

OPINION NO. 72-055**Syllabus:**

1. For purposes of Chapter 145, Revised Code, 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, is a "public employee" under Section 145.01 (A), Revised Code.
2. When a private contractor has contracted to take over what was before the date of such contract a publicly operated function, the contracting governmental unit is required to notify the Public Employees Retirement Board of such intended takeover.
3. If there is any doubt as to whether any newly-hired employee is a "public employee", for purposes of Chapter 145, Revised Code, the head of the appropriate department should notify the Public Employees Retirement Board of such hiring, and request its ruling on the question.

To: J. Douglass Peters, Acting Executive Director, Public Employees Retirement System, Columbus, Ohio
By: William J. Brown, Attorney General, July 21, 1972

I have before me your predecessor's request for my opinion, which reads as follows:

"(1) Does a political subdivision have the right to terminate payments of the employee and employer contributions into the Public Employees Retirement System when a servicer or subcontractor is hired to perform substantially the same duties previously performed by said political subdivision with substantially the same employees being hired by the servicer or subcontractor?"

"(2) Does a political subdivision have the duty to notify the Public Employees Retirement System as to the hiring of a contractor who will perform substantially the same duties previously performed by the political subdivision?"

"(3) Does a political subdivision have the duty to notify the Public Employees Retirement System board and to pay contributions for new employees, hired by a subcontractor, who will perform substantially the same duties previously performed by members of the Public Employees Retirement System?"

Your first and third questions are governed by Section 145.01, Revised Code, which reads in pertinent part as follows:

"(A) 'Public employee' means any person holding an office, not elective, under the

state or any county, municipal corporation, park district, conservancy district, sanitary district, health district, township, metropolitan housing authority, state retirement board, Ohio historical society, public library, county law library, union cemetery, joint hospital, institutional commissary, state university rotary fund, 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 by the legislative authority of any of the units of local government named in this division, 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 section 3307.01 or 3309.01 of the Revised Code. 'Public employee' also means one who is a member of the 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 Chapter 145. of the Revised Code.

"* * * 'Public employee' means also any 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. * * *

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

* * * * *

"(D) 'Employer' means the state or any county municipal corporation, park district, conservancy district, health district, township, metropolitan housing authority, state retirement board, Ohio historical society, public library, county law library, union cemetery, joint hospital, institutional commissary, state university local rotary fund 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 by the legislative authority of any of the units of local government named in this division not covered by section 3307.01 or 3309.01 of the Revised Code. In addition, 'employer' means the employer of employees described in division (A) of this section." (Emphasis added.)

The first emphasized sentence in Section 145.01 (A), supra, governs your first question. Clearly, an employee who continues to perform the same duties under a servicer or subcontractor, which takes over a publicly operated function, is still a "public employee" for purposes of Chapter 145, Revised Code. Membership in the Public Employees Retirement System is compulsory for public employees (with certain exceptions not relevant here), under Section 145.03, Revised Code. See State ex rel. Boda v. Brown, 157 Ohio St. 368, 371 (1952); Opinion No. 72-004, Opinions of the Attorney General for 1972.

However, this result only applies to employees who are carried over in employment from the governmental unit. A consideration of employees newly hired to replace them requires an answer to your third question, which I will give before completing the answer to your first.

In response to your third question, a new employee hired after the takeover by the servicer or contractor, who did not perform the same duties for the governmental unit before the takeover, does not appear to be a public employee. He is not covered by the first emphasized sentence of Section 145.01 (A), supra. The second emphasized sentence appears to refer to the first, which immediately precedes it. Hence, it designates the governmental unit as the employer only of those employees covered by the preceding sentence.

The third emphasized sentence refers to the definition of employer in division (D), supra, which speaks of governmental units and, in the fourth emphasized sentence, "the employer of employees described in division (A)." As discussed, no language in division (A), supra, refers to the employee described in your third question, unless it be the third emphasized sentence. However, the fourth emphasized sentence cannot refer to the third, because then each would depend entirely on the other for its meaning, and, consequently, neither would mean anything. I conclude that the employees described in your third question are not "public employees" for purposes of Chapter 145, supra, and therefore are not required to belong to the Public Employees Retirement System.

In summary, employees who remain after the takeover are "public employees", but their replacements are not. I do not find any provision which would require that all employees of the private contractor be members of the Public Employees Retirement System, merely because most of the employees are. Hence, your first question must be answered for each employee individually.

I am aware of the administrative difficulties which may result from this construction of the statute, because some employees will belong to the Public Employees Retirement System and some to Social Security, and two employees with identical positions may be members of different retirement systems. I am also aware that this construction will tend to deprive the Public Employees Retirement System of younger members, whose contributions help to finance the retirement benefits of older ones. However, I can see no other reasonable construction of the language of Section 145.01, supra.

In response to your second question, there is no express requirement in Chapter 145, *supra*, that a political subdivision notify the Public Employees Retirement Board of the hiring of a contractor to take over a public function. However, a monthly statement of other information is required by Section 145.17, Revised Code, which reads as follows:

"The head of each department shall, on the first day of each calendar month, notify the public employees retirement board of the employment or entering into office of new public employees, and shall submit to the board a statement showing the names, sex, title, compensation, duties, and date of birth of each of such new public employees, and shall also notify the board at the same time of all removals, withdrawals; and changes in salary of any members of the public employees retirement system, which have occurred during the preceding month."

Section 145.01 (C), *supra*, defines "head of the department" as the elective or appointive head of, *inter alia*, local government. Sections 145.15 and 145.16, Revised Code, also require employee information. Section 145.15, *supra*, reads as follows:

"The head of each department shall submit to the public employees retirement board a statement showing the name, sex, title, compensation, duties, date of birth, and length of service as a public employee of every public employee in his department."

Section 145.16, *supra*, reads as follows:

"Each public employee, upon becoming a member of the public employees retirement system, shall file a detailed statement of all his previous service as a public employee and shall furnish such other facts of personal history as the public employees retirement board requires for the proper operation of the system."

The purpose of these Sections, clearly, is to provide the Board with information it needs to operate the System properly. The takeover of a public function by a private contractor will have a marked effect on the functioning of the System with respect to the employees involved, in view of my answer to your first and third questions. Consequently, the legislature must have intended to require heads of departments to notify the Board of such takeovers, even though it did not expressly so require.

However, I do not see any reason why the legislature would have intended to require notification in the situation described by your third question, since the new employee will not belong to the System. However, if there is any doubt as to whether the employee is a "public employee", the Board should be notified, as it makes the final determination of such matter. Section 145.01 (A), *supra*. An example might be the situation in which an employee who had performed certain duties under a governmental unit, leaves the employment, but is rehired by the private contractor after the

takeover to perform the same duties. Since this question is not before me, I will not attempt to answer it. I only caution that when any doubt exists as to the public status of an employee, the head of his department should request a determination from the board.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. For purposes of Chapter 145, Revised Code, 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, is a "public employee" under Section 145.01 (A), Revised Code.

2. When a private contractor has contracted to take over what was before the date of such contract a publicly operated function, the contracting governmental unit is required to notify the Public Employees Retirement Board of such intended takeover.

3. If there is any doubt as to whether any newly-hired employee is a "public employee" for purposes of Chapter 145, Revised Code, the head of the appropriate department should notify the Public Employees Retirement Board of such hiring, and request its ruling on the question.