OPINION NO. 75-075

Syllabus:

1. If an office of the State or one of the political subdivisions thereof contracts with a private employment agency for the temporary services of individuals or directly hires individuals on a contractual basis and such office has the right to exercise the ultimate control over the mode and manner of the work performed, any person performing such work qualifies as a "public employee" as defined in R.C. 145.01(A). Accordingly, such an employee is required to contribute to the Public Employees Retirement System pursuant to R.C. 145.47 unless he has been exempted from compulsory membership pursuant to R.C. 145.03.

2. Any office of the State or one of the political subdivisions thereof which employs any individual who qualifies as a "public employee" under the terms of R.C. 145.01 and is a member of the Public Employees Retirement System is required to deduct such employee's contribution from his wages pursuant to R.C. 145.47 and to contribute to the employer's contribution fund pursuant to R.C. 145.48.

3. The legal criteria to be applied in determining whether or not an individual qualifies as a public employee for purposes of the Public Employees Retirement System are those set forth in R.C. 145.01(A). In those cases in which an individual does not fit squarely within one of the several classes described therein, R.C. 145.01 expressly provides that the public employees retirement board shall determine whether any person is a public employee.

To: J. Douglass Peters, Executive Director, Public Employees Retirement System of Ohio, Columbus, Ohio

By: William J. Brown, Attorney General, October 23, 1975

I have received your request for my opinion which reads as follows:

> "1. Is a person who is employed by a private temporary help service and assigned to temporary work in an office operated by the State of Ohio or one of its political subdivisions required to contribute to Public Employees Retirement System?
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> "2. Is a public office which employs temporary help from a private temporary help service required to collect Public Employees Retirement System deductions from such employees and to pay employer contributions for them?

"3. Is a person who is employed in a temporary help service operated by a state department required to membership in Public Employees Retirement System?

"4. If one employed in a public temporary help agency is required to Public Employees Retirement System membership, who is to collect employee deductions and pay employer contributions?

"5. Is a person who is employed on a contractual basis required to pay employee deductions from such contractual remuneration, and, if so, who is to pay the employer contributions?

"6. What are the legal criteria for determining who is a public employee and required to membership in Public Employees Retirement System?"

R.C. 145.47 specifically provides that each public employee who is a member of the Public Employees Retirement System shall contribute eight per cent of his earnable salary or compensation to the employees savings fund. In order to properly determine whether the persons described in your first question are required to contribute to the Public Employees Retirement System, it is first necessary to determine whether they qualify as public employees.

R.C. 145.01, which sets forth definitions for various terms used in statutes dealing with the Public Employees Retirement System, provides in part as follows:

"As used in Chapter 145. of the Revised Code:

"(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. Credit for such service shall be included as total service credit, provided, the employee makes the payments required by Chapter 145. of the Revised Code, and his employer makes the payments required by sections 145.48 and 145.51 of the Revised Code.

"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, 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 medical college, 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.)

Clearly, 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, qualifies as a public employee under the terms of the first emphasized sentence of R.C. 145.01(A). 1972 Op. Att'y Gen. No. 72-055. I shall assume, therefore, that you are concerned with the status of individuals who have never been a member of the Public Employees Retirement System.

Although it does not specifically so hold, I noted in Opinion No. 72-055, supra, that new employees hired by a subcontractor do not qualify as public employees for purposes of R.C. Chapter 145. and are not, therefore, required to belong to the Public Employees Retirement System. This conclusion is not, in all cases, correct. The Opinion did not, I feel, give adequate consideration to the individuals described in the second emphasized provision of R.C. 145.01(A). Under the terms of that provision, an individual who performs any service for and under the direction of any employer, as that term is defined in R.C. 145.01(D), is specifically included within the definition of "public employee." In discussing this provision in 1973 Op. Att'y Gen. No. 73-051, I stated as follows:

> "These statutory definitions [including R.C. 145.01(A)] of a 'public employee' adopt the common law distinction between an employee and an independent contractor. If the governmental unit can 'direct' the individual's actions, the person is a public employee. But, if the governmental unit can not 'direct' the employee, then he is the employee of an independent contractor."

