by R.C. 145.35. Application may be made by a member, by a person acting in the member's behalf, or by the member's employer, provided that the member has disability coverage and is not receiving a disability benefit under any other Ohio state or municipal retirement program. *See* R.C. 145.35(B), (C). With respect to the timing of the filing of the application, R.C. 145.35(C) states:

Application must be made within two years from the date the member's contributing service

> terminated, unless the [public employees] retirement board determines that the member's medical records demonstrate conclusively that at the time the two-year period expired, the member was physically or mentally incapacitated for duty and unable to make an application.

"Contributing service" means service for which contributions are made to PERS. R.C. 145.01(T).

After a member applies for a disability benefit, medical examination of the member is conducted "by a competent disinterested physician or physicians selected by the board to determine whether the member is mentally or physically incapacitated for the performance of duty by a disabling condition either permanent or presumed to be permanent." R.C. 145.35(E). If the physician or physicians determine that the member qualifies for a disability benefit and the Public Employees Retirement Board concurs, the member is entitled to receive a disability benefit:

effective on the first day of the month immediately following the later of the following:

(1) The last day for which compensation was paid;
(2) The attainment of eligibility for a disability benefit.

R.C. 145.35(D). By providing that the disability benefit is effective on the later of the last day for which compensation was paid and the date on which eligibility for a disability benefit was attained, R.C. 145.35(D) clearly contemplates that a member may attain eligibility for a disability benefit prior to the last day for which compensation is paid. It follows that the disability may exist while the member is still employed and engaged in contributing service. *See* R.C. 145.35(C).

The statutes and rules nowhere state that an application for a disability benefit may not be considered if a PERS member is still being compensated for services performed or is still on active pay status, as, for example, on vacation or sick leave. As discussed above, the language of R.C. 145.35(D) indicates that an individual may attain eligibility for a disability benefit prior to the last day for which compensation is paid. It follows that PERS may consider a member's application for a disability benefit while that member is being compensated for services performed on behalf of his employer or is on some form of paid leave, such as vacation or sick leave.

The statutes governing application for PERS disability benefits require that an applicant undergo medical examination to establish eligibility for a disability benefit. A disability benefit may be awarded only if the examining physicians and the Board agree that the member is mentally or physically incapacitated for the performance of duty by a disabling condition that is either permanent or presumed to be permanent. R.C. 145.35(E). There is a possibility that an application will be denied. R.C. 145.35; *cf. Fair v. School Employees Retirement System*, 53 Ohio St. 2d 118, 372 N.E.2d 814 (1978) (the School Employees Retirement Board, rather than the employer, is responsible for determining whether a member of the retirement system is afflicted with a disease or physical impairment that will prevent the person from satisfactorily performing his assigned job duties). If a member continues to work after submitting an application for a disability benefit, the member's capacity to continue to work may be relevant to the factual determination as to whether the member is incapacitated for the performance of duty by a disabling condition. *See, e.g.*, 1990 Op.

Att'y Gen. No. 90-002 (State Highway Patrol Retirement System). *Compare* 20 C.F.R. §404.1520(b) (1993) (for purposes of determining disability under federal social security provisions: "[i]f you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience"). There is, however, no legal requirement that a member who applies for a disability benefit must, upon the filing of the application, cease to perform any further services for compensation or cease to be on active pay status.

Termination of Active Work Status When Application Is Made for a Disability Benefit from PERS

Your second question asks when an employee who has applied for a disability benefit must terminate his active work status. The term "active work status" is not defined by statute but is given the following definition by administrative rule: "conditions under which an employee is actually in a work status and is eligible to receive pay but does not include vacation pay, sick leave, personal leave, and disability leave." 2 Ohio Admin. Code 123:1-47-01(A)(3). Thus an employee is on active work status when he is actually working. An employee is not on active work status if he is being paid but is not working because he is on vacation or on some other kind of paid leave.

You suggest that the appropriate time for an employee to terminate his active work status might be when the employee's application for a disability benefit is filed with the Public Employees Retirement Board or when the Board renders its decision. R.C. 145.35 does not directly address this issue. The language of R.C. 145.35(D) quoted above does, however, indicate that payment of a disability benefit may not begin until an employee has ceased to receive compensation. The employee must, accordingly, cease to be on active pay status (and thus also cease to be on active work status) before he may receive a disability benefit. This conclusion is consistent with R.C. 145.362, which states that a disability benefit recipient shall be considered to be on leave of absence from his position of employment during the first five years following the effective date of a disability benefit.

