

OPINION NO. 79-015**Syllabus:**

1. Teachers who are engaged under personal service contracts with the Department of Mental Health and Mental Retardation are "employed" by the Department for purposes of R.C. Chapter 3307 if the Department exercises control over the mode and manner in which the teachers perform their work.
2. The Department of Mental Health and Mental Retardation must

deduct employee contributions and pay employer contributions to the State Teachers Retirement System, pursuant to the requirements of R.C. Chapter 3307, for all individuals employed as "teachers," as defined in R.C. 3307.01(B).

3. Prior to January 4, 1979, the effective date of H.B. 813, the Department of Mental Health and Mental Retardation was required by R.C. Chapter 3307, as then in effect, to deduct employee contributions and to pay employer contributions to the State Teachers Retirement System for all teachers engaged under personal service contracts who were "regularly employed," as defined by R.C. 3307.01(C), as then in effect. A teacher was "employed" within that definition only if the Department exercised control over the mode and manner of the teacher's work.

To: Timothy B. Moritz, M.D., Director, Ohio Department of Mental Health and Mental Retardation, Columbus, Ohio
By: William J. Brown, Attorney General, May 22, 1979

I have before me your letter of March 26, 1979, which presents the following request for my opinion:

The Department of Mental Health and Mental Retardation contracts with a number of teachers for their services in its institutions. The Department would like an Attorney General's Opinion as to whether or not it must deduct employee contributions to the State Teachers Retirement System (S.T.R.S.) for these personal service contract teachers. Presently, the Department recognizes only civil service teachers as S.T.R.S. members.

Your letter refers to statutory definitions of the words "employer," "teacher," and "regularly employed," as well as 1975 Op. Att'y Gen. No. 75-075. That opinion advised the Executive Director of the Public Employees Retirement System upon an analogous question of whether or not individuals hired by an office of the State of Ohio on a contractual basis, where such office had the right to exercise the ultimate control over the mode and manner of the work performed, were "public employees" required to contribute to the Public Employees Retirement System pursuant to R.C. 145.47.

Your letter does not specify the time period to which it relates. Accordingly, I shall consider the law both as it exists at the present time and as it existed prior to January 4, 1979, the effective date of H.B. 813, which amended pertinent sections of R.C. Chapter 3307. Prior to those amendments, Section 3307.01(A) and (B) read as follows:

As used in Chapter 3307 of the Revised Code:

(A) "Employer" means the board of education, school district, college, university, institution, or other agency within the state by which a teacher is employed and paid.

(B) "Teacher" means any person paid from public funds and employed in the public schools of the state under any type of contract described in section 3319.08 of the Revised Code in a position for which he is required to have a certificate issued pursuant to sections 3319.22 to 3319.31, inclusive, of the Revised Code; and any other teacher or faculty member regularly employed in any school, college, university, institution, or other agency wholly controlled and managed, and supported in whole or in part by the state or any subdivision thereof. The educational employees of the department of

education, as determined by the state superintendent of public instruction, shall be considered teachers for the purpose of membership in this system. In all cases of doubt the state teachers retirement board shall determine whether any person is a teacher, and its decision shall be final. (Emphasis added.)

The language of Section (A) above is clearly applicable to the Department of Mental Health and Mental Retardation since the Department is an instrumentality or "other agency" of the state. Such fact has been acknowledged in your letter, which states that the Department presently recognizes civil service teachers as being members of the State Teachers Retirement System.

Considering the definition of "teacher" in Section (B) above, the first clause is inapplicable because it refers only to teachers who are employed in public schools under a contract described in R.C. 3319.08 and who are certified pursuant to R.C. 3319.22 to 3319.31. The remaining language however, is applicable, because it states that a "teacher" is also "any other teacher or faculty member regularly employed in any school, college, university, institution, or other agency wholly controlled and managed, and supported in whole or in part by the state or any subdivision thereof. . . ." Since there can be no doubt that the Department of Mental Health and Mental Retardation is included within this language, the issue becomes whether or not individual teachers, engaged under personal service contracts with the Department of Mental Health and Mental Retardation, were "regularly employed" as that term was defined in former R.C. 3307.01(C):

"Regularly employed" means full-time employment for twelve or more consecutive school weeks by the same employer during the year. Any regularly employed member also employed concurrently for part-time service as a teacher or faculty member by a different employer shall contribute from his compensation for his part-time service.

The phrase "regularly employed" was also used as a term of art in the definition of "teacher" in former Section 3307.01(B); however, effective January 4, 1979, H.B. 813 deleted the phrase "regularly employed" as a defined term in division (C), and also removed it from usage in division (B). R.C. 3307.01(B) now reads:

"Teacher" means any person paid from public funds and employed in the public schools . . . and any other teacher or faculty member employed in any school, college, university, institution, or other agency wholly controlled and managed, and supported in whole or in part, by the state (Emphasis added.)

