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TOWNSHIP TRUSTEES — REQUIRED TO CONTRIBUTE AMOUNT OF EMPLOYER CONTRIBUTIONS TO PUBLIC EMPLOYEES RETIREMENT BOARD FOR EMPLOYEE REQUIRED TO BE A MEMBER OF SAID RETIREMENT SYSTEM BUT WHICH EMPLOYEE FAILED TO DO SO DURING PORTION OF HIS TERM OF EMPLOYMENT—§145.51, R.C.

SYLLABUS:

Where in 1948 a township employed a person who was by the provisions of then existing Section 486-33, General Code, required to be a member of the Public Employees Retirement System, and such person worked until 1957 without becoming a member of said System, then became a member in 1957 and left such employment in 1958, the board of township trustees is now required to pay the amount of employer contributions which should have been paid as a result of such person's employment from the commencement thereof until the time that such person actually became a member of the Retirement System. Under such circumstances, if such board of township trustees fails to make such payment, the Public Employees Retirement Board may proceed under the provisions of Section 145.51, Revised Code, in order to effectuate payment of the amount so delinquent.

Columbus, Ohio, June 30, 1961

Hon. E. Raymond Morehart, Prosecuting Attorney
Fairfield County, Lancaster, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

"I would like your opinion on the following facts:

"Mr. 'S' was employed by Hocking Township, Fairfield County, Ohio about February, 1948. He was a laborer in the road department and was considered to be a casual employee. He worked as such to December 31, 1956. During this period, it was understood by the Trustees of the township that it was not compulsory for this type of employee to be a member of the Public Employees Retirement System. The employee informed the Trustees that he did not want to be a member, and did not want any of his salary withheld for that purpose. No withholding from his wages was made for that purpose and no amount was paid by the Trustees on account of his employment into the system.

"From about February 1, 1957, the Trustees understood that membership in the Public Employees Retirement System was now compulsory for such employees. They withheld appropriate amounts from Mr. 'S's' salary as a member, and paid the matching amounts from the township as employer until his employment ceased in March, 1958.

"Sometime after September 15, 1959, the employee retired and withdrew all the money he had paid into the fund.

"It would seem that this employee cannot possibly benefit from any payments made into the fund by the township for the period involved.

"However, the Public Employees Retirement System has certified to the Auditor of State, under R.C. 145.51, that there is a delinquent amount covering the service of this employee. The amount so certified is the amount which was not paid by the township during such period from 1948 through 1956 when the employee stated he did not wish to be a member of the fund and did not himself contribute.

"Under the circumstances, is the Township required to pay such amount, and can the Auditor of Fairfield County, Ohio, upon being directed to do so, withhold such amount from tax money otherwise due the Township?"

In February of 1948 when the employee in question was hired by the township trustees, the statutory law dealing with membership in the Public Employees Retirement System was found in Section 486-33, General Code (122 Ohio Laws, 192, 195), which read as follows:

“A public employes retirement system is hereby created for the employes of the state of Ohio and of the several local authorities mentioned in section 486-32, General Code. Membership in the public employes retirement system shall be compulsory and shall consist of all public employes upon being regularly appointed. Provided, that the board shall have authority to exempt from compulsory membership in the retirement system, classes or groups of employes engaged in work of a temporary, casual, or exceptional nature, but individuals in any such class or group so exempted may become members by making application therefor, subject to the approval of the retirement board; provided, however, that any employe who is, or who becomes, a member must continue such membership as long as he is a public employe, even though he may be in or transferred to an exempted class or group.”

It will be noted that membership in the Retirement System at that time was compulsory although the Retirement Board could exempt classes or groups from membership. From the facts set forth in your request, it appears that no such exemption was granted by the Retirement Board and that the employee was therefore governed by the compulsory membership provision found in Section 486-33, *supra*. His request to the township trustees could not, of course, have any effect upon the afore-mentioned statutory provisions.

Since the employee in question was required by law to be a member of the Retirement System during the period involved, it must naturally follow that the employer, in this case the township, is responsible to the System for the employer contributions which should have been paid on behalf of the township from the time of the employment of such employee until the time he first became a member of the Retirement System. It should be noted that payment by the employer is not conditioned upon benefit to the employee and that the employer's payments to the Retirement System are never subject to a refund. When an employee leaves public employment and withdraws his contributions, the contribution of the employer which were made because of the employment of such individual remain in the fund and are used by the Retirement Board to offset liabilities caused by benefits granted to others. This has the effect of reducing or

holding down the employer contribution rate since the Retirement System is founded on the principle of an actuarially sound, fully funded retirement plan. Therefore, to relieve the trustees in question from this responsibility merely because the employee involved would not receive benefits would be in fact a grant of a special privilege or right to this employer group which would cause a detriment to all other employer groups. The Retirement Board, of course, is acting in a fiduciary capacity and as such it must administer Chapter 145., Revised Code, equally and impartially to all employers and all employees.

In the case of *State, ex rel. Public Employees Retirement Board, et al v. Baker, et al*, 169 Ohio St., 499, the Supreme Court of Ohio had before it a petition in mandamus filed for the Retirement Board to require the respondents therein to pay to the Retirement Board the accumulated contributions of a member of the System which the respondents neglected to withhold from the member's compensation, and also to pay the employer's contributions based upon that member's employment. The first three paragraphs of the syllabus of the *Baker* case, *supra*, are pertinent herein and read as follows:

"1. Under the provisions of Section 486-33f, General Code (Section 145.48, Revised Code), of the Public Employees Retirement Act of Ohio, it is mandatory that the employer shall pay to the employer's accumulation fund the same rates per cent of the compensation of each employee member employed by it for normal contribution and for the deficiency contribution as the state will be required to pay for its employees in pursuance of the provisions of Sections 486-68a to 486-68e, both inclusive.

"2. Under the provisions of Section 486-68, General Code (Section 145.47, Revised Code), it is likewise mandatory that the employer shall deduct the employee's contribution from his salary and pay it into the retirement system.

"3. The failure to pay the required contribution of an employer or an employee does not relieve the obligation for payment of the other.

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As you have pointed out in your letter, the Public Employees Retirement Board is authorized by the provisions of Section 145.51, Revised Code, to certify to the state auditor or county auditor any amount of employer contributions when such employer is delinquent in making payment of the same and such amount shall thereupon be withheld from

that employer's funds in the hands of the state auditor or the county auditor.

In accordance with the above, it is my opinion and you are advised that where in 1948 a township employed a person who was by the provisions of then existing Section 486-33, General Code, required to be a member of the Public Employees Retirement System, and such person worked until 1957 without becoming a member of said System, then became a member in 1957 and left such employment in 1958, the board of township trustees is now required to pay the amount of employer contributions which should have been paid as a result of such person's employment from the commencement thereof until the time that such person actually became a member of the Retirement System. Under such circumstances, if such board of township trustees fails to make such payment, the Public Employees Retirement Board may proceed under the provisions of Section 145.51, Revised Code, in order to effectuate payment of the amount so delinquent.

Respectfully,

MARK McELROY

Attorney General