

OPINION NO. 77-024

Syllabus:

A board of education cannot authorize its clerk to withhold from the salaries of its nonresident employees those income taxes that are ultimately due to another state under

a valid reciprocal agreement. (1961 Op. Att'y. Gen. No. 2261 approved and followed)

To: Donald L. Jones, Washington County Pros. Atty., Marietta, Ohio
By: William J. Brown, Attorney General, May 9, 1977

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

"May a board of education negotiate (pursuant to Dayton Classroom Teachers Association v. Dayton Board of Education, 41 Ohio St.2d 127) or unilaterally adopt a policy, pursuant to Sections 3313.20 and 3313.47, Revised Code, authorizing the clerk of the board of education to deduct from the salaries of nonresident teaching and nonteaching employees (who file certificates of nonresidence pursuant to reciprocal income tax agreements) the amount of the state income tax deductions authorized, provided, or required by the income tax law of the other state which has entered into a reciprocal income tax agreement with this State?"

In 1961 Op. Att'y. Gen. No. 2261, my predecessor stated as follows in the syllabus to that opinion:

"The statutes of this state do not authorize a clerk of a board of education to deduct from moneys due employees of the board any amounts representing taxes due to another state from said employees; and the board of education may not adopt a rule under Section 3313.20, Revised Code, purporting to invest the clerk with the power to so deduct."

At the time that Opinion was written, Ohio did not have a personal income tax. The subsequent enactment of R.C. Chapter 5747 and the reciprocal agreements entered into between the Tax Commissioner of Ohio and the appropriate taxing officials of the individual states contiguous to Ohio necessitate a review of that opinion.

My understanding of the facts that give rise to your request is as follows. A board of education in Ohio employs a number of people that work in Ohio but reside in the state of West Virginia. R.C. 5747.02 levies an income tax on "every individual residing in or earning income in this state." Therefore, under the statute, nonresident employees would be subject to the tax levied in R.C. 5747.02. However, because of a valid reciprocal agreement between Ohio and West Virginia executed pursuant to R.C. 5747.05(A)(3), the Ohio income tax is not levied upon their Ohio income. Rather, Ohio has waived its right to tax the income of West Virginia's waiver of the right to tax the income of Ohio residents earned in West Virginia.

Under R.C. 5747.06, the Ohio income tax is withheld from the employee's compensation by the employer. The question to be considered here concerns the authority of a board of education to have its clerk withhold from the compensation of its non-resident employees the taxes that are ultimately due to West Virginia under that state's tax laws.

It is a well-settled tenet of Ohio law that administrative boards and agencies are creatures of statute and, consequently, can act only in areas where the General Assembly has specifically conferred the power to do so. See Steward v. Evatt (1944), 143 Ohio St. 547, 56 N.E.2d 159, and Ohio Central Telephone Corp. v. Public Utilities Commission (1957), 166 Ohio St. 180, 140 N.E.2d 782. In addition, it has been said that an attempt on the part of an administrative agency to exercise powers beyond the scope of those specifically delegated to it is a usurpation of legislative power and, as such, is ineffective Gardner v. Ewing, 88 F. Supp. 315 (S.D. Ohio), aff'd. 185 F. 2d 781 (6th Cir. 1950), rev'd. on other grounds, 341 U.S. 321, 71 S.Ct. 684, 95 L.Ed. 968 (1951). Therefore, in order for a clerk of a board of education to withhold income tax from the compensation of a nonresident employee on behalf of another state, the Revised Code must contain a specific authorization to do so.

The general withholding provision in the Ohio Income Tax Law is R.C. 5747.06(A) which states:

"Every employer * * * making payment of any compensation to an employee who is a taxpayer shall deduct and withhold * * * the tax reasonably estimated to be due from the employee * * * with respect to the amount of such compensation * * *

"* * * * * * * * * *"
(Emphasis added)

Thus, Ohio law requires employers to deduct taxes only from compensation paid to employees who are "taxpayers." Clearly, if the recipient of the income is not a "taxpayer," there is no requirement that such sums be withheld by the employer.

R.C. 5747.01(O) defines the term "taxpayer" for purposes of the income tax as follows:

"(O) 'Taxpayer' means any person subject to the tax imposed by section 5747.02 of the Revised Code."

R.C. 5747.02 levies an income tax upon:

"* * * [E]very individual residing in or earning or receiving income in this state * * *."

