

OPINION NO. 90-001

Syllabus:

The State Highway Patrol Retirement Board is not authorized to accept, process, or approve a retirement application that is submitted to the Board on behalf of a deceased member of the Highway Patrol Retirement System by such member's surviving spouse.

To: R. D. Huffman, Executive Director, Highway Patrol Retirement System, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, March 7, 1990

You have requested my opinion regarding the authority of the State Highway Patrol Retirement Board to accept and process an application for retirement benefits that is filed by the surviving spouse of a deceased member of the Highway Patrol Retirement System (HPRS). According to information provided in conjunction with your opinion request, an employee in the uniform division of the State Highway Patrol contracted an illness in April 1986 that was subsequently diagnosed as terminal cancer. As his condition deteriorated, the employee and his wife made inquiries of both the State Highway Patrol and HPRS regarding the amount of pension benefits that would be paid to her as a surviving spouse following her husband's death. In particular, they wished to know the amount of benefits to which she would be entitled as the surviving spouse of an active member of HPRS and, alternatively, the amount of benefits to which she would be entitled as the surviving spouse of a retired member of HPRS. This question was asked, *inter alia*, in anticipation of the husband becoming eligible in July 1986 to retire and receive a full, life pension in accordance with the terms of R.C. 5505.16 and R.C. 5505.17.

On the basis of information provided by HPRS, the State Highway Patrol informed the employee that, pursuant to R.C. 5505.17(A)(3),¹ his wife would

¹ During the time periods in question, R.C. 5505.17(A)(3) read as follows:

A surviving spouse of a deceased member or retirant shall receive a pension of four hundred twenty-five dollars per month, or fifty per cent of the computed monthly pension the member was receiving, whichever is greater, during the spouse's life, or until the spouse remarries, if the spouse was married to the deceased member or retirant while he was in the active service of the patrol. Benefits terminated under this division due to a first remarriage shall resume if the remarriage ceases within two years due to divorce, annulment, dissolution, or death.

R.C. 5505.17(A)(3) has since been amended, however, *see* 1987-1988 Ohio Laws, Part I, 1789 (Am. H.B. 10, eff. May 6, 1988); Am. Sub. H.B. 340, 118th Gen. A. (eff. Nov. 2, 1989), and currently provides the following:

(a) A surviving spouse of a deceased member shall receive a monthly pension, determined as follows, during the spouse's life, or until the spouse remarries:

(i) If at the time of his death the member was not eligible to be granted a pension payable under this section or to elect to receive a reduced pension payable under section 5505.16 of the Revised Code, six hundred dollars;

(ii) If at the time of his death the member was eligible to be granted a pension payable under this section or to elect to receive a reduced pension payable under section 5505.16 of the Revised Code, the greater of six hundred dollars or fifty per cent of the computed monthly pension the member would have received had he been granted a pension under this section or elected to receive a reduced pension under section 5505.16 of the Revised Code.

be entitled to receive a monthly pension of four hundred twenty-five dollars as the surviving spouse of an active member of HPRS, or a monthly pension of seven hundred twelve dollars as the surviving spouse of a retired member of HPRS. His employer also informed him that the death benefits otherwise provided by his state group life insurance policy would terminate in the event of his retirement, as would certain benefits provided under the life insurance policy applicable exclusively to employees of the State Highway Patrol. Based upon the information thus provided by both HPRS and the State Highway Patrol, the employee in question elected not to retire and, accordingly, was still an active member of HPRS when he died in November 1986. Surviving spouse benefits for his wife in the amount of four hundred twenty-five dollars per month were approved by the State Highway Patrol Retirement Board in December 1986.

The surviving spouse has since determined, however, that a decision by her husband to apply for and receive retirement benefits prior to his death would, on balance, have been more financially advantageous to her. Accordingly, she now proposes to file an application for retirement on behalf of her deceased husband with the State Highway Patrol Retirement Board, and has requested that the Board accept and process the application as if filed by her husband prior to his death. You wish to know whether the State Highway Patrol Retirement Board may accept and process such an application, thereby entitling the surviving spouse to receive the higher survivor's benefit of seven hundred twelve dollars per month.

In R.C. Chapter 5505 the General Assembly has established the Highway Patrol Retirement System for the benefit of all State Highway Patrol employees, as defined in R.C. 5505.01(A), and membership therein is mandatory for all such employees. R.C. 5505.02. R.C. 5505.04 further creates the State Highway Patrol Retirement Board and vests in the Board responsibility for administering and managing HPRS and effecting the provisions of R.C. Chapter 5505. Thus, as a creature of statute, the State Highway Patrol Retirement Board may exercise only those powers and responsibilities expressly conferred upon it by the General Assembly, or that are necessarily implied by those powers and responsibilities that are expressly granted it. 1981 Op. Att'y Gen. No. 81-024; 1980 Op. Att'y Gen. No. 80-090. See also *In re Ford*, 3 Ohio App. 3d 416, 446 N.E.2d 214 (Franklin County 1982); 1986 Op. Att'y Gen. No. 86-041. Any authority on the part of the Board to accept and process a retirement application in the circumstances described in your

