

OPINION NO. 88-028

Syllabus:

1. Employees of a public library established pursuant to R.C. Chapter 3375 are eligible to participate in the deferred compensation program promulgated and administered by the Ohio Public Employees Deferred Compensation Board under R.C.

145.71-.73, or in any additional deferred compensation program that may be offered by the board of library trustees of a public library district under R.C. 145.74, or both.

2. A deferred compensation program offered by the board of library trustees of a public library district to its employees under R.C. 145.74 is not subject to approval by the Public Employees Retirement Board.

To: Steve C. Shuff, Seneca County Prosecuting Attorney, Tiffin, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 21, 1988

You have requested my opinion regarding the eligibility of employees of a public library established under R.C. Chapter 3375, who, pursuant to the terms of R.C. 3375.411, are contributing members of the Public Employees Retirement System (PERS), to participate in either the deferred compensation program operated and administered by the Ohio Public Employees Deferred Compensation Board under R.C. 145.71-.73, or other such program that may be offered under R.C. 145.74. R.C. 3375.411, the terms of which have prompted your request, reads as follows:

A board of library trustees of a free public library, appointed pursuant to the provisions of sections 3375.06, 3375.08, 3375.12, 3375.15 and 3375.22 of the Revised Code, which has not less than seventy-five full-time employees, and which, prior to September 16, 1943, was providing for retirement of the employees of such library with annuities, insurance, or other provisions, under authority granted by former section 7889 of the General Code, may provide such retirement, insurance, or other provisions in the same manner authorized by former section 7889 of the General Code, as follows: the library board of such library which has appropriated and paid the board's portion provided in such system or plan, may continue to appropriate and pay the board's portion provided in such system or plan out of the funds received to the credit of such board by taxation or otherwise. Each employee of such library who is to be included in a system of retirement shall contribute to the retirement fund not less than four per cent per annum of his salary from the time of his eligibility to join the retirement system to the time of his retirement. If a group insurance plan is installed by any library, not less than fifty per cent of the cost of such insurance shall be borne by the employees included in such plan.

Provided, any employee whose employment by said library began on or after September 16, 1943, may exempt himself from inclusion in such retirement system, or withdraw from such retirement system. Upon such exemption or withdrawal, such person shall become a member of the public employees retirement system in accordance with sections 145.02, 145.03 and 145.28 of the Revised Code respectively. *All employees appointed for the first time on and after January 1, 1956, shall, for retirement purposes, be eligible only for membership in the public employees retirement system as provided in section 145.01 to 145.57, inclusive, of the Revised Code.*

A library board which provides for the retirement of its employees with annuities, insurance, or other provisions under the authority granted by this section may, pursuant to a board resolution adopted within thirty days after the effective date of this section, terminate such retirement plan. Upon the effective date of such termination, which is specified in the resolution, each employee covered by such retirement plan shall become a member of the public employees retirement system. (Emphasis added.)

Specifically, you wish to know whether the foregoing emphasized language of R.C. 3375.411 operates to prohibit the public library employees referred to therein from participating in the state deferred compensation program established under R.C. 145.71-.73, or another such program that may be offered under R.C. 145.74.

Pursuant to R.C. 145.72, the Ohio Public Employees Deferred Compensation Board has been created "as a separate legal entity for the purpose of administering a deferred compensation system for all *eligible employees*." (Emphasis added.) Accordingly, R.C. 145.73 further provides that the Ohio Public Employees Deferred Compensation Board shall "initiate, plan, expedite, and, subject to an appropriate assurance of the approval of the internal revenue service, promulgate and offer to all eligible employees, and thereafter administer on behalf of all participating employees and continuing members, and alter as required, a program for deferral of compensation." R.C. 145.73(A). An "[e]ligible employee" is defined in R.C. 145.71(A) as including, *inter alia*, "any public employee as defined in division (A) of section 145.01 of the Revised Code." In turn, R.C. 145.01(A) defines the term "[p]ublic employee," as used in R.C. Chapter 145, and includes thereunder any person "employed and paid in whole or in part by...any [public library]." Thus, employees of a public library are "[e]ligible employee[s]," as defined in R.C. 145.71(A), and are thereby entitled to participate in the deferred compensation program promulgated and offered by the Ohio Public Employees Deferred Compensation Board under R.C. 145.73(A).

