

OPINION NO. 2013-026**Syllabus:**

2013-026

A township is not required to seek reimbursement from its employees for payments of employee contributions made by the township to the Ohio Police and Fire Pension Fund after the township failed to deduct those contributions from the employees' wages. A township may, however, choose to seek reimbursement from employees for those contributions.

To: Donald L. Crain, West Chester Township Law Director, West Chester, Ohio

By: Michael DeWine, Ohio Attorney General, August 7, 2013

You have requested an opinion whether a township is required or permitted to seek reimbursement from an employee when the township makes payments to the Ohio Police and Fire Pension Fund ("OPFPF") as a result of the township's failure to withhold the employee's contribution from his salary.

OPFPF provides retirement and disability benefits as specified in R.C. Chapter 742 to employees who are members of the fund. R.C. 742.02. A "[m]ember of the fund" is defined as:

any person, except an other system retirant as defined in [R.C. 742.26], who is contributing a percentage of the person's annual

salary to the Ohio police and fire pension fund or who is receiving a disability benefit or pension from the fund as a result of service in a police or fire department.¹

R.C. 742.01(E) (footnote added). The benefits provided by OPFPF are funded by contributions from employers and employees. Each employer is required to pay to OPFPF a percentage of the salary of each member employee. R.C. 742.33 (employer must pay, on monthly basis, nineteen and one-half percent of the salaries of members of the employer's police department); R.C. 742.34 (employer must pay, on monthly basis, twenty-four percent of the salaries of members of the employer's fire department). This is referred to as the "employer contribution."

Additionally, each member employee must contribute to OPFPF a certain percentage of his salary, referred to as the "employee contribution." R.C. 742.31. The employee's contribution "shall be deducted by the employer from the employee's salary . . . for each payroll period." R.C. 742.31(C). The employer's fiscal officer must transmit monthly reports to OPFPF showing all employee deductions along with payments covering the total of such deductions. R.C. 742.32(A); 2B Ohio Admin. Code 742-9-10(E)(3). Thus, the employer is responsible for submitting payments for both the employer contribution and the employee contribution to OPFPF.

According to your letter, West Chester Township is required to make contributions to OPFPF.² For some period of time, the Township failed to deduct sufficient amounts from its employees' salaries because of an error made by the Township in calculating the required employee contributions. You explain that "the Township discontinued calculating longevity pay as pensionable for [OPFPF] participants for a period of time, resulting in missed contributions for a fraction of the employees' pay." The missed contributions included both employer and employee contributions. Your question, however, focuses on the missed employee contributions.

R.C. 742.32 addresses situations in which an employer fails to transmit an employee's contribution to OPFPF.

¹ An "[o]ther system retirant" is a former member of the public employees retirement system, state teachers retirement system, school employees retirement system, state highway patrol retirement system, or Cincinnati retirement system "who is receiving a disability benefit or an age and service or commuted age and service retirement benefit or allowance from a system of which the person is a former member." R.C. 742.26(A)(2).

² A township may be an "employer" for purposes of R.C. Chapter 742. "Employer" means the government entity by which an employee is employed and paid." R.C. 742.01(D). "Employee" is defined as "any person who is a member of a police department or a member of a fire department." R.C. 742.01(C). Finally, "[m]ember of a police department" and "[m]ember of a fire department" are defined in R.C. 742.01(A) and (B) respectively. Thus, a township that has "employees," as defined in R.C. 742.01(C), is an "employer" for purposes of contributions to Ohio Police and Fire Pension Fund ("OPFPF").

Where an employer fails to deduct contributions for any employee and transmit such amounts to the fund, the board may make a determination of the employee's liability for contributions and certify to the employer the amounts due for collection in the same manner and subject to the same penalties as payments due the employer's contributions funds.

R.C. 742.32(C). *See also* R.C. 742.352; 2B Ohio Admin. Code 742-9-10. In your situation, the Township self-reported the missed contributions. Following the instructions it received from OPFPF, the Township paid the missed contributions to OPFPF. You now ask whether the Township is required or permitted to seek reimbursement from its employees for payments made by the Township to OPFPF for the missed employee contributions. Additional discussion with your office has indicated that your primary concern is whether a township is required to seek reimbursement from its employees.