Nothing in R.C. Chapter 145 or rules adopted thereunder prevents an employee from remaining on active pay status through the last day of the month before his disability benefit begins. The only statutory requirement is that a member of PERS must cease to receive compensation before he begins to receive a disability benefit. *See* R.C. 145.35(D). It may even be possible for a disabled member to remain on active work status while an application for a disability benefit is pending - perhaps through extraordinary efforts that enable him to perform for a limited period of time duties that he is found mentally or physically incapable of performing on a regular basis; through the employer's acceptance, for a limited period of time, of a level of performance that would not be adequate on a permanent basis; through temporary assignment to a different set of duties; or through some other sort of arrangement. The existence of arrangements of this nature is a matter between the employer and the member and is not the responsibility of PERS. *See generally* R.C. 4112.02(A), (L) (making it an unlawful discriminatory practice for an employer to discharge a handicapped person without just cause, or otherwise discriminate against a handicapped person in matters of employment, but specifying that there is no requirement that a handicapped person be

employed under circumstances that would significantly increase the occupational hazards affecting the handicapped person, other employees, the general public, or the facilities in which the work is performed, or in a job that requires the handicapped person routinely to undertake any task if its performance is substantially and inherently impaired by his handicap); Op. No. 90-002, at 2-7 (duty assignments of members of the State Highway Patrol Retirement System "sometimes are made to accommodate physical disabilities which make it impossible for some members to function on road duty, but which allow them to function fully in the jobs to which they are assigned"). The Board's responsibility is to determine whether the member qualifies for a disability benefit and, if the member does so qualify, to pay the benefit as provided by statute. *See* R.C. 145.35-.362. Again, however, it is clear that the fact that an individual is able to remain on active work status may be relevant to the question whether the individual is mentally or physically incapacitated for the performance of duty pursuant to R.C. 145.35(E).

Application for a Disability Benefit from PFDPF

You have also asked whether PFDPF may consider a member's application for total and permanent disability while that member is still being compensated for services performed as a police officer or firefighter or while that member remains on active pay status. R.C. 742.37(C) provides for the payment of disability benefits to a member of PFDPF who is permanently and totally disabled, or who is partially disabled if the disability prevents him from performing his official duties and impairs his earning capacity. R.C. 742.01(F) defines "total disability" as the "inability to perform the duties of any gainful occupation for which the member of the fund is reasonably fitted by training, experience, and accomplishments, provided that absolute helplessness is not a prerequisite of total disability." "Permanent disability" is defined as "a condition of disability with respect to which the board of trustees of [PFDPF] finds there is no present indication of recovery." R.C. 742.01(G). In determining whether a disability exists, the Board of Trustees of PFDPF considers, and bases its findings on, all competent evidence made available to it, including medical testimony, opinions, and statements. R.C. 742.01(G). The Board may grant or deny an application for a disability benefit, or may postpone its determination pending an additional examination or the receipt of additional facts. 3 Ohio Admin. Code 742-3-05(A)(2).

Nothing in the statutes or rules governing the award of disability benefits by PFDPF indicates that a member may not be on active pay status or be compensated for services performed as a police officer or firefighter while the member's application for total and permanent disability is being considered. As with disability benefits under PERS, the fact that a member is able to continue to work may be relevant to the determination as to whether the member suffers from total and permanent disability. *See* R.C. 742.01(F), (G); R.C. 742.37; 3 Ohio Admin. Code 742-3-05. There is, however, no provision of law requiring a member to terminate his active pay status or cease working while the Board of Trustees of PFDPF is considering the member's application for total and permanent disability.

It is easy to see how a member might remain on active pay status while his application for total and permanent disability is pending, by drawing on accrued vacation or sick leave. It may be more difficult to imagine a situation in which a member who is able to continue his employment will

be found medically unable to perform the duties of any gainful occupation for which the member is reasonably fitted by training, experience, and accomplishments. That possibility cannot, however, be ruled out as a matter of law, as absolute helplessness is not a prerequisite of total disability. R.C. 742.01(F). There will be questions of fact concerning the health and skills of each individual. The member and employer may be able to make accommodations to permit the member to perform services during the time that a disability application is pending. *See generally* Op. No. 90-002. As with PERS, the arrangements between the member and the employer are not the issue before PFDPF. *See generally Fair v. School Employees Retirement System.* The Board of Trustees of PFDPF is simply responsible for determining, on the basis of competent evidence, whether the member is in a state of total and permanent disability as those terms are defined in R.C. 742.01(F) and (G).

The PFDPF statutes permit a member who has sought a disability benefit to waive the disability benefit award. The member may refuse a disability award and continue to work. R.C. 742.37(C)(8); *see* 3 Ohio Admin. Code 742-3-05(A)(3)(b). No exception from the provision permitting waiver of a disability benefit is created for an application for total and permanent disability. The statutory scheme thus clearly contemplates that a member may continue to perform his job or remain on active pay status while the member's disability application is under consideration. *See, e.g., State ex rel. Kidd v. Board of Trustees of PFDPF,* 66 Ohio App. 3d 647, 585 N.E.2d 930 (Franklin County 1991), *mandamus granted*, No. 93AP-200 (Ct. App. Franklin County Sept. 28, 1993).

