

**OPINION NO. 81-024****Syllabus:**

1. Pursuant to R.C. 5505.17, where there is a surviving spouse, dependent child or other dependent qualified to receive pension benefits, the State Highway Patrol Retirement System is required to pay pension benefits to such qualified dependent.
2. Pursuant to R.C. 5505.21, which is the only statute authorizing the distribution of the accumulated contributions of a deceased member of HPRS, HPRS may make a distribution of the accumulated contributions of a deceased member only if no pension becomes payable pursuant to R.C. 5505.17.
3. Once a pension becomes payable pursuant to R.C. 5505.17, the accumulated contributions standing to the credit of the deceased member in the employees' savings fund are transferred to the survivors' benefit fund and are no longer available for distribution under R.C. 5505.21. HPRS has no authority to make a distribution of any portion of a deceased member's accumulated contributions after a pension has become payable, even where the eligibility of all dependents to receive pension benefits pursuant to R.C. 5505.17 has terminated without exhausting the full amount of the deceased member's accumulated contributions. The same result is reached regardless of whether there is a possibility of a resumption of the eligibility of a spouse to receive pension benefits pursuant to R.C. 5505.17, as amended by Sub. H.B. 974. (1973 Op. Att'y Gen. No. 73-047 overruled to the extent it conflicts with this opinion.)

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**To: Jack Walsh, Superintendent, State Highway Patrol, Columbus, Ohio**  
**By: William J. Brown, Attorney General, April 28, 1981**

You have requested my opinion relating to certain benefits available to surviving dependents of deceased members of the State Highway Patrol Retirement System (HPRS). Your specific questions are as follows:

1. May the State Highway Patrol Retirement System retain undistributed accumulated contributions that would ordinarily be payable to the designated beneficiary or estate of a deceased member pursuant to Section 5505.21 while the possibility exists that a surviving spouse may again become eligible to receive pension benefits pursuant to Section 5505.17?
2. Does the refund of undistributed accumulated contributions to a member's designated beneficiary or estate pursuant to Section 5505.21 relieve the retirement system from further obligation to pay benefits pursuant to Section 5505.17?
3. In the event that the balance of a member's accumulated contributions are refunded to a designated beneficiary or his estate, may the retirement system require that an equal amount be returned to the system before pension benefits are renewed pursuant to Section 5505.17(A)(3)?

Essentially your questions involve a determination as to whether the dependents of a deceased member of HPRS may receive benefits pursuant to both R.C. 5505.17 and R.C. 5505.21. You have raised these questions in light of recently enacted Substitute House Bill 974, 113th Gen. A. (1980) (eff. April 9, 1981), which amends R.C. 5505.17(A)(3).

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R.C. 5505.17(A), which provides that certain monthly pension benefits shall be paid to qualifying dependents of deceased members of HPRS, states, in pertinent part, as follows:

(3) A surviving spouse of a deceased member or retirant shall receive a pension of two hundred sixty-three dollars per month during the spouse's life, or until the spouse remarries, if such 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.

(4) A surviving spouse of a deceased member or retirant having one child shall receive a pension of three hundred twenty-one dollars per month until such child attains the age of eighteen years, or marries, whichever occurs first.

(5) (a) A surviving spouse of a deceased member or retirant having two children shall receive a pension of three hundred seventy-nine dollars per month until such children attain the age of eighteen years, or marries [sic], whichever occurs first.

(b) A surviving spouse of a deceased member or retirant having three children shall receive a pension of four hundred thirty-seven dollars per month until such children attain the age of eighteen years, or marries [sic], whichever occurs first.

Such spouse of a deceased member shall receive fifty-eight dollars for each additional child who qualifies.

(6) If a member or retirant dies and leaves no spouse, each surviving child under eighteen years of age and not married, shall receive a pension of ninety-five dollars per month, provided that if there are more than two children, they shall receive a pension of two hundred forty-two dollars per month to be divided equally among them.

(7) Except as otherwise provided in this division, if the spouse of a member or retirant remarries or dies, while having the care of unmarried children under eighteen years of age, then each child shall receive a pension of ninety-five dollars per month, provided if there are more than two eligible children, they shall receive a pension of two hundred forty-two dollars per month to be divided equally among them.

. . . .

(12) If a deceased member leaves no spouse or surviving children, but leave two parents depending solely upon him for support, each parent shall be paid a monthly pension of ninety-five dollars. If in such case, there is only one parent dependent solely upon him for support, such parent shall be paid a monthly pension of ninety-five dollars. Such pension shall be paid during the life of the surviving parents, or until dependency ceases, or until remarriage, whichever event occurs first. (Emphasis added.)