We must examine the language of the relevant statutes to determine whether a township is required or permitted to seek reimbursement from its employees for missed employee contributions paid by the township to OPFPF. R.C. Chapter 742 is silent with respect to whether a township is required or permitted to seek reimbursement from its employees for missed employee contributions paid by the employer to OPFPF. Rule 742-9-10 also is silent on this issue.

There is no language in R.C. Chapter 742 or rule 742-9-10 that requires a township to seek reimbursement for missed employee contributions that the township has paid to OPFPF. We cannot read such a requirement into the statute. *Perrysburg Twp. v. City of Rossford*, 103 Ohio St. 3d 79, 2004-Ohio-4362, 814 N.E.2d 44, at ¶7 (quoting *Cleveland Elec. Illuminating Co. v. City of Cleveland*, 37 Ohio St. 3d 50, 524 N.E.2d 441 (1988) (syllabus, paragraph three)) (“it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used”). Similarly, we find no language in R.C. Chapter 742 or rule 742-9-10 that prohibits a township from seeking reimbursement from employees for such payments. No limitation on a township's ability to seek reimbursement from its employees may, therefore, be inferred. *See Perrysburg Twp. v. City of Rossford*, 103 Ohio St. 3d 79, at ¶7; 2011 Op. Att'y Gen. No. 2011-019, at 2-167 (“where, as here, such limitations or qualifications are not included in the statute, we must give effect only to the words used and not insert words not used”); 1983 Op. Att'y Gen. No. 83-049, at 2-195 (“R.C. 4513.34 is silent as to whether permits may be issued for divisible loads. No limitation upon the issuance of such permits may, therefore, be implied”). Accordingly, R.C. Chapter 742 neither requires nor prohibits a township from seeking reimbursement from its employees for missed employee contributions that the township has paid to OPFPF.

We are not aware of any provision in the Revised Code that requires a township to seek reimbursement from its employees for missed employee contributions paid by the township to OPFPF. Nor are we aware of any provision in the Revised Code that prohibits a township from seeking reimbursement for those payments.

Although we do not find any prohibitions on a township's ability to seek

reimbursement from its employees for missed contributions, that alone does not determine whether a township may seek reimbursement. We must also consider whether a township has authority to seek reimbursement. Generally, a board of township trustees is a creature of statute that has only those powers expressly conferred by statute or necessarily implied thereby.³ ; *New London Twp. v. Miner*, 26 Ohio St. 452, 456 (1875). Because your primary concern is whether a township is required to seek reimbursement from its employees for missed contributions, and because you do not ask what mechanisms a township may utilize to seek reimbursement, we do not explore every mechanism by which a township may seek reimbursement.

It is sufficient for the purpose of this opinion to recognize that a township has express statutory authority to compensate employees of its police and fire departments. R.C. 505.38; R.C. 505.49. In addition to any statutes that authorize a township to recover moneys that have been illegally or erroneously expended, including R.C. 117.28, it is logical to conclude that the power to expend moneys to compensate employees includes the implied authority to seek recovery of those moneys if they are paid illegally or erroneously. *Cf. State v. Hale*, 60 Ohio St. 3d 62, 573 N.E.2d 46 (1991) (state may recover overpayments of compensation made to members of the Ohio Civil Rights Commission); *Gibbs v. Greenfield Exempted Vill. Sch. Dist. Bd. of Educ.*, No. 01CA8, 2001-Ohio-2638, 2001 Ohio App. LEXIS 6016, at ** 22-23 (Highland County Dec. 24, 2001) (R.C. 117.28 is not the only means by which a board of education may recover wages improperly paid to employee); *Green Local Teachers Ass'n v. Blevins*, 43 Ohio App. 3d 71, 73-75, 539 N.E.2d 653 (Scioto County Dec. 7, 1987) (school district may recover overpayments of compensation made to teachers due to calculation error made by the school district's treasurer); 2007 Op. Att'y Gen. No. 2007-010, at 2-78 to 2-81 (bonuses and severances paid without authority by Secretary of State's Office to its employees may be recovered under R.C. 117.28 if an audit report shows that public money was illegally expended); 1987 Op. Att'y Gen. No. 87-074, at 2-482 (if an audit report makes a finding of illegal expenditures under R.C. 117.10, a civil action may be initiated to recover moneys incorrectly paid to employees of county sheriff for accrued, unused sick leave and vacation leave benefits); 1976 Op. Att'y Gen. No. 76-017, at 2-51 to 2-52 (civil action may be initiated under R.C. 117.10, now R.C.

