

OPINION NO. 92-021**Syllabus:**

A member of the Public Employees Retirement System who, pursuant to a collective bargaining agreement entered into under R.C. Chapter 4117, is placed on a leave of absence that is approved by his public employer to perform full-time service for and under the direction of his employee organization for which service he is compensated directly by the employee organization, is entitled to receive service credit under R.C. Chapter 145 for the period of leave only as provided for in R.C. 145.291.

To: Richard E. Schumacher, Executive Director, Public Employees Retirement System, Columbus, Ohio

By: Lee Fisher, Attorney General, May 21, 1992

You have requested an opinion concerning a situation you describe as follows:

A member of the Public Employees Retirement System [PERS] may be elected to an office within his/her local union. Under the applicable union contract, this individual is granted a leave of absence from his/her employment.

The employee, while on such leave, does not receive any salary or compensation from the public employer. Rather the union pays a salary to the officer. The officer can be off the public employer's payroll for a year or more.

Under these circumstances, is the person considered on the public employer's payroll for the purposes of accruing contributing service credit in PERS, or, alternatively, is the member only eligible to receive service credit per Section 145.291, Ohio Revised Code?

Information provided with your request states that the individual about whom you ask has already established membership in PERS by virtue of serving in a position as a regional transit authority employee, and, thus, is a public employee, as that term is defined in R.C. 145.01(A). See generally *Spitaleri v. Metro Regional Transit Authority*, 67 Ohio App. 2d 57, 426 N.E.2d 183 (Summit County 1980) (for purposes of R.C. Chapter 145, persons employed by a regional transit authority are "public employees"). Your question, however, concerns the individual's status for purposes of R.C. Chapter 145 during the period in which he is on a leave of absence from the transit authority to perform services for his employee organization and is compensated directly by the employee organization.

Information accompanying your opinion request indicates that the arrangement pursuant to which the employee is placed on a leave of absence from his employment to serve as a union officer is part of a collective bargaining agreement entered into pursuant to R.C. Chapter 4117. Although I am unable to make a determination of the rights and obligations of the parties to the particular agreement mentioned in your request, see 1986 Op. Att'y Gen. No. 86-039, pursuant to R.C. 4117.10(A), "[l]aws pertaining to...[among other matters], the retirement of public employees...prevail over conflicting provisions of agreements between employee organizations and public employers." Thus, while the individual about whom you ask may, according to the terms of the agreement, remain in the employ of the public employer while he is being paid by, and rendering service to, the employee organization, his employment status under the contract is not determinative of his eligibility for service credit under R.C. Chapter 145.

I. Service Credit for Purposes of R.C. Chapter 145

In order to answer your specific question regarding an individual's eligibility to purchase or otherwise receive service credit under R.C. Chapter 145 in the circumstances outlined in your opinion request, it is first necessary to examine the various ways by which PERS members generally may establish or receive service credit within that system.

A. Contributing Service Credit

R.C. 145.03, with certain exceptions, requires that each person who is a "public employee," as that term is defined in R.C. 145.01(A), become a member of PERS. R.C. 145.01, as recently amended in Sub. H.B. 382, 119th Gen. A. (1991) (eff. June 30, 1991), states in part:

As used in this chapter:

(A) "Public employee" means:

(1) Any person holding an office, not elective, under the state or any county, municipal corporation, park district,...or board, bureau, commission, council, committee, authority, or administrative body as the same are, or have been, created by action of the general assembly...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. 3307.01 or R.C. 3309.01].

(2) A person who is a member of the public employees retirement system who continues to perform the same or similar duties under the

direction of a contractor who has contracted to take over what before the date of such contract was a publicly operated function. The governmental unit with whom such contract has been made shall be deemed the employer for the purposes of administering this chapter.

(3) Any person who is an employee of a public employer, notwithstanding his compensation for such employment is derived from funds of a person or entity other than the employer. Credit for such service shall be included as total service credit, provided the employee makes the payments required by this chapter, and his employer makes the payments required by [R.C. 145.48 and R.C. 145.51].