Therefore, a "taxpayer" is one who resides within the borders of Ohio or who earns or receives income in this state. Thus, every employer is required to withhold the Ohio income tax from the salary of any individual who fits within the ambit of R.C. 5747.02. The general rule is clear: all Ohio employers must withhold the Ohio tax from the salaries of their nonresident employees since those employees earn or receive income in this state. Since a board of education is an employer pursuant to R.C. 5747.06, it is required to withhold the tax from the compensation paid.

This general rule is subject to an important exception, however. R.C. 5747.05(A)(3) provides:

"(3) The tax commissioner may enter into an agreement with the taxing authorities of any state or of the District of Columbia that imposes an income tax or a tax measured by income to provide that compensation paid in this state to a nonresident taxpayer shall not be subject to the tax levied in section 5747.02 of the Revised Code [so long as the agreement binds the other jurisdiction in a similar manner]."

(Emphasis and bracketed matter added)

When the State of Ohio enters into a reciprocal agreement with the taxing authority of another state pursuant to R.C. 5747.05(A)(3), the income earned in Ohio by a resident of the other state is deemed to be immune from the levy of R.C. 5747.02. A nonresident recipient has not "earned or received income in this state" within the meaning of that statute. As such, a nonresident is not a "taxpayer" under R.C. 5747.01(O) and, therefore, is not subject to the withholding provisions of R.C. 5747.06(A). Thus, the statutes clearly provide that Ohio income tax is not to be withheld from the salaries of nonresidents provided that there is a valid reciprocal agreement and that the nonresidents have filed the necessary certificates of nonresidency.

The statutes, however, are silent on the question of withholding taxes due to another state by employers of this state. None of the provisions set forth above, nor any other provision of Chapter 5747 of the Revised Code, has any bearing upon this question. Therefore, it must be concluded that the income tax laws do not authorize the board of education to adopt such a policy. The silence of the General Assembly must be considered determinative since, without authorization, the board is powerless to act.

This conclusion is not altered by the reciprocal agreement entered into by the State of Ohio and the State of West Virginia. Under date of January 25, 1972, the Tax Commissioner of Ohio exercised the power conferred upon him by R.C. 5747.05(A)(3) and entered into a "Reciprocal Income Tax Agreement." That Agreement contains the following relevant language:

"A. Agreements respecting withholding.

"1. No Ohio or West Virginia employer shall be required to withhold Ohio income tax from compensation paid in Ohio to a resident of West Virginia who files with his employer a certificate of nonresidence unless and until such employer is advised that any such certificate was improperly filed.

"2. No Ohio or West Virginia employer shall be required to withhold West Virginia income tax from compensation paid in West Virginia to a resident of Ohio who files with his employer a certificate of nonresidence unless and until such employer is advised that any such certificate was improperly filed.

"3. Every West Virginia employer shall, to the extent provided by the Ohio Income Tax, be liable to the State of Ohio for the withholding of Ohio income tax from compensation paid to residents of Ohio.

"4. Every Ohio employer shall, to the extent provided by the West Virginia Income Tax Act, be liable to the State of West Virginia for the withholding of West Virginia individual income tax from compensation paid to residents of West Virginia.

"5. Ohio will encourage Ohio employers to withhold and remit West Virginia income tax for residents of West Virginia employed in Ohio.

"6. West Virginia will encourage West Virginia employers to withhold and remit Ohio income tax for residents of Ohio employed in West Virginia."

It is apparent the Agreement contains mutual promises to assist one another in the enforcement of the respective income tax acts. However, these promises do not create additional responsibilities for employers in either state. Rather, the promises are referenced to and are dependent upon the law of each particular state and it is this law which creates whatever duties exist.

Clearly, the only provisions of this Reciprocal Agreement that could conceivably apply to the matter currently under consideration are Paragraphs 4 and 5. However, even a cursory examination of their language reveals that they do not supply the needed authority for the proposed action of the board of education.

Paragraph 4 indicates that Ohio employers are to be liable to the State of West Virginia for withholding but specifically limits that liability to "the extent provided by the West Virginia Income Tax Act." Section 11-21-71(A) of the West Virginia Act provides in relevant part:

"(a) General.--Every employer maintaining an office or transacting business within this State and making payment of any wages taxable under this article to a resident or nonresident individual shall deduct and withhold from such wages for each payroll period a tax computed in such manner as to result, so far as practicable, in withholding from the employee's wages during each calendar year an amount substantially equivalent to the tax reasonably estimated to be due under this article resulting from the inclusion in the employee's West Virginia adjusted gross income of his wages received during such calendar year. * * *."