(b) The surviving spouse of a retirant shall receive a monthly pension, determined as follows, during the spouse's life or until remarriage:

(i) If the retirant had applied for a pension payable under section 5505.16 of the Revised Code, but at the time of his death had not attained the age of eligibility for the pension, six hundred dollars;

(ii) If the retirant had applied for a pension payable under section 5505.16 of the Revised Code and had attained the age of eligibility for the pension, but at the time of his death had not elected to begin receiving the pension, the greater of six hundred dollars or fifty per cent of the computed monthly pension the retirant was eligible to receive under section 5505.16 of the Revised Code;

(iii) If the retirant was receiving a pension under this section or section 5505.16 or 5505.18 of the Revised Code, or, regardless of whether or not he had actually received any payment, if the retirant was eligible to receive a pension under this section or section 5505.16 or 5505.18 of the Revised Code and had elected to begin receiving it, the greater of six hundred dollars or fifty per cent of the computed monthly pension awarded the retirant.

(c) Benefits terminated under this division due to a first remarriage shall resume if the remarriage ceases within two years due to divorce, annulment, dissolution, or death.

letter, therefore, must be either expressly addressed within the statutory provisions that comprise R.C. Chapter 5505, or necessarily implied somewhere within those provisions.

The duties, powers, and responsibilities conferred specifically upon the State Highway Patrol Retirement Board are found in several different provisions of R.C. Chapter 5505. In addition to creating the State Highway Patrol Retirement Board and granting it responsibility for the general administration and management of HPRS, R.C. 5505.04 provides that the Board "[m]ay sue and be sued, plead and be impleaded, contract and be contracted with, and do all things necessary to carry out [R.C. Chapter 5505]," and further describes the membership of the Board, certain procedures that must be followed in the case of formal Board meetings, and particular records of the Board that shall be considered confidential or privileged. R.C. 5505.07 authorizes the Board to hire and set the compensation of a secretary and other employees that will enable the Board to transact the business of HPRS, R.C. 5505.07(A). R.C. 5505.07 further states that the Board shall "appoint an actuary who shall be its technical advisor," R.C. 5505.07(C); "from time to time adopt such mortality and other tables of experience, and such rate or rates of interest, as are required in the proper operation of the retirement system," R.C. 5505.07(D); and "determine by appropriate rules the service to be credited any member in any calendar year," R.C. 5505.07(E). The Board is also directed to "perform other functions and adopt rules as required for the proper execution of Chapter 5505. of the Revised Code," *id.*

R.C. 5505.06 and R.C. 5505.08 enumerate the specific powers and responsibilities of the State Highway Patrol Retirement Board with respect to the investment of HPRS funds. *See* R.C. 5505.03. R.C. 5505.12 requires the Board to have actuarial reports compiled periodically that evaluate the prospective assets and liabilities of HPRS funds, and R.C. 5505.14 directs the Board, upon the written request of an HPRS member, to issue a certificate certifying to the aggregate length of such member's prior service as a State Highway Patrol employee. R.C. 5505.17, which sets forth the benefit calculation formulae for HPRS members and their spouses and dependents, *see* R.C. 5505.17(A)(1)-(8), also states that the Board shall adopt, and may amend or rescind, rules necessary for the administration of such section, R.C. 5505.17(B), and R.C. 5505.171-.174 confer certain duties upon the Board with respect to the calculation and certification of additional benefits to be paid to HPRS retirees.

R.C. 5505.19 further provides that the State Highway Patrol Retirement Board shall pay to any HPRS member who for any cause except his death, disability, or retirement ceases to be an employee of the State Highway Patrol such member's accumulated contributions standing to the credit of his individual account in the employee's savings fund, and R.C. 5505.21 describes the distribution to be made by the Board with respect to the accumulated contributions of an HPRS member who dies under circumstances when no pension becomes payable from HPRS funds on account of his employment with the State Highway Patrol. Finally, R.C. 5505.28 authorizes the Board to enter into agreements with insurance companies and other providers to procure policies or contracts for health, medical, hospital, and surgical benefits for HPRS retirees and their dependent beneficiaries. *See also* R.C. 5505.30 (lump sum payment of a death benefit by the State Highway Patrol Retirement Board to the surviving spouse of an HPRS retiree).

It is evident that an express grant of authority on the part of the State Highway Patrol Retirement Board to accept and process retirement applications that are regularly filed by HPRS members does not appear in any of the aforementioned provisions of R.C. Chapter 5505. Nonetheless, it is clear that such authority on the part of the Board may be reasonably inferred from several of those provisions. R.C. 5505.04 states, in pertinent part, that "the making effective of [R.C. Chapter 5505 is] hereby vested in" the State Highway Patrol Retirement Board, which may "do all things necessary to carry out [R.C. Chapter 5505]." R.C. 5505.07 further states that the Board "shall perform other functions...as required for the proper execution of [R.C. Chapter 5505]." The General Assembly has, in R.C. Chapter 5505, established the Highway Patrol Retirement System for the purpose of providing pension benefits to State Highway Patrol employees, and the surviving spouses and children of those employees. The eligibility of HPRS members to

