

OPINION NO. 99-003**Syllabus:**

1. Pursuant to R.C. 2301.22 and R.C. 2301.24, court reporters may receive two types of compensation, one for taking testimony and one for preparing transcripts.
2. The Public Employees Retirement Board has authority under R.C. 145.01(A) to determine whether a particular person is a public em-

ployee and authority under R.C. 145.01(R)(3) to determine by rule whether any compensation not enumerated by statute is earnable salary, and the Board's decisions on those matters are final.

3. Whether particular payments made pursuant to R.C. 2301.24 and R.C. 2301.25 to a court reporter of the court of common pleas for preparing transcripts and copies should be included for purposes of making contributions to the Public Employees Retirement System is subject to determination by the Public Employees Retirement Board.

To: Julia R. Bates, Lucas County Prosecuting Attorney, Toledo, Ohio
By: Betty D. Montgomery, Attorney General, February 1, 1999

We have received your request for an opinion on the question whether payments for transcripts should be included in the salary of an official court reporter for purposes of making contributions to the Public Employees Retirement System (PERS). Your question pertains specifically to payments made by the court of common pleas pursuant to R.C. 2301.24 and R.C. 2301.25.

In connection with your question, we have been informed by the Court Administrator of the Lucas County Common Pleas Court that reporters of that court receive two distinctly separate types of compensation. Those court reporters are considered to be full-time employees in the unclassified service and, in that capacity, they take testimony and receive a salary that is reported as wages on a W-2 form. *See* R.C. 124.11(A)(10); R.C. 2301.22; *see also* 1933 Op. Att'y Gen. No. 1571, vol. II, p. 1426. Compensation for making transcripts is provided separately. Transcript payments are based on the number of pages of transcript prepared. Amounts per page are set by the court and are paid in addition to the salary. For this purpose, the court reporters receive compensation either from the county treasury or from the party for whom the transcript is made and are not considered to be employees. *See* R.C. 2301.24-.25. Amounts so paid by the county are reported as non-employee income on a form 1099.

The instant controversy has arisen because of correspondence from PERS indicating that transcript payments should be included in earnable salary and retirement contributions should be taken. You have informed us that most counties do not include transcript payments as part of a court reporter's salary for purposes of making PERS contributions, but at least one county does, and you ask for guidance on this matter.

In order to understand the matter at issue, we need to examine the provisions governing the appointment and compensation of court reporters. The court of common pleas is authorized to appoint an official shorthand reporter and assistant shorthand reporters for terms of up to three years. R.C. 2301.18-.19. The statutory duties of these court reporters are to "take accurate shorthand notes of the oral testimony or other oral proceedings" and to file the notes in the office of the official shorthand reporter. R.C. 2301.20. The notes must be carefully preserved for the prescribed period of time. *Id.* A court reporter is considered to be "a public employee and an officer of the court." 1989 Op. Att'y Gen. No. 89-073, at 2-333; *see also* 1946 Op. Att'y Gen. No. 1143, p. 598, at 599.

Pursuant to statute, "[e]ach shorthand reporter shall receive such compensation as the court of common pleas making the appointment fixes." R.C. 2301.22. This compensation is in place of any per diem compensation, unless the appointment is for less than a year, in

which case there may be per diem compensation plus payment of actual and necessary expenses incurred. If the compensation is on an annual basis, the reporter is paid monthly from the county treasury. If compensation is per diem, payment is made upon presentation of authorization by the court. Compensation paid pursuant to R.C. 2301.22 is for taking testimony and performing other duties under the orders of the court. *Id.*; see also 1988 Op. Att'y Gen. No. 88-025; 1973 Op. Att'y Gen. No. 73-066; 1946 Op. Att'y Gen. No. 1143, p. 598, at 600.

In many cases, no transcripts are requested, and the court reporter's only duty is to see that the notes are properly preserved. See R.C. 2301.20. In some instances, however, the court, a party, or the attorney for a party requests transcripts, and the reporter is required to "make full and accurate transcripts of the notes for the use of such court or party." R.C. 2301.23. Separate compensation is allowed the court reporter for making transcripts and copies of decisions rendered and charges delivered by the court. R.C. 2301.23; R.C. 2301.24; R.C. 2301.25; see 1988 Op. Att'y Gen. No. 88-025, at 2-96 ("[b]y statute ... separate provision is made for the shorthand reporter's preparation of, and compensation for, transcripts of his shorthand notes"); 1980 Op. Att'y Gen. No. 80-099 (syllabus, paragraph 3) ("[c]ommon pleas court reporters and assistant court reporters may collect the compensation provided for in R.C. 2301.24 and R.C. 2301.25 for preparing transcripts for indigent criminal defendants, in addition to their regular salary which is fixed by the court pursuant to R.C. 2301.19 and 2301.22"); 1965 Op. Att'y Gen. No. 65-191, at 2-424 ("[i]t is well settled that the compensation provided for in [R.C. 2301.24] is in addition to the compensation allowed such reporters under the provisions of [R.C. 2301.22]"); 1954 Op. Att'y Gen. No. 3645, p. 143; 1921 Op. Att'y Gen. No. 2017, vol. I, p. 329, at 332; 1920 Op. Att'y Gen. No. 1036, vol. I, p. 235, at 236.

