

**OPINION NO. 90-075****Syllabus:**

A county board of mental retardation and developmental disabilities may establish a cash payment retirement incentive program as a form of compensation to its employees, regardless of the provisions of R.C. 145.297 and R.C. 3307.35.

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**To: David W. Norris, Portage County Prosecuting Attorney, Ravenna, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, November 8, 1990**

I have before me your opinion request in which you ask: "May a board of Mental Retardation and Developmental Disabilities establish a cash incentive retirement program that would offer a cash payment to employees to retire who are otherwise eligible to retire under the Public Employees Retirement System or State Teachers Retirement System?" By way of background, your opinion request states that the board is currently unable to meet the requirements for the establishment of a retirement incentive plan pursuant to R.C. 145.297 (Public Employees Retirement System) or R.C. 3307.35 (State Teachers Retirement System). You, therefore, question the board's ability, outside of R.C. 145.297 or R.C. 3307.35, to provide a retirement incentive program for those of its employees who are otherwise eligible to retire under the Public Employees Retirement System (PERS) or the State Teachers Retirement System (STRS).

Pursuant to R.C. 5126.02, there is created a county board of mental retardation and development disabilities within each county. Since a county board of mental retardation and developmental disabilities is created by statute, it has only those powers expressly granted by statute or necessarily implied from such express powers. See *Cuyahoga County Bd. of Mental Retardation v. Cuyahoga County Bd. of Commissioners*, 41 Ohio St. 2d 103, 322 N.E.2d 885 (1975).

The type of authority necessary for a public employer to provide a retirement incentive program for its employees was addressed in 1985 Op. Att'y Gen. No. 85-005. The proposal discussed in Op. No. 85-005 intended to make cash payments to employees whose services were no longer needed. I found that where such payments were made in order to encourage the early retirement of certain current employees whose services were no longer needed, such payments could not be considered a fringe benefit, or form of compensation, for such employees. In that opinion, however, I noted that if such payments were made as part of a retirement incentive program provided on a continuing basis to encourage current employees to continue their present employment in order to be able to take advantage of the program at some time in the future, such a program could be viewed as a form of

compensation. The difference is that in the latter situation the retirement incentive program would be offered to the employees as an inducement to continue their current employment, rather than being offered merely to terminate such employees' service. See 1982 Op. Att'y Gen. No. 82-006 at 2-16 through 2-17 ("a fringe benefit is commonly understood to mean something that is provided at the expense of the employer and is intended to directly benefit the employee so as to induce him to continue his current employment"). For purposes of this opinion, I will assume that the proposal you describe may be appropriately characterized as a form of compensation, and that such payments are not merely a device to encourage current employees to terminate their present employment with the board. Similarly, I am assuming that the plan will conform to any state or federal laws applicable to the establishment and operation of such a plan.

The authority of a county board of mental retardation and developmental disabilities (formerly, county board of mental retardation) to provide compensation for its employees was addressed in *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). In *Ebert*, the court concluded that the board's authority to compensate its employees included the power to provide other fringe benefits, as a form of compensation, to the extent that such authority was not otherwise constricted by statute.

In the situation you describe, the board plans to provide a cash payment retirement incentive program for its employees. Early retirement incentive programs are, however, as mentioned in your letter, the subject of two statutes, R.C. 145.297 and R.C. 3307.35, which are applicable to various employees of the county board of mental retardation and developmental disabilities. In order to determine whether either statute limits the authority of the board to establish the program you describe, it is necessary to apply the following analysis:

If an applicable statute constitutes a minimum statutory entitlement to a particular benefit, the public employer may, pursuant to its power to compensate and in the absence of any statute constricting its action in the particular case, choose to provide such benefit in excess of the minimum statutory entitlement. If an applicable statute limits the general authority of the public employer to compensate its employees with the particular fringe benefit in question, it must, of course, be viewed as a restriction upon the employer's authority to grant the particular benefit.