Potential Liability When Application Is Made for a Disability Benefit from PFDPF

Your final question is whether the employer of a member of PFDPF, or members of the Board of Trustees of PFDPF, individually or jointly, "could be held liable for any consequential damages incurred by reason of the continuing active work status of an individual who has already filed an application for either partial or total and permanent disability but on whose application there has not been a ruling." Your question does not indicate what sort of factual situation is contemplated or what types of damages might be alleged. Questions of liability must be determined by the courts on the basis of evidence presented in a particular case. Research has disclosed no Ohio cases that discuss the type of liability with which you are concerned. Whether liability may result if an individual continues to work after submitting an application for disability benefits is dependent upon the facts and legal principles that apply in a particular situation and cannot be determined by opinion of the Attorney General. *See generally, e.g.*, 1991 Op. Att'y Gen. No. 91-063. Accordingly, this opinion does not reach any firm conclusions with respect to potential liability but, instead, discusses general principles and statutory provisions that may be applied, as appropriate, to the specific circumstances that arise.

Potential Liability of an Employer of a Member of PFDPF

Members of PFDPF work for the State of Ohio or for political subdivisions of the state. *See* R.C. 742.01(A)-(E). Accordingly, the potential liability of their employers should be considered in light of the statutes governing the liability of those entities and their officers and employees.

R.C. Chapter 2744 governs the tort liability of political subdivisions. R.C. 2744.02 and 2744.03 define circumstances in which political subdivisions, or their employees, may be immune from liability or subject to liability. In general, "a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." R.C. 2744.02(A)(1). Exceptions exist for the negligent operation of motor vehicles and the negligent performance of acts of employees with respect to proprietary functions; specified defenses are provided for public police, fire, and emergency medical vehicles. R.C. 2744.02(B). Liability is imposed upon political subdivisions for certain failure to keep streets and roads in repair, for injuries caused by negligence and occurring in buildings used for governmental functions, and when expressly provided by statute. R.C. 2744.02(A)(3), (4), (5). Various defenses and immunities are provided by R.C. 2744.03. In particular, a political subdivision is immune from liability resulting "from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources, unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner." R.C. 2744.03(A)(5). Further, an employee is immune from liability unless his acts or omissions were manifestly outside the scope of his employment or official responsibilities, his acts or omissions were performed with malicious purpose, in bad faith or in a wanton or reckless manner, or liability is expressly imposed by statute. R.C. 2744.03(A)(6).

A political subdivision is required to provide for the defense of an employee in a civil action for damages allegedly resulting from an act or omission of the employee that occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities, and also to indemnify the employee in such circumstances for any judgment, other than a judgment for punitive or exemplary damages. R.C. 2744.07(A). A political subdivision may secure insurance or establish a self-insurance program to cover the potential liability of the subdivision and its employees. R.C. 9.83; R.C. 2744.08.

Liability of the State of Ohio, including its boards and agencies, is governed by R.C. Chapter 2743. *See, e.g.,* R.C. 2743.01. The state has waived its immunity from liability and consented to be sued in the Court of Claims. R.C. 2743.02-.03. Officers and employees of the state are granted immunity from civil actions for damage or injury caused in the performance of their duties, unless the actions were manifestly outside the scope of employment or official responsibilities or were performed with malicious purpose, in bad faith, or in a wanton or reckless manner; exceptions exist for civil actions arising out of the operation of a motor vehicle and for civil actions in which the state is the plaintiff. R.C. 9.86; *see also* R.C. 9.85; R.C. 109.36. R.C. 9.83 authorizes the state or a political subdivision to procure insurance insuring its officers and employees against liability for damages resulting from motor vehicle operation.

The state is required to indemnify an officer or employee from liability incurred in the performance of his duties, with the following exceptions: when the officer or employee is covered by a policy of insurance purchased by the state; when the officer or employee acts manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a

wanton or reckless manner; for punitive or exemplary damages; or for any portion of a consent judgment or settlement that is unreasonable. R.C. 9.87. In general, the Attorney General provides representation and defense in civil actions against a state officer or employee unless the individual was acting manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner. R.C. 109.36-.362.