R.C. 5505.21, which provides for the distribution of accumulated contributions of a deceased member of HPRS, states, in part, as follows:

Should a member of the state highway patrol retirement system die and no pension becomes [sic] payable from funds of the system on account of his employment with the patrol, his accumulated contributions, less interest, standing to his credit in the employees' savings fund at the time of his death shall be paid to such person or persons as he has nominated by written designation duly executed and filed with the state highway patrol retirement board. If there is no such designated person or persons surviving such member, his accumulated contributions shall be paid according to the state law of descent and distribution; . . . . (Emphasis added.)

R.C. 5505.17 provides a pension (monthly benefits) to qualifying dependents over a period of time. R.C. 5505.21 provides for a one-time lump-sum distribution of the member's accumulated contributions.

The questions that you have posed basically involve the following circumstances. Upon the death of a member who has qualifying dependents, such dependents receive monthly pension benefits pursuant to R.C. 5505.17. At some time these monthly pension benefits terminate, due to the fact that the dependent's statutory qualifications end, e.g., a surviving spouse remarries. At the time of termination, it occurs that the already distributed pension benefits do not exceed the amount of the member's accumulated contributions. Therefore, the initial question which must be answered is whether HPRS can distribute this excess amount of accumulated contributions.

As I have previously indicated, the boards of retirement systems cannot act absent statutory authority. 1980 Op. Att'y Gen. No. 80-090. Thus, absent authority both to pay a pension benefit pursuant to R.C. 5505.17, and to distribute accumulated contributions pursuant to R.C. 5505.21 based on the same member's account, HPRS cannot do so.

An examination of R.C. Chapter 5505 reveals that there exists no express statutory authority which authorizes HPRS both to pay a benefit to a qualifying dependent pursuant to R.C. 5505.17 and to distribute to the deceased member's designated beneficiary or heirs "unused" accumulated contributions. R.C. 5507.17 is the only statute which authorizes the payment of pension benefits to surviving dependents of a deceased member of HPRS. R.C. 5505.21, on the other hand, is the only statute which authorizes the distribution of accumulated contributions of a deceased member of HPRS. The language of R.C. 5505.17 and R.C. 5505.21 reflects a legislative intent that the authority to pay pension benefits and the authority to distribute accumulated contributions be mutually exclusive.

Pursuant to R.C. 5505.17, a pension "shall" be paid to a surviving spouse, dependent child or other dependent of a deceased member. The term "pension" is defined in R.C. 5505.01(N) as "an annual amount payable by the retirement system throughout the life of a person or as otherwise provided in the plan. All pensions shall be paid in equal monthly installments." The use of the mandatory imperative "shall" in R.C. 5505.17 requires that in the event there is a surviving spouse, dependent child or other qualified dependent of a deceased member, HPRS must pay the appropriate monthly pension benefit. See Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) ("shall" is to be construed as mandatory unless there appears from the language of the statute a legislative intent to the contrary).

Pursuant to R.C. 5505.21, a distribution of the accumulated contributions of a deceased member of HPRS may be made only if "no pension becomes payable." Since R.C. 5505.17 mandates that a pension be paid if there are qualified dependents, and since R.C. 5505.21 provides that the distribution of accumulated contributions may be made only if "no pension becomes payable," it is clear that, if a pension is payable at the time of the member's death, no distribution of accumulated contributions can be made at any time.

Moreover, pursuant to the statutory scheme established by R.C. Chapter 5505, once a pension is payable, there no longer exists a fund from which a distribution of accumulated contributions could be made. R.C. 5505.03(B) provides in pertinent part, as follows:

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<sup>1</sup> Additionally, it should be noted that a distribution of accumulated contributions pursuant to R.C. 5505.21 must be made first to the member's designated beneficiary. Only in the absence of a designated beneficiary may HPRS distribute accumulated contributions in line with Ohio's law of descent and distribution.

The employees' savings fund is the fund in which shall be accumulated the contributions deducted from the salaries of members. Any refunds of accumulated contributions, as provided in the plan, shall be paid from such fund. . . . In the event a pension is payable on account of the death of a member, his accumulated contributions standing to his credit in the employees' savings fund shall be transferred to the survivors' benefit fund if his death occurs after January 1, 1966, or to the employer's accumulation fund if his death occurs prior to January 1, 1966. (Emphasis added.)

The "survivors benefit fund" is defined in R.C. 5505.03(E) as "the fund from which shall be paid all pensions, payable under section 5505.17 of the Revised Code." In order to be in compliance with the provisions of R.C. 5505.03, if a pension is payable at the time of a member's death, HPRS must transfer the member's accumulated contributions from the "employees' savings fund" to the "survivors' benefit fund." Since a distribution of a deceased member's accumulated contributions may be made only from the "employees' savings fund," and since funds in the "survivors' benefit fund" may be used only for the purpose of paying the pension benefits authorized under R.C. 5505.17, once a pension becomes payable, HPRS clearly has no authority to make a distribution of accumulated contributions.