(4) Any civilian employees of the national guard and the air national guard, employed in or with a unit of the Ohio national guard or the Ohio air national guard, except those employed by the national guard bureau, shall be considered as employees of the adjutant general of the state for the purpose of this chapter, although such employees may be paid by federal funds.

In all cases of doubt, the public employees retirement board shall determine whether any person is a public employee, and its decision is final. (Emphasis added.)

Membership in the system continues until the member receives a refund of accumulated contributions, dies, or retires in a manner other than under R.C. 145.39 (disability retirement). R.C. 145.41. During a member's employment as a "[p]ublic employee," he is required to make contributions to the employees' savings fund, *see generally* R.C. 145.23(A), as prescribed by R.C. 145.47, which states in part:

Each *public employee who is a contributor*¹ to the public employees retirement system shall contribute eight per cent of his earnable salary to the employees' savings fund, except that the public employees retirement board may raise the contribution rate to a rate not greater than ten per cent of the employee's earnable salary.

The head of each state department, institution, board, and commission, and the fiscal officer of each local authority subject to this chapter, shall deduct from the earnable salary of each contributor on every payroll of such contributor for each payroll period subsequent to the date of coverage, an amount equal to the applicable per cent of

¹ The term "[c]ontributor," as used in R.C. Chapter 145, means "any person who has an account in the employees' savings fund created by [R.C. 145.23]." R.C. 145.01(F). R.C. 145.23(A) states as follows:

The employees' savings fund is the fund in which shall be accumulated contributions from the earnable salaries of contributors for the purchase of annuities or retirement allowances.

The accumulated contributions of a contributor returned to him upon his withdrawal, or paid to his estate or designated beneficiary in the event of his death, shall be paid from the employees' savings fund. Any accumulated contributions forfeited by failure of a member, or his estate, to claim the same, shall be transferred from the employees' savings fund to the income fund. The accumulated contributions of a contributor shall be transferred from the employees' savings fund to the annuity and pension reserve fund in the event of his retirement.

Thus, upon commencement of public employment, a public employee begins contributing to the employees' savings fund, thereby establishing an account that remains in the fund until the withdrawal of contributions by the employee or until the employee's death or retirement. Therefore, each public employee becomes a "[c]ontributor" upon commencement of contributions, as required by R.C. 145.47, and remains so until he withdraws his contributions, dies, or retires.

the contributor's earnable salary....In addition to the periodical reports of deduction required by this section, the fiscal officer of each local authority subject to this chapter shall submit to the board at least once each year a complete listing of all noncontributing appointive employees. (Emphasis and footnote added.)

At the same time, "[e]ach employer shall pay to the employers' accumulation fund an amount which shall be a certain per cent of the earnable salary of all contributors to be known as the 'employer contribution'...." R.C. 145.48. See generally R.C. 145.23(B) (employers' accumulation fund). It is in this manner, through employee and employer contributions, as required by R.C. 145.47 and R.C. 145.48, that contributing service credit in PERS is generally established. See R.C. 145.01(T) (defining "[c]ontributing service" for purposes of R.C. Chapter 145).

B. Disability Leave Service Credit; Purchased Service Credit

R.C. Chapter 145 provides various other means by which members may acquire service credit. For example, specific provision is made for a contributor to receive service credit while on disability leave, as provided in R.C. 145.296, pursuant to which the employer makes both the employee and employer contributions for the time spent on leave. Further, R.C. 145.301 authorizes the purchase of service credit for certain military service. R.C. Chapter 145 also permits PERS members to purchase service credit for time spent in the employment of certain entities not covered by PERS. See, e.g., R.C. 145.292 (employment with municipal zoo or associated zoological society); R.C. 145.293 (out-of-state service). Finally, R.C. 145.291 permits a member to purchase service credit for time spent on certain leaves of absence as specified therein.