Disposition of the issues at hand depends, therefore, upon a determination of whether or not a governmental unit is able to "direct" the individual in question. Although no Ohio Court has had the occasion to discuss the distinction between employees and independent contractors for purposes of the Public Employees Retirement System, the question has arisen with sufficient frequency in other contexts. In setting forth the appropriate test to be used in determining whether one who renders services to another is an employee or merely an independent contractor for purposes of workmen's compensation, the Supreme Court, in the case of Councell v. Douglas, 163 Ohio St. 292, 295 (1955), stated as follows (quoting from Miller v. Metropolitan Life Insurance Co., 134 Ohio St. 289, 291 (1938)):

> "The relation of principal and agent or master and servant is distinguished from the relation of employer and independent contractor by the following test: Did the employer retain control or the right to control the mode and manner of the work contracted for? If he did, the relation is that of principal and agent or master and servant. If he did not but is interested merely in the ultimate result to be accomplished, the relation is that of employer and independent contractor."

Thus, in 1973 Op. Att'y Gen. No. 73-051 I held that people working in a state park lodge and cabin facilities pursuant to a contract with a private organization were employees of that organization, rather than of the state, and were thereby included within the jurisdiction of the National Labor Relations Act. After examining the terms of the contract between Ohio Inns and the Department of Natural Resources, I concluded that although the State does exercise some control over the employees of Ohio Inns, it does not exercise daily supervision over them. The individuals were, therefore, held to be employees of the independent contractors.

The case of State, ex rel. Board of Education v. Holt, 174 Ohio St. 55 (1962) dealt with the question of whether or not employees of a bus owner who entered into a contract with the local board of education were school employees for purposes of the School Employees Retirement System. Even though the bus owner retained the authority to hire, fire, fix wages and determine the terms of employment, the Court held that such bus drivers are school employees for purposes of the retirement system because the board of education retains ultimate control over their daily work pursuant to certain statutory provisions.

Although your letter does not indicate who has the ultimate control over the individuals in question, I assume that some, if not all, of them actually perform work in the office of whatever public agency may have hired them. In so doing, they are, presumably, required to follow standard office procedure,

to use office equipment and to perform their duties in accordance with office standards. Moreover, their duties would be performed under the direct and constant supervision of the public agency. Under such circumstances the public agency is clearly capable of controlling the mode and manner of the work performed. Accordingly, I feel that such individuals properly qualify as public employees for purposes of the Public Employees Retirement System.

It will be noted that the foregoing discussion applies, as well, to those persons employed by a public agency on a contractual basis, whom you mention in your fifth question. Contracts with professionals for work of a casual nature or on a project basis are authorized by R.C. 124.15. Although it seems more likely that individuals working pursuant to such contracts are independent contractors rather than public employees, disposition of the matter will ultimately depend upon who has the right to control the mode and manner of the work performed.

In this respect, special attention should be directed to those cases which have held that a mere right reserved by the employer to direct the quantity of the work to be done, or the condition of the work when completed, is not a right to control the mode and manner of the work so as to justify the conclusion that an employer-employee relationship exists. Hughes v. Railway Co. 39 Ohio St. 461 (1883). Thus, the members of special consulting firms or special counsel hired by the Attorney General would not qualify as public employees for purposes of membership in the retirement system.

It has been suggested that the critical difference between one who qualifies as a public employee and one who does not is that the former is on an official public payroll and the latter serves by special contract. There is, however, no basis for such a distinction to be found in any of the pertinent statutes. Admittedly, one of the factors to be considered in determining whether an employer-employee relationship exists is the manner and source of payment. Even at common law, however, this factor is inconclusive. The general rule is that the matter of compensation is not usually decisive of the relationship of employer and employee, but that the manner and source of payment for services is a circumstance entitled to weight in a case of doubt and may sometimes determine the question. Industrial Commission of Ohio v. Shaner, 127 Ohio St. 366 (1933).

The evidentiary value of this factor at common law, however, is negated by the second emphasized provision of R.C. 145.01, which states that certain individuals shall be considered public employees notwithstanding the fact that their compensation has been or is being paid by one other than such employer. I feel, therefore, that the manner and source of payment is of no consequence in determining whether an individual qualifies as a public employee.

While all of the individuals described in R.C. 145.01(A) qualify as public employees, it will be noted that R.C. 145.03 provides for certain exemptions from compulsory membership to the Public Employees Retirement System. This section provides in part as follows:

> "A public employees retirement system is hereby created for the employees of the state and of the several local authorities mentioned in Section 145.01 of the Revised Code. Membership in the system is compulsory upon being employed. Provided, a student whose employment will not exceed eight hundred hours in any calendar year or any new employee, not a member at the time of his employment, whose employment will not exceed twenty hours per week, may be exempted from compulsory membership by signing a written application for exemption within the first month after being employed."
>
> (Emphasis added.)