The statutory scheme providing for the distribution of accumulated contributions only if no pension is payable was reinforced by the enactment of Sub. H.B. 974. Prior to this amendment, R.C. 5505.17(A)(3) read:

A surviving spouse of a deceased member or retirant shall receive a pension of two hundred sixty-three dollars per month during the spouse's life, or until the spouse remarries, if such spouse was married to the deceased member or retirant while he was in the active service of the patrol.

Sub. H.B. 974 added the following provision to the above-quoted portion: "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" (emphasis added). In enacting Sub. H.B. 974, which provides for the resumption of pension benefits, the General Assembly impliedly recognized that double benefits from the operation of R.C. 5505.17 and R.C. 5505.21 were not authorized. This is so because a total distribution of accumulated contributions would eliminate the interest of previously qualified dependents in HPRS, and would eliminate any account basis, which arguably might exist even after the accumulated contributions have been transferred to the "survivors' benefit fund," for a resumption in benefits. Consequently, it must be concluded that once a pension becomes payable pursuant to R.C. 5505.17, HPRS may not distribute the balance of the deceased member's accumulated contributions to the designated beneficiary or heirs of the deceased member, even if the eligibility of all dependents to receive pension benefits pursuant to R.C. 5505.17 has terminated without exhausting the full amount of the deceased member's accumulated contributions.

I am aware that the conclusion reached herein may conflict with the conclusion I reached in 1973 Op. Att'y Gen. No. 73-047. Op. No. 73-047 was issued in response to an inquiry by HPRS as to whether it could distribute an amount equal to the deceased member's "unused" accumulated contributions to the deceased member's children, where the eligibility of all dependents to receive pension benefits had terminated without exhausting the accumulated contributions. I stated, in response to that request that "[u]pon the death of a member of the State Highway Patrol retirement system, and in the absence of a beneficiary eligible for pension benefits, any portion of the member's personal contributions to the fund, still remaining therein, passes to his estate for distribution to his heirs." *Id.* at 2-182. I realize that the conclusion reached in Op. No. 73-047 may be interpreted to hold that HPRS has the authority to distribute the balance of a deceased member's accumulated contributions where the eligibility of all dependents to receive pension

benefits pursuant to R.C. 5505.17 has terminated without exhausting the accumulated contributions. In light of the plain language of R.C. 5505.03(B), R.C. 5505.17, as amended by Sub. H.B. 974, and R.C. 5505.21, I cannot concur in the result reached in Op. No. 73-047 to the extent that it may be so interpreted. Consequently, Op. No. 73-047 is overruled to the extent it is inconsistent with this opinion.

In light of the fact that HPRS has no authority to distribute the accumulated contributions of a deceased member where pension benefits are payable pursuant to R.C. 5505.17, the factual circumstances with which your second and third questions are concerned will never arise. In answer to your first question, I am of the opinion that HPRS must retain the balance of a deceased member's accumulated contributions after the eligibility of a spouse or other dependent to receive pension benefits pursuant to R.C. 5505.17 terminates. HPRS must continue to retain such accumulated contributions even if there is no possibility of a resumption of the eligibility of a spouse to receive pension benefits pursuant to R.C. 5505.17, as amended by Sub. H.B. 974.

In conclusion, then, it is my opinion, and you are so advised, that:

1. Pursuant to R.C. 5505.17, where there is a surviving spouse, dependent child or other dependent qualified to receive pension benefits, the State Highway Patrol Retirement System is required to pay pension benefits to such qualified dependent.
2. Pursuant to R.C. 5505.21, which is the only statute authorizing the distribution of the accumulated contributions of a deceased member of HPRS, HPRS may make a distribution of the accumulated contributions of a deceased member only if no pension becomes payable pursuant to R.C. 5505.17.
3. Once a pension becomes payable pursuant to R.C. 5505.17, the accumulated contributions standing to the credit of the deceased member in the employees' savings fund are transferred to the survivors' benefit fund and are no longer available for distribution under R.C. 5505.21. HPRS has no authority to make a distribution of any portion of a deceased member's accumulated contributions after a pension has become payable, even where the eligibility of all dependents to receive pension benefits pursuant to R.C. 5505.17 has terminated without exhausting the full amount of the deceased member's accumulated contributions. The same result is reached regardless of whether there is a possibility of a resumption of the eligibility of a spouse to receive pension benefits pursuant to R.C. 5505.17, as amended by Sub. H.B. 974. (1973 Op. Att'y Gen. No. 73-047 overruled to the extent it conflicts with this opinion.)