Your concern is whether a person who is a member of PERS is entitled to receive service credit within PERS for the period in which he is on a leave of absence from his public employment to perform services for an employee organization, during which time he is compensated directly by the employee organization. You specifically ask whether this person is considered to be on the public employer's payroll for purposes of acquiring contributing service credit, or whether he may only purchase service credit for his leave of absence as authorized by R.C. 145.291.

II. Definitions Applicable to Contributing Service Credit under R.C. 145.47 and R.C. 145.48

Only a person who is a "[p]ublic employee," as defined in R.C. 145.01(A), and a "[c]ontributor," as defined in R.C. 145.01(F), is eligible to establish PERS service credit by payment of employee and employer contributions under R.C. 145.47 and R.C. 145.48. While the person about whom you ask may be a "[c]ontributor," by virtue of having already established and continuing to maintain an account in the employees' savings fund, see generally note 1, *supra*, he must also be a "[p]ublic employee" in order to make the contributions required by R.C. 145.47.

Clearly, the person described in your opinion request does not fit within the definitions of "[p]ublic employee" set forth in R.C. 145.01(A)(2) or (4) while he is performing services on a full-time basis for, and is compensated directly by, an employee organization. Further, the first alternative under R.C. 145.01(A)(1) requires that a person hold a non-elective office under one of the entities enumerated in R.C. 145.01(A)(1) in order to qualify as a "[p]ublic employee." Since the individual you describe is not holding a non-elective office for one of the entities listed in R.C. 145.01(A)(1), he does not qualify as a "[p]ublic employee" under the first portion of R.C. 145.01(A)(1).

The latter portion of R.C. 145.01(A)(1) qualifies as a "[p]ublic employee" any person "*employed and paid in whole or in part by the state or any of the authorities named in [R.C. 145.01(A)] in any capacity not covered by [R.C. 3307.01 or R.C. 3309.01].*" A similar category is established by R.C. 145.01(A)(3) which includes as a "[p]ublic employee," "an employee of a public employer," even though compensation "*for such employment is derived from funds of a person or entity*

other than the employer" (emphasis added).² Common to both of these definitions is the requirement that the person be "employed" by a public employer. Once the necessary employment relationship is established, the source of compensation then becomes relevant in determining whether a person qualifies as a "[p]ublic employee" under either R.C. 145.01(A)(3) or under the latter portion of R.C. 145.01(A)(1).

The concept of "employment" for purposes of R.C. Chapter 145 has long been interpreted in accordance with the common law meaning of that term. 1987 Op. Att'y Gen. No. 87-073; 1973 Op. Att'y Gen. No. 73-051. Most frequently, the question of whether a particular individual qualifies as a public employee for purposes of R.C. Chapter 145 arises in the context of whether an individual is an employee, as opposed to an independent contractor, of the person or entity paying his compensation. As concluded in Op. No. 87-073, a necessary element of the employment relationship for purposes of R.C. Chapter 145 is the public employer's control, or right to control, the mode and manner in which the worker performs his duties. In the situation you describe, while the individual is on leave of absence from his employment with his public employer, the regional transit authority, he is not working under the direction or control of the regional transit authority and is not being "compensated for such employment." Rather, he is performing work under the direction of, and being compensated directly by, the employee organization, which is not an "[e]mployer" or "public employee" for purposes of R.C. Chapter 145. Thus, for this reason, the individual about whom you ask does not qualify as a "[p]ublic employee," under either the latter portion of R.C. 145.01(A)(1), or R.C. 145.01(A)(3), during the time he performs full-time service under the direction of, and is compensated directly by, an employee organization.