The separate compensation allowed for preparing transcripts is fixed by the court and "paid forthwith by the party for whose benefit a transcript is made." R.C. 2301.24. When transcripts are requested by the prosecuting attorney during trial in criminal cases, or by the court, compensation is paid from the county treasury and taxed as costs. *Id.* When more than one transcript is ordered at the same time by the same party, or by the court, the compensation for the additional transcript is one-half of that allowed for the first copy. R.C. 2301.25. Transcript moneys paid by the county to court reporters pursuant to R.C. 2301.24 come within the category of disbursements designated "Transcripts," whereas those used to pay annual or per diem compensation to court reporters pursuant to R.C. 2301.22 are included within "Salaries-Employee(s)." 2 Ohio Admin. Code 117-1-02; see generally 1991 Op. Att'y Gen. No. 91-068.

Before sophisticated electronic systems became available, each court reporter took notes in shorthand and had individual responsibility for preparing transcripts from those notes. See, e.g., *Searles v. Cowdrick*, 21 Ohio C.C. (n.s.) 378 (Cir. Ct. Lucas County 1912), *aff'd*, 91 Ohio St. 371, 110 N.E. 1067 (1914). Whether transcripts were needed varied from matter to matter, as did the time constraints imposed. We have been informed that, when time was of the essence, the reporters sometimes employed others to prepare transcripts from notes taken by the reporters. Hence, the separate role of the court reporter in preparing transcripts is consistent with our understanding of the historical context. See, e.g., 1954 Op. Att'y Gen. No. 3645, p. 143, at 145 (quoting Attorney General's informal opinion No. 334, dated January 28, 1954, as follows: "It is thus to be seen that the reporter in each court is compensated on a dual basis, i.e., a salary to be fixed by the court, and the allowance of fees for certain special services as ordered by the court or by the parties").

Thus, pursuant to R.C. 2301.22 and R.C. 2301.24, court reporters may receive two types of compensation, one for taking testimony and one for preparing transcripts. The

statutes governing court reporters grant discretion to the court to fix the compensation for taking testimony and to fix the compensation for making transcripts and copies. R.C. 2301.22; R.C. 2301.24. Therefore, it is not necessary for all counties to establish arrangements that are identical to those that exist in Lucas County. This opinion considers the facts as they were presented to us by the Court Administrator of the Lucas County Common Pleas Court, with the understanding that other arrangements may exist in other counties.

Let us turn now to the statutes governing contributions to PERS. Those statutes require each public employer to deduct from the earnable salary of a contributor to PERS the designated percentage of the earnable salary and pay that amount to PERS, and also to pay the appropriate employer contribution. R.C. 145.47-.48. In general, public employees are required to be contributors to PERS. *See* R.C. 145.01(A), (F); R.C. 145.03. Thus, for compensation paid to an individual to be the subject of contributions to PERS, it must first be determined that the individual is a public employee. In cases of doubt, the Public Employees Retirement Board is authorized to determine whether a particular person is a public employee, and the Board's decision on that matter is final. R.C. 145.01(A).

Contributions to PERS are based on a member's "earnable salary," which is defined in R.C. 145.01(R) to mean "all salary, wages, and other earnings paid to a contributor by reason of employment in a position covered by the retirement system." R.C. 145.01(R)(1). "Earnable salary" includes payments made for sick leave and vacation, full maintenance allowances, and fees and commissions paid to a township clerk under R.C. 507.09. *Id.* The statute specifies various payments that are not included as "earnable salary," among them payments for insurance coverage, incidental benefits, and reimbursement for job-related expenses. R.C. 145.01(R)(2).

Of greatest relevance to your question is the following statutory exception:

"Earnable salary" does not include any of the following:

(a) Fees and commissions, other than those paid under [R.C. 507.09], paid as sole compensation for personal services and *fees and commissions for special services over and above services for which the contributor receives a salary ...*

R.C. 145.01(R)(2) (emphasis added). In applying this provision to particular facts, it must be determined whether transcript payments made to a court reporter pursuant to R.C. 2301.24 and R.C. 2301.25 are "fees and commissions for special services over and above services for which the contributor receives a salary," and thereby are excluded from salary for purposes of determining PERS contributions. *See, e.g.,* 1954 Op. Att'y Gen. No. 3645, p. 143, at 145 (characterizing transcript payments as fees for special services, paid in addition to salary).