Therefore, the requirement that a teacher be employed for twelve or more consecutive school weeks by the same employer has been removed by the General Assembly. Presently, it is only required that a teacher be "employed" in a public school or state institution, and no reference is made to any particular length of time of such employment. In other words, after January 4, 1979, teachers need not be employed on a "regular" basis, but just "employed" in order to be included as members of the State Teachers Retirement System.

The question then becomes what constitutes being employed as an "employee" as opposed to being engaged as an "independent contractor." One of the principal indicia distinguishing between the two terms is outlined in the case of Newcomb v. Dredge, 105 Ohio App. 417 (1957):

The right of control is the distinguishing feature between an employer-independent contractor relationship and a master-servant relationship; and where such right relates to the result and not to the details of the work to be performed the relationship of employer and independent contractor exists.

Resolution of the issue depends, therefore, upon a determination of whether or not the Department of Mental Health and Mental Retardation exercises

"control" over the teachers in question. Such a question is similar to the question presented to me in 1975 Op. Att'y Gen. No. 75-075, wherein I was asked to determine if certain individuals were "employees" or "independent contractors" for purposes of Chapter 145 and, thus, whether they were required to be members of the Public Employees Retirement System.

I noted in that opinion that, although no Ohio court has had the occasion to discuss the distinction between employees and independent contractors for purposes of the Public Employees Retirement System, the question has arisen frequently in other contexts, such as in determining whether one who renders services to another is an employee or an independent contractor for purposes of workers' compensation. Further, I noted that the case of Council v. Douglas, 163 Ohio St. 292, 295 (1955), stated as follows [quoting from Miller v. Metropolitan Life Insurance Co., 134 Ohio St. 289, 291 (1938)]:

The relation of principal and agent or master and servant is distinguished from the relation of employer and independent contractor by the following test: Did the employer retain control or the right to control, the mode and manner of the work contracted for? If he did, the relation is that of principal and agent or master and servant. If he did not but is interested merely in the ultimate result to be accomplished, the relation is that of employer and independent contractor.

Your letter does not provide any information regarding who has control over the teachers in question; however, I assume that the Department of Mental Health and Retardation does require them to teach specific subjects, skills or programs in facilities directly supervised and controlled on a daily basis by the agency itself. In such circumstances, it appears that the Department is clearly capable of "controlling the mode and manner of the work performed," which leads to the conclusion that such teachers should be considered employees of the Department, and not independent contractors.

It is the nature of the work itself and the manner in which it is performed which must be examined, not the title or name given to the contract by which an individual is employed. Your letter states that the Department presently recognizes that teachers covered by civil service are members of the State Teachers Retirement System; yet you do not draw any distinction between the duties or work performed by such civil service teachers and the work performed by teachers hired under personal service contracts. If both groups of teachers perform the same or substantially similar duties, and if the Department exercises the same degree of control over the manner in which both groups perform their duties, there can be no logical distinction for including one group in membership of the State Teachers Retirement System and not the other. Both groups are "employed" by the Department if both are supervised and controlled in the same fashion. Further, R.C. 3307.01 makes no distinction between teachers who are in the civil service and those who are not. Indeed, all "teachers," as defined by R.C. 3307.01, 3319.22, and 3319.31, are specifically excluded from membership in the Public Employees Retirement System by R.C. 145.01(A) and from membership in the School Employees Retirement System by R.C. 3309.01.

In view of the foregoing, I conclude that the Department of Mental Health and Mental Retardation was required under the provisions of R.C. Chapter 3307, as in effect prior to January 4, 1979, to deduct employee contributions and to pay employer contributions to the State Teachers Retirement System for those teachers engaged under personal service contracts with the Department who were "regularly employed" teachers, as defined by former R.C. 3307.01(C), and whose mode and manner of work were controlled by the Department.

I also conclude that, under R.C. Chapter 3307 as currently in effect, the Department of Mental Health and Mental Retardation is required to deduct employee contributions and to pay employer contributions to the State Teachers Retirement System for those teachers under personal service contracts to the

Department of Mental Health and Mental Retardation who are "teachers employed" by the Department within the meaning of R.C. 3307.01. A teacher is employed for purposes of 3307.01(B) if the Department exercises control over the mode and manner of the teacher's work.

Therefore, in specific answer to your question, it is my opinion, and you are advised, that:

1. Teachers who are engaged under personal service contracts with the Department of Mental Health and Mental Retardation are "employed" by the Department for purposes of R.C. Chapter 3307 if the Department exercises control over the mode and manner in which the teachers perform their work.
2. The Department of Mental Health and Mental Retardation must deduct employee contributions and pay employer contributions to the State Teachers Retirement System, pursuant to the requirements of R.C. Chapter 3307, for all individuals employed as "teachers" as defined in R.C. 3307.01(B).
3. Prior to January 4, 1979, the effective date of H.B. 813, the Department of Mental Health and Mental Retardation was required by R.C. Chapter 3307, as then in effect, to deduct employee contributions and to pay employer contributions to the State Teachers Retirement System for all teachers engaged under personal service contracts who were "regularly employed," as defined by R.C. 3307.01(C), as then in effect. A teacher was "employed" within that definition only if the Department exercised control over the mode and manner of the teacher's work.