receive those pension benefits, and the calculation and payment of such benefits, are further addressed in R.C. 5505.16, R.C. 5505.17-.174, and R.C. 5505.18. A member of HPRS who is otherwise eligible to receive such benefits is directed to file his application therefor with the State Highway Patrol Retirement Board. *See, e.g.*, R.C. 5505.16(A) (a member of HPRS who has been in the service of the State Highway Patrol for a period of twenty-five years as an employee according to the rules adopted by the State Highway Patrol Retirement Board "may make application for a pension which, if he is under age forty-eight, shall be deferred until he attains age forty-eight"); R.C. 5505.16(B) (a member of HPRS who has been in the service of the State Highway Patrol for a period of twenty years as an employee according to the rules adopted by the State Highway Patrol Retirement Board "may make application for a pension which, if he is under age fifty-two, shall be deferred until he attains age fifty-two"); R.C. 5505.16(C) ("[a]ny member who attains the age of fifty-five years and has been in the service of the patrol for a period of twenty years as a uniformed patrol officer according to the rules adopted by the board, shall file application for retirement with the board"); R.C. 5505.18(A) (upon the application of a member of HPRS, or the Superintendent of the State Highway Patrol on behalf of a member, a member who becomes totally and permanently incapacitated for duty in the employ of the State Highway Patrol may be retired by the State Highway Patrol Retirement Board). Authority on the part of the State Highway Patrol Retirement Board to accept and process such retirement applications as are filed with the Board is obviously implicit in the provisions of R.C. 5505.04, R.C. 5505.07, R.C. 5505.16, and R.C. 5505.18, lest the filing of such applications be rendered a futile and meaningless act. As a general matter, therefore, I am of the opinion that the State Highway Patrol Retirement Board has implied authority to accept, process, and, in the appropriate circumstances, approve applications for retirement that are filed with the Board by HPRS members.

Whether the State Highway Patrol Retirement Board is similarly authorized to accept, process, and approve an application for retirement that is filed as described in your opinion request presents a significantly different question. According to your letter the surviving spouse of a deceased employee of the State Highway Patrol wishes to submit a retirement application to the Board on behalf of her husband and have the Board accept and approve the application as if it had been filed by her husband prior to his death. The surviving spouse is, in other words, requesting that the State Highway Patrol Retirement Board retroactively retire her deceased husband in order that she may receive from HPRS the higher survivor's benefits to which she would have been entitled under R.C. 5505.17(A)(3) had her husband been an HPRS retiree at the time of his death.

Having reviewed the provisions of R.C. Chapter 5505 set forth above, I conclude that there is implied by those provisions no authority on the part of the State Highway Patrol Retirement Board to accept, process, and approve such a retirement application. To the contrary, the available statutory evidence suggests fairly convincingly that the Board may not, in fact, process and approve a retirement application that is filed in the manner and for the reasons you have described to me.

First, it is apparent that the decision to apply for either age and service retirement under R.C. 5505.16, or disability retirement under R.C. 5505.18, rests exclusively with the individual who is a "[m]ember" of HPRS, as defined in R.C. 5505.01(J).² *See* R.C. 5505.16(A)-(C); R.C. 5505.18(A). In the present situation, the surviving spouse is not, and has never been, a member of HPRS. Moreover, the filing of the appropriate retirement application subsequent to the decision to retire is, with but one exception, the sole responsibility of the HPRS member himself. The single exception is found in R.C. 5505.18(A), which states that an application for disability retirement may be filed by a member of HPRS or by the Superintendent of

² R.C. 5505.01 reads, in pertinent part, as follows:

As used in this chapter:

(A) "Employee" means any qualified employee in the uniform division of the state highway patrol, and any qualified employee in the radio division hired prior to the effective date of this amendment. "Employee" includes the superintendent of the

the State Highway Patrol "on behalf of a member." In no instance, however, does R.C. Chapter 5505 confer upon a person who is not a member of HPRS the discretion to decide whether someone who is a member of HPRS should retire, and to file on the member's behalf an application for retirement and the payment of retirement benefits. Accordingly, I discern no logical or reasonable basis for inferring authority on the part of the State Highway Patrol Retirement Board to accept, process, or approve a retirement application that is submitted to the Board by a person who is not a member of HPRS. Further, I find this conclusion particularly compelled where the application for retirement is submitted with respect to a deceased member of HPRS who, prior to his death, made the decision not to retire and thus remained an active member of HPRS at the time of his death.

It is, therefore, my opinion, and you are advised that the State Highway Patrol Retirement Board is not authorized to accept, process, or approve a retirement application that is submitted to the Board on behalf of a deceased member of the Highway Patrol Retirement System by such member's surviving spouse.

state highway patrol. In all cases of doubt, the state highway patrol retirement board shall determine whether any person is an employee as defined in this division, and the decision of the board is final.

....
(J) "Member" means any employee included in the membership of the retirement system, whether or not rendering contributing service.

(K) "Retirant" means any member who retires with a pension payable from the retirement system.