

5540

EMPLOYEES, STATE — ALL PERSONS EMPLOYED BY BOARD OF TRUSTEES OF STATE UNIVERSITY, PAID OUT OF PUBLIC FUNDS — CAPACITIES, MATRONS, COOKS, KITCHEN ASSISTANTS OR LIKE CAPACITY — PUBLIC EMPLOYEES RETIREMENT ACT — SECTION 486-32 G.C.

SYLLABUS:

All persons who are employed by the board of trustees of a state university in capacities such as matrons, cooks, kitchen assistants, or in any like capacity, and who are paid out of public funds, are "state employes" as that term is defined in Section 486-32 of the General Code, being a part of the Public Employes Retirement Act.

Columbus, Ohio, October 14, 1942.

Mr. Wilson E. Hoge, Secretary, Public Employes Retirement System, Columbus, Ohio.

Dear Sir:

I have your letter requesting my opinion, which letter reads as follows:

"Various state educational institutions employ persons in capacities such as matrons, cooks, kitchen assistants, etc., who are not paid directly by the State Auditor's Office out of funds deposited with the State Treasurer, but are employed by the Board of Trustees and paid from rotary funds set up under state law, audited by the State Auditor, etc.

We would like your opinion as to whether an employe of the Board of Trustees of a State University who is paid out of the rotary fund not deposited with the State Treasurer, but set up in accordance with the statutes, comes within the meaning of 'state employe' as that term is defined in Section 486-32 of the General Code of Ohio."

Subsection (4) of Section 486-32, General Code, reads as follows:

"(4) 'State employe' shall mean any person holding a state office, not elective, under the state of Ohio, or employed and/or paid in whole or in part by the state of Ohio in any capacity whatsoever. But the term 'state employe' shall not include those persons who come within the provisions of the state teachers' retirement system, as provided for in the General Code (Sections 7896-1 to 7896-63).

In all cases of doubt the retirement board shall determine whether any person is a state employe as defined in this paragraph, and its decision shall be final."

By a recent amendment to Section 486-48, General Code, elective officials may also become members of the Public Employes Retirement System.

If we give to the language of the above quoted section its ordinary meaning, it would seem to be inclusive of all persons who work for the state of Ohio or any of its departments or institutions, pursuant to appointment, and who are paid in whole or in part by funds belonging to the state or any of its institutions, regardless of the question whether their duties are of high dignity or strictly menial. The humblest employe would be as clearly entitled to the benefits of the act and subject to its burdens as would the highest official.

Much force also should be given to the second paragraph of the subsection above quoted, giving to the retirement board discretion to determine in case of doubt whether any person is a state employe, and making its decision final. The finality of the board's discretion would be subject only to the qualification that it must not be so arbitrary or baseless as to be tantamount to fraud.

Section 486-33, General Code, provides as follows:

“A state employes retirement system is hereby created for the employes of the state of Ohio. Membership in the state employes retirement system shall be compulsory and shall consist of all state employes, either as original members or as new members upon being regularly appointed. Provided, however, that any original member may be exempted from membership by filing written application for such exemption with the retirement board within three months after this act goes into effect; and any new member over the age of fifty years may be exempted from membership by filing written application for exemption with the retirement board within three months after being regularly appointed as a state employe. And provided, further, that the board shall have authority to exempt from compulsory membership in the retirement system, classes or groups of employes engaged in work of a temporary, casual or exceptional nature, but individuals in any such class or group so exempted may become members by making application therefor, subject to the approval of the retirement board; provided, however, that any employe who is, or who becomes, a member must continue such membership as long as he is a state employe, even though he may be in or transferred to an exempted class or group.”

Attention is particularly called to that provision of the above quoted section which gives the board authority “to exempt from compulsory

membership in the retirement system, classes or groups of employes engaged in work of a *temporary, casual or exceptional nature.*" The fact that the Legislature thought it necessary to make this provision indicates that it regarded the word "employee" as all inclusive.

It is evident that some of the employes of the character mentioned in your letter might be drawn from the student body, who may possibly serve for only a small portion of each day, or for only a few days in a month, while the same work might possibly be done by one who has been regularly employed and who has occupied the position continuously for a long period. The question of what employes are to be exempt as "temporary, casual or exceptional" is one with which the board will have to deal under the provisions of the statute.

The question whether the employes in question are paid out of funds which have been deposited in the state treasury, or are paid from funds remaining in the hands of the university treasurer, does not in my opinion affect the status of these persons as "employees" within the meaning of the Retirement Act. In this connection I call attention to Section 7923-1, General Code, a portion of which reads as follows:

"That the boards of trustees of Kent State University, Bowling Green State University, Ohio University, Miami University, the college of education and industrial arts at Wilberforce University, Wilberforce, Ohio, and Ohio State University are hereby authorized to construct, equip, *maintain and operate* upon sites within the campuses of the above universities respectively as their respective boards may designate therefor, buildings to be used as dormitories for students and members of the faculty and servants of said state universities, *and to pay for same out of any funds in their possession derived from the operation of any dormitories*, under their control, or out of funds borrowed therefor, or out of funds appropriated therefor by the general assembly of Ohio, or out of funds or property received by gift, grant, legacy, devise, or otherwise, for such purposes, * * *." (Emphasis mine.)

My immediate predecessor, in construing this statute (1937 Opinions Attorney General, p. 2029), said:

"A reading of Section 7923-1 in the light of the fact that in the past there were various dormitory funds in the hands of the various state universities, the status of which was questionable, shows a legislative intent to expressly release these dormitory funds for expenditure in the construction, equipment and operation of dormitories for students and members of the faculty."

In a subsequent opinion (1938 Opinions Attorney General, p. 1661), in considering the character of funds received from the operation of such dormitories and held under favor of Section 7923-1, it was held:

“Such dormitory funds held by the treasurers of such universities, although public moneys in the generally accepted sense, are not ‘public moneys’ within the meaning of the term as used in the Uniform Depository Act, Sections 2296-1, et seq., General Code, requiring such moneys to be deposited by the state and subdivisions thereof in accordance therewith.”

But the fact that these funds were not considered “public moneys” within the purview of the Uniform Depository Act, does not prevent them from being public funds when used for the payment of the employes of the state.

Answering your question specifically, it is my opinion that all persons who are employed by the board of trustees of a state university in capacities such as matrons, cooks, kitchen assistants, or in any like capacity, and who are paid out of public funds, are “state employes” as that term is defined in Section 486-32 of the General Code.

Respectfully,

THOMAS J. HERBERT
Attorney General.