Thus, certain temporary full time and permanent part time employees are exempted from membership in the system. With respect to employees of the latter type, however, it will be noted that certain procedural requirements must be satisfied. The law, as originally enacted and as later amended, has always required a written application from an eligible employee for an exemption from participation in the Public Employees Retirement System before the employer can be excused from the duty to withhold the required amount from the employee's wages. 1972 Op. Att'y Gen. No. 72-004.

In conclusion, if an office of the State of Ohio or one of the political subdivisions thereof contracts with a private employment agency for the services of temporary employees or directly hires individuals on a contractual basis and such office exercises the ultimate control over the mode and manner of the work performed, an individual performing such work qualifies as a "public employee" as defined in R.C. 145.01(A). Accordingly, such an employee is required to contribute to the Public Employees Retirement System pursuant to R.C. 145.47 unless he has been exempted from compulsory membership pursuant to R.C. 145.03.

Since it is possible for both a temporary employee provided to a public office by a private employment agency and for a person rendering services to a public office on a contractual basis to qualify as public employees for purposes of the Public Employees Retirement System, it is necessary to answer your second question as to whether the public office is required to collect deductions from such employees and to pay employer contributions for them.

R.C. 145.47, which provides that the employer is responsible for deducting the employee's contribution from his wages, provides in part as follows:

> "[T]he head of each state department, institution, board, and commission, and the fiscal officer of each local authority subject to Chapter 145. of the Revised Code, shall deduct from the compensation of each member on every payroll of such member for each payroll period subsequent to the date such employee became a member, an amount equal to the applicable per cent of such member's earnable salary or compensation. The head of each state department and the fiscal officer of each local authority subject to Chapter 145. of the Revised

> Code, shall transmit promptly to the secretary of the public employees retirement board a report of member deductions at such intervals and in such form as the board shall require, showing thereon all deductions for the public employees retirement system made from all the earnings, salary, or compensation of each member employed together with warrants or checks covering the total of such deductions. . . ."

R.C. 145.48, which requires employers to contribute to the Public Employees Retirement System, provides in part as follows:

> "Each employer described in division (D) of section 145.01 of the Revised Code shall pay to the employers accumulation fund an amount which shall be a certain per cent of the earnable compensation of all members to be known as the "employer" contribution. . . ."

If the individuals in question qualify as public employees for purposes of membership in the Public Employees Retirement System, it is obvious that the public agency for which they work is deemed the employer. The pertinent statutes clearly define the duties of the employer. I must conclude, therefore, that a public agency which employs any individual who qualifies as a "public employee" under the terms of R.C. 145.01, and is a member of the Public Employees Retirement System is required to deduct such employee's contribution from his wages pursuant to R.C. 145.47 and to contribute to the employer's accumulation fund pursuant to R.C. 145.48.

With regard to the third and fourth questions set forth in your request, it is my understanding that the state department which operated a temporary help service no longer exists. It is not, therefore, necessary to answer these questions.

With regard to your final question, I can only state that the legal criteria to be applied in determining whether or not an individual qualifies as a public employee for purposes of the Public Employees Retirement System are those set forth in R.C. 145.01. In those cases in which an individual does not fit squarely within one of the several classes described therein, R.C. 145.01 expressly provides that the public employees retirement board shall determine whether any person is a public employee and its decision shall be final.

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

1. If an office of the State or one of the political subdivisions thereof contracts with a private employment agency for the temporary services of individuals or directly hires individuals on a contractual basis and such office has the right to exercise the ultimate control over the mode and manner of the work performed, any person performing such work qualifies as a "public employee" as defined in R.C. 145.01(A). Accordingly, such an employee is required to contribute to the Public Employees Retirement System pursuant to R.C. 145.47 unless he has been exempted from compulsory membership pursuant to R.C. 145.03.

2. Any office of the State or one of the political subdivisions thereof which employs any individual who qualifies as a "public employee" under the terms of R.C. 145.01 and is a member of the Public Employees Retirement System is required to deduct such employee's contribution from his wages pursuant to R.C. 145.47 and to contribute to the employer's contribution fund pursuant to R.C. 145.48.

3. The legal criteria to be applied in determining whether or not an individual qualifies as a public employee for purposes of the Public Employees Retirement System are those set forth in R.C. 145.01(A). In those cases in which an individual does not fit squarely within one of the several classes described therein, R.C. 145.01 expressly provides that the public employees retirement board shall determine whether any person is a public employee.