(Emphasis added)

Thus, Paragraph 4 applies only to Ohio employers that have voluntarily placed themselves within the ambit of West Virginia's Act by engaging in business in that state. It does not apply to employers like a board of education who neither maintain an office nor transact business within the territorial boundaries of West Virginia. Therefore, it does not provide a board of education with the authority necessary to undertake the proposed action.

Similarly, Paragraph 5 cannot be construed so as to alter the basic conclusion espoused above. The Agreement promises merely that Ohio will "encourage Ohio employers to withhold and remit West Virginia income tax for residents of West Virginia employed in Ohio." However, this encouragement does not supply a board of education with the necessary statutory authorization. Only the General Assembly can supply this power and it has not done so in the Ohio income tax laws. Therefore, the board of education cannot embark upon the proposed course of action.

It should also be noted that the Revised Code provisions relevant to a board of education or its clerk do not supply the requisite authorization. The duties of the clerk of a board of education are enumerated by Sections 3313.22 through 3313.32 of the Revised Code. As my predecessor noted in 1961 Op. Att'y. Gen. No. 2261, none of these provisions can be construed to authorize a clerk of a board of education to deduct from the compensation paid to those taxes which are due to another state by the employee. Moreover, the enactment of R.C. 3313.262 evidences an intention on the part of the General Assembly to limit the authority of a clerk to deduct from an employee's compensation only those amounts which are specifically authorized by Ohio law or required by federal law. The General Assembly has given a clerk the authority to withhold from a teacher's compensation "such amounts for political organizations and parties and non-partisan issues as the teacher by written authorization may demand * * *." When this authorization is read in conjunction with R.C. Chapter 5747 and the Internal Revenue Code, both of which require an "employer" to withhold income from compensation paid to employees, it is clear that the rule of expressio unius est exclusio alterius is applicable. Since the General Assembly has expressly stated what other items may be deducted from an employee's

compensation by the clerk of a board of education, no action can be taken to enlarge the statutory duties of a clerk.

Similarly, the portions of the Revised Code that deal specifically with the powers of the board of education do not authorize the proposed action. R.C. 3313.20 empowers a board of education to:

"* * * [M]ake such rules and regulations as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises. * * *."

Webster's Third New International Dictionary defines "government" in the context used in R.C. 3313.20 as follows:

"* * *2: the act or process of governing: authoritative direction or control * * *."

As such, a board of education may only make such rules and regulations as are necessary for it to carry on its function as a governmental unit and to maintain its "unauthoritative direction or control" over its employees, pupils and persons entering upon property owned by the board. It is not necessary for a board of education to withhold from an employee's compensation income taxes due to another state in order to maintain its "authoritative direction or control" over its employees. Therefore, a board of education could not look to R.C. 3313.20 as authority for authorizing a clerk of the board to withhold such taxes.

Finally, the case of Dayton Teachers Assn. v. Dayton Bd. of Edn. (1975), 41 Ohio St. 127, 323 N.E.2d 714, is inapposite to the matter presently under consideration except insofar as it recognizes that the board cannot take any action which conflicts with the duties and obligations imposed by law. That case involved a collective bargaining agreement between the board and its teaching employees. Also at issue was a binding arbitration clause found in the contract. The Court considered the assertions that entering into either or both of these was beyond the scope of the board's authority. The Court upheld the board's power in both respects.

That decision has no applicability here, however. The contract there was fundamental to the operation of the school and therefore fit within the "necessary for government" language of R.C. 3313.20. Moreover, the Court noted that the contract itself was a manifestation of the board's overall policy. 41 Ohio St. 2d at 134, fn. 20. Therefore, the Court approved the action. In the present matter, however, neither of these considerations is present. Withholding foreign taxes is neither necessary for the board's government nor the proper subject of an overall policy decision. It does not fall within the ambit of R.C. 3313.20. Since no other provision of the Revised Code authorizes such withholding and to do so would amount to a board of education

expanding the statutory duties of a clerk, a board of education cannot embark upon the proposed course of action.

Accordingly, it is my opinion and you are so advised that a board of education cannot authorize its clerk to withhold from the salaries of its nonresident employees those income taxes that are ultimately due to another state under a valid reciprocal agreement. (1961 Op. Att'y. Gen. No. 2261 approved and followed)