The person about whom you ask is not a "public employee," for purposes of R.C. Chapter 145, during the time he is on leave of absence from his public employment to perform work under the direction of his employee organization, for which he is compensated directly by such employee organization. He is, therefore, ineligible, during that time, to make the payments required of public employees by R.C. 145.47. Consequently because employee contributions, as required by R.C. 145.47, are a necessary part of establishing service credit under the method described in R.C. 145.47 and R.C. 145.48, the person described in your request may not establish service credit under this method for the time in which he is on such leave of absence from his public employment.³

² At least since 1989, the date on which the individual about whom you ask commenced his leave of absence, and prior to its amendment in Sub. H.B. 382, 119th Gen. A. (1991) (eff. June 30, 1991), R.C. 145.01(A)(3) included as a "[p]ublic employee," "[a]ny person who performs or has performed services under the direction of an employer, as defined in division (D) of this section, notwithstanding his compensation for such services has been or is paid by one other than such employer." Sub. S.B. 3, 119th Gen. A. (1991) (eff. April 17, 1991); Sub. S.B. 240, 118th Gen. A. (1990) (eff. July 24, 1990); 1987-1988 Ohio Laws, Part III, 4276 (Am. Sub. H.B. 552, eff. Dec. 15, 1988). Thus, for the period of his leave of absence prior to June 30, 1991, the individual about whom you ask also did not qualify as a "[p]ublic employee" under the previous definition. Although he had performed services under the direction of an "employer," the regional transit authority, *see* R.C. 145.01(D) (defining "[e]mployer" or "public employer"), the services for which he was compensated by the employee organization were not performed under the direction of that "employer."

³ The situation discussed in this opinion is distinguishable from the situation where a public employer does not place the employee on a leave of absence, but instead continues to compensate the public employee for time spent working with other employees of the public employer while performing service for an employee organization. As stated in your Notice to Employers, dated January 22, 1991:

Employees released from their jobs for service as
full-time union officials may be contributing members of PERS

III. Service Credit for a Leave of Absence Under R.C. 145.291

The remaining question is whether the person about whom you ask may qualify under R.C. 145.291 to purchase service credit for the period he is on leave of absence from his public employment. R.C. 145.291 states in part:

Any member, who...was off the payroll for not more than one year on a leave of absence approved by the then appointing authority, shall have the right to make such payment, at the contribution rate in effect at the time of payment, with interest on such amount compounded annually at a rate to be determined by the board as he would have made if he had continued on the payroll at the earnable salary he was receiving at the time his public service was interrupted provided that subsequent to such leave of absence he returned to regular contributing status in this system for at least twelve calendar months....The payment shall entitle the member to receive service credit for the leave of absence.

For purposes of R.C. Chapter 145, a "[m]ember" is defined as "any public employee other than a public employee excluded or exempted from membership in the retirement system by [R.C. 145.03-.035] or [R.C. 145.38]." R.C. 145.01(B). The person about whom you ask was a "[p]ublic employee" and a "member" for purposes of R.C. Chapter 145 prior to his leave of absence. When he returns to a position which is under the direction and control of the regional transit authority and is compensated for such employment, he will regain his status as a "[p]ublic employee" and will again become a "[m]ember" of PERS.

Pursuant to R.C. 145.291, therefore, once a member, including the one about whom you inquire, has returned to regular contributing service for a period of twelve months, after having been on a leave of absence approved by his then appointing authority, he is eligible to purchase service credit for the period of not more than one year during which he was on leave of absence.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that, a member of the Public Employees Retirement System who, pursuant to a collective bargaining agreement entered into under R.C. Chapter 4117, is placed on a leave of absence that is approved by his public employer to perform full-time service for and under the direction of his employee organization for which service he is compensated by the employee organization, is entitled to receive service credit under R.C. Chapter 145 for the period of leave only as provided for in R.C. 145.291.

if they are paid on the public employer's payroll. The union official must be working directly with employees of the public employer paying the union official.

Employees released from their jobs for *part-time* union service may have contributions submitted on this service if they are paid on the public employer's payroll for this part-time union service and it is considered part of their regular work week. (Emphasis in original.)