R.C. 145.73(E) further states that R.C. 145.73 does not otherwise limit the authority of the political subdivisions and public entities specified therein, including, *inter alia*, a public library, to "provide separate authorized plans or programs for deferring compensation of their officers and employees in addition to the program for the deferral of compensation offered by the [Ohio Public Employees Deferred Compensation Board]." R.C. 145.74 addresses specifically the provision of such separate deferred compensation plans or programs. R.C. 145.74(B) states, in part, as follows:

In addition to the program of deferred compensation that may be offered under sections 145.71 to 145.73 of the Revised Code, a *governing board* may offer to all of the officers and employees of the *government unit* not to exceed two additional programs for deferral of compensation designed for favorable tax treatment of the compensation so deferred. Any such program shall include a reasonable number of options to the officer or employee for the investment of the deferred funds, including annuities, variable annuities, regulated investment trusts, or other forms of investment approved by the governing board, that will assure the desired tax treatment of the funds. (Emphasis added.)

R.C. 145.74 also defines the terms "[g]overnment unit," and "[g]overning board," as used therein, as follows:

(A) "Government unit" means a county, township, park district of any kind, conservancy district, sanitary district, health district, *public library district*, or county law library.

(B) "Governing board" means, in the case of the county, the board of county commissioners; in the case of a township, the board of township trustees; in the case of a park district, the board of park commissioners; in the case of a conservancy district, the district's board of directors; in the case of a sanitary district, the district's board of directors; in the case of a health district, the board of health; *in the case of a public library district, the board of library trustees*; and in the case of a county law library, the board of trustees of the law library association. (Emphasis added.)

Thus, under R.C. 145.74 the board of library trustees of a public library district may, in addition to the deferred compensation program offered under R.C. 145.71-73, establish up to two deferred compensation programs for public library district employees.

It is apparent, therefore, that employees of a public library are entitled to participate either in the deferred compensation program promulgated and administered by the Ohio Public Employees Deferred Compensation Board under R.C. 145.71-73, or in any deferred compensation program that may be offered by the board of library trustees of a public library district under R.C. 145.74. Accordingly, it follows that the language in R.C. 3375.411 that states that all public

library employees appointed for the first time on and after January 1, 1956, shall be eligible "only for membership in the public employees retirement system as provided in section 145.01 to 145.57, inclusive, of the Revised Code" cannot be interpreted as a limitation upon the participation of public library employees in such deferred compensation programs. Rather, R.C. 3375.411 states clearly and unambiguously that such eligibility limitation is "for retirement purposes," and does not otherwise extend such limitation to other benefit programs for which public library employees may be eligible under state law. Cf. R.C. 145.73(D) (stating, in part, that the deferred compensation program offered under R.C. 145.73 "shall be in addition to any retirement or any other benefit program provided by law for employees of this state"). In R.C. 3375.411, therefore, the General Assembly simply intended to make clear that employees of a public library appointed on and after January 1, 1956, would not be eligible for membership in any retirement plan or system, other than PERS, that preexisted the date of such employees' appointment. *See, e.g.*, 1951 Op. Att'y Gen. No. 930, p. 765.

In a conversation with a member of my staff you have also asked whether a deferred compensation program offered under R.C. 145.74 by the board of library trustees of a public library district to employees thereof must be approved by PERS. There is no provision in R.C. 145.74, or any other statute of which I am aware, requiring a deferred compensation program established thereunder to be approved by PERS. In the absence of such a statutory requirement, I conclude that such a program may be established and offered under R.C. 145.74 without PERS approval therefor.

Accordingly, based upon the foregoing it is my opinion, and you are advised that:

1. Employees of a public library established pursuant to R.C. Chapter 3375 are eligible to participate in the deferred compensation program promulgated and administered by the Ohio Public Employees Deferred Compensation Board under R.C. 145.71-.73, or in any additional deferred compensation program that may be offered by the board of library trustees of a public library district under R.C. 145.74, or both.
2. A deferred compensation program offered by the board of library trustees of a public library district to its employees under R.C. 145.74 is not subject to approval by the Public Employees Retirement Board.