³ Your request notes that West Chester Township is a limited home rule township. In general, boards of township trustees have only the powers expressly conferred by statute or necessarily implied thereby. *See, e.g., Drees Co. v. Hamilton Twp.*, 132 Ohio St. 3d 186, 2012-Ohio-2370, 970 N.E.2d 916, at ¶13; 1981 Op. Att'y Gen. No. 81-011, at 2-40. A limited home rule township may exercise a greater measure of authority, in a greater number of matters, than the authority granted to townships generally by other provisions of R.C. Title 5. *See* R.C. 504.04(A); 2002 Op. Att'y Gen. No. 2002-013, at 2-71 n.1. Here, we conclude that a township that has not adopted a limited home rule government has authority to seek compensation from employees for missed employee contributions paid by the township to OPFPF. Therefore, it is unnecessary to consider the powers of a township that has adopted a limited home rule government.

117.28, against state employees who received improper payments).⁴ *See also State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 470, 423 N.E.2d 105 (1981) (a power may be implied where it is reasonably related to the duties of the public agency). It is within the discretion of a board of township trustees to decide whether to pursue reimbursement from the township's employees for the payment of missed employee contributions to OPFPF and to determine the specific mechanisms the township will utilize to seek reimbursement.⁵

It is, therefore, my opinion, and you are hereby advised that a township is not required to seek reimbursement from its employees for payments of employee contributions made by the township to the Ohio Police and Fire Pension Fund after the township failed to deduct those contributions from the employees' wages. A

⁴ In addition to the cases cited above, several other cases and Attorney General opinions address the recovery of overpayments of compensation. *City of Hubbard ex rel. Creed v. Sauline*, 74 Ohio St. 3d 402, 659 N.E.2d 781 (1996); *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976); *State ex rel. Gilie v. Warren*, 36 Ohio St. 2d 89, 304 N.E.2d 242 (1973); *Goshen Twp. Trs. v. Heywood*, No. CA84-02-007, 1985 Ohio App. LEXIS 6415 (Clermont County Apr. 8, 1985); *Bd. of Stark Cnty. Comm'rs v. Halsy*, Nos. CA 4743 and CA 4755, 1977 Ohio App. LEXIS 9109 (Stark County Dec. 1, 1977); 2008 Op. Att'y Gen. No. 2008-017, at 2-196 to 2-197; 1984 Op. Att'y Gen. No. 84-087, at 2-302; 1982 Op. Att'y Gen. No. 82-047, at 2-135. *See generally* 2007 Op. Att'y Gen. No. 2007-010, at 2-79 to 2-81 (discussing, in greater detail, the various court decisions regarding recovery of overpayments for compensation). Although these cases did not permit recovery of the overpayments, they serve as examples of instances in which a public body was able to bring an action for the recovery of monies paid illegally or erroneously.

⁵ 1973 Op. Att'y Gen. No. 73-118 reached a different conclusion when considering analogous language in the statutes governing the Ohio Public Employees Retirement System (PERS). According to that opinion, "[a] township does not have the right to seek reimbursement from an employee of monies paid to the Public Employees Retirement System as a result of its failure to withhold the employee's contributions from his salary." 1973 Op. Att'y Gen. No. 73-118 (syllabus, paragraph 2). The opinion concluded that because a township has the duty, pursuant to statute, to remit missed employee contributions to PERS, the township is foreclosed from subsequently seeking reimbursement of those contributions from the employee. *Id.* at 2-452 to 2-453.

We do not find this conclusion reasonably supported by the statutes, nor do we find it to be a logical extension of the statutory requirement that a township remit missed employee contributions to PERS. There is no basis in the statutory language to conclude that a township's mandatory obligation to remit payment for missed employee contributions to PERS precludes the township from subsequently seeking reimbursement from the employee. Therefore, we reject the conclusion reached in the 1973 opinion and decline to apply it in this instance.

township may, however, choose to seek reimbursement from employees for those contributions.