The Public Employees Retirement Board is given statutory authority to determine by rule whether any compensation not enumerated by statute is earnable salary, and the Board's decision on that matter is final. R.C. 145.01(R)(3). Pursuant to its statutory authority, the Board has adopted a rule that "amplifies and is in addition to" the statutory definition of earnable salary contained in R.C. 145.01(R). 2 Ohio Admin. Code 145-3-07(A). The rule does not expressly mention court reporters. *See* 2 Ohio Admin. Code 145-3-07. It does specify, however, that earnable salary does not include: "Payments made as fees or commissions which are fixed charges or calculated as a percentage of an amount not directly related to work or services performed." 2 Ohio Admin. Code 145-3-07(E)(9). In applying this provision to particular facts, it must be determined whether transcript payments made to a court reporter pursuant to R.C. 2301.24 and R.C. 2301.25 come within the language of rule

145-3-07(E)(9) and thereby are excluded from salary for purposes of determining PERS contributions.¹

In order for particular payments to be included in the salary of an official court reporter for purposes of making contributions to PERS, it is necessary to determine first that the court reporter is a public employee and then that the payments are included in the earnable salary of the public employee. Payments may be excluded for purposes of making PERS contributions either because the recipient is not a public employee or, if the recipient is a public employee, because the payments are not included as earnable salary. See *Gerchak v. Public Employees Retirement Bd.*, No. 98AP-325 (C.P. Franklin County Sept. 15, 1998). It is possible for an individual to be an employee who receives earnable salary in one capacity while being an independent contractor who is not a member of PERS in another capacity. See, e.g., [1998-1999 Monthly Record, vol. 1] Ohio Admin. Code 145-5-15, at 476.²

The Public Employees Retirement Board is empowered to make certain decisions concerning the interpretation and application of statutes governing its functions. As discussed above, the Board has authority under R.C. 145.01(A) to determine whether a particular person is a public employee and authority under R.C. 145.01(R)(3) to determine by rule whether any compensation not enumerated by statute is earnable salary, and the Board's decisions on those matters are final. Whether particular payments made pursuant to R.C. 2301.24 and R.C. 2301.25 to a court reporter of the court of common pleas for preparing transcripts and copies should be included for purposes of making contributions to the Public Employees Retirement System is subject to determination by the Public Employees Retirement Board.

This opinion does not purport to decide matters that have been left to the discretion of the Board. Instead, we have set forth the general principles of law that are applicable to the situation you have described, and we have raised issues that might be considered by the Board in the implementation of its statutes and rules. Therefore, we refer you to the Board for a determination of the application of the law to a particular set of facts.³

¹ The Public Employees Retirement Board has discretion, through appropriate procedures, to amend or rescind any of its rules, including 2 Ohio Admin. Code 145-3-07, and to adopt other rules that are consistent with existing statutes. See R.C. 145.01(R)(3); R.C. 145.09. The courts give deference to the Board's reasonable construction of rules it has adopted. See *McAuliffe v. Board of Pub. Employees Retirement Sys.*, 93 Ohio App. 3d 353, 360, 638 N.E.2d 617, 621 (Franklin County 1994).

² [1998-1999 Monthly Record, vol. 1] Ohio Admin. Code 145-5-15(C), at 476, states in part:

[I]f a contract employee performs services for which the employee also receives a payment, fee or commission over and above services for which the employee receives earnable salary, and for which the individual is an independent contractor the payments for those services over and above their salary services are not earnable salary. The employee is not a member for such additional services, no contributions are due, and no service credit shall be granted.

³ You have provided us with a copy of correspondence from the Cashier Supervisor of the Public Employees Retirement System to the Lucas County Payroll Director indicating that the earnings received by your county's court reporters for typed transcripts are to be considered earned salary and retirement contributions are to be taken. In our conversations

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. Pursuant to R.C. 2301.22 and R.C. 2301.24, court reporters may receive two types of compensation, one for taking testimony and one for preparing transcripts.
2. The Public Employees Retirement Board has authority under R.C. 145.01(A) to determine whether a particular person is a public employee and authority under R.C. 145.01(R)(3) to determine by rule whether any compensation not enumerated by statute is earnable salary, and the Board's decisions on those matters are final.
3. Whether particular payments made pursuant to R.C. 2301.24 and R.C. 2301.25 to a court reporter of the court of common pleas for preparing transcripts and copies should be included for purposes of making contributions to the Public Employees Retirement System is subject to determination by the Public Employees Retirement Board.