An employer who is aware of the submission of an application for disability benefits is placed on notice that the member believes he can meet the eligibility standards established by law. In such circumstances, an employer may be able to make arrangements to accommodate the worker on active pay status or perhaps even on active work status while a determination is made on the issue of liability. An examination of the responsibility of a particular employer to do so in such circumstances involves factual considerations and generally exceeds the scope of this opinion. *See generally, e.g.*, Rehabilitation Act of 1973, 29 U.S.C.A. §§701-797b (West 1985 & Supp. 1993); Americans with Disabilities Act of 1990, 42 U.S.C.A. §§12101-12213 (West Supp. 1993); R.C. 4112.01-.02; *Asplundh Tree Expert Co. v. Ohio Civil Rights Commission*, 68 Ohio App. 3d 550, 589 N.E.2d 102 (Franklin County), *motion to certify overruled*, 62 Ohio St. 3d 1417, 577 N.E.2d 662 (1991); Op. No. 90-002.

Potential Liability of Members of the Board of Trustees of PFDPF

R.C. 742.08 authorizes the Board of Trustees of PFDPF to "secure insurance coverage designed to indemnify board members and employees for their actions or conduct in the performance of official duties." This provision indicates an implicit determination by the General Assembly that PFDPF board members should not be immune from liability as a general matter. If appropriate insurance is acquired, however, the board members will not suffer any personal loss for damages resulting from the performance of their official duties. R.C. 742.08.

The Board of Trustees of PFDPF has the statutory powers and duties granted pursuant to R.C. Chapter 742. By R.C. 742.11, the members of the Board of Trustees of PFDPF are made trustees of the funds created by R.C. 742.38 and are given fiduciary responsibility with respect to those funds. As discussed above, PFDPF is not responsible for employment arrangements established between an employer and a member of PFDPF. It is clear that when a member of PFDPF submits an application for disability benefits, the Board of Trustees of PFDPF is put on notice that the member believes he can meet the eligibility standards established by law. The Board of Trustees of PFDPF does not, however, have any responsibility for determining the work status or job duties of a particular member. Because of the nature of the responsibilities of the Board of Trustees of PFDPF, it is difficult to imagine a situation such as you have posed in your opinion request, in which the board members would be found liable for damages "incurred by reason of the continuing active work status of an individual" whose application for partial or total and permanent disability is pending.

The Board of Trustees of PFDPF includes elected state officials, the fiscal officer of a municipal corporation (appointed by the Governor), police officers, firefighters, and a retired police officer or firefighter. R.C. 742.03(B). Questions concerning the manner and extent to which the liability, immunity, defense, and indemnification provisions of R.C. 9.85-.87, R.C. 109.36-.362, R.C. Chapter 2743, and R.C. Chapter 2744 may affect these individuals when the individuals are acting in their capacities as members of the Board of Trustees of PFDPF are complex. They are not directly addressed by statute and have not been clearly determined by the courts. Because of the apparent remoteness of the connection between actions of PFDPF board members and any damages accruing in the situation you have described, the possible applications of liability and immunity statutes to the various members of the Board of Trustees of PFDPF are not discussed in this opinion. As noted above, the Board may prepare for any potential liability by securing insurance coverage pursuant to R.C. 742.08(B).

Conclusion

In response to your questions, it is my opinion, and you are advised, as follows:

1.The Public Employees Retirement System may, in accordance with R.C. 145.35, consider a member's application for a disability benefit while that member is still being compensated for services performed on behalf of his employer or is still on active pay status.

2.Pursuant to R.C. 145.35(D), a member of the Public Employees Retirement System must cease to be on active work status and cease to be on active pay status before the member may begin to receive a disability benefit.

3.The Board of Trustees of the Police and Firemen's Disability and Pension Fund may, in accordance with R.C. 742.37, consider a member's application for total and permanent disability while that member is still being compensated for services performed as a police officer or firefighter or is still on active pay status.

4.If a member of the Police and Firemen's Disability and Pension Fund works for a political subdivision, the member's employer is subject to the liability, immunity, defense, indemnification, and insurance provisions of R.C. 9.83 and R.C. Chapter 2744.

5.If a member of the Police and Firemen's Disability and Pension Fund works for the State of Ohio, the member's employer is subject to the liability, immunity, defense, indemnification, and insurance provisions of R.C. 9.83, R.C. 9.85-.87, R.C. 109.36-.362, and R.C. Chapter 2743.

6. The Board of Trustees of the Police and Firemen's Disability and Pension Fund has no control over the work status or job duties of an individual who has filed an application for partial or total and permanent disability benefits, and the possibility that a board member might be held liable for any consequential damages incurred by reason of the individual's continuing active work status appears to be remote. Pursuant to R.C. 742.08(B), the Board may secure insurance to cover any such potential liability.

Respectfully,

LEE FISHER
Attorney General

November 16, 1993

The Honorable Thomas E. Ferguson
Auditor of State
88 East Broad Street
Columbus, Ohio 43266-1140

SYLLABUS: 93-036

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