1981 Op. Att'y Gen. No. 81-052 at 2-202.<sup>1</sup>

Pursuant to R.C. 145.297(B), a county board of mental retardation and developmental disabilities, as an employing unit, R.C. 145.297(A)(3)(b), "may establish a retirement incentive plan for its eligible employees." (Emphasis added.) See generally R.C. 145.297(C) (defining eligible employees). Such a plan provides for the employing unit to purchase service credit within PERS for its employees participating in the plan. Nothing in the wording of R.C. 145.297 requires an employing unit to establish such a program, or requires an eligible employee to participate in such a plan if the plan is established by his employing unit.

After setting forth various requirements for the establishment of a retirement incentive plan, R.C. 145.297(B) states: "No employing unit shall have

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<sup>1</sup> My predecessor concluded in 1981 Op. Att'y Gen. No. 81-052, that a board of education could provide cash payments in addition to regular salary payments in order to encourage teachers to commit to early retirement. As noted in 1985 Op. Att'y Gen. No. 85-005 at 2-12 n.1, however, Op. No. 81-052 was issued prior to the enactment of R.C. 3307.35, establishing a retirement incentive program for members of the State Teachers Retirement System, and did not, therefore, address the effect, if any, of the enactment of R.C. 3307.35 on the power of a board of education to establish its own early retirement incentive program.

more than one retirement incentive plan in effect at any time." When read in the context of the rest of R.C. 145.297(B), this sentence operates to limit an employing unit to the establishment of only one retirement incentive plan of the type provided for in R.C. 145.297(B), *i.e.*, a plan in which service credit for PERS purposes is purchased by the employing unit for its participating employees. The plan you propose has no relation to the purchase of service credit within PERS, but is merely a cash payment by the board to its employees, with no effect on the statutory scheme governing PERS.<sup>2</sup> Thus, I have no basis for concluding that R.C. 145.297 prevents an employing unit, such as a county board of mental retardation and developmental disabilities, from providing a different form of retirement incentive program, outside of the PERS provisions, for its employees.

The other statute mentioned in your request, R.C. 3307.35, also authorizes, but does not require, an employer to establish a retirement incentive plan for its employees. R.C. 3307.35 has many features similar to those of R.C. 145.297. Pursuant to R.C. 3307.35, "[a]n employer may establish a retirement incentive plan for its employees who are members of the state teachers retirement system." The basic operation of such a plan is explained as follows: "For each year of service credit purchased under this section, the employer shall pay an amount specified by the state teachers retirement board equal to the additional liability resulting from the purchase of that year of service credit as determined by an actuary employed by the board." R.C. 3307.35. Again, no eligible employee need participate in such a plan should the employer choose to establish one. R.C. 3307.35, thus, regulates the purchase of service credit within STRS as a retirement incentive. As stated above, however, the plan you propose offers only a cash payment to the board's employees as an early retirement incentive with no effect on the statutory scheme governing STRS.<sup>3</sup> Thus, I have no basis for concluding that R.C. 3307.35 constricts the authority of a county board of mental retardation and developmental disabilities to establish independently a cash payment retirement incentive program for its employees, so long as such program is offered as an inducement for the board's employees to maintain their current employment.

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<sup>2</sup> Pursuant to R.C. Chapter 145, the retirement benefits to which a member is entitled upon retirement depends in part on the member's "final average salary." *See, e.g.*, R.C. 145.33 (age and service retirement); R.C. 145.36 (benefit upon disability retirement). The term "final average salary," as defined by R.C. 145.01(K), is a figure determined with reference to the member's "earnable salary." R.C. 145.01(R) states in pertinent part: "Except as otherwise provided in this division, 'earnable salary' means all salary, wages, and other earnings paid to a member by reason of his employment."

Specifically excluded from the term "earnable salary," however, is:

*Anything of value received by the member that is based on or attributable to retirement or an agreement to retire, except that payments made on or before January 1, 1989, that are based on or attributable to an agreement to retire shall be included in earnable salary if both of the following apply:*

- (i) The payments are made in accordance with contract provisions that were in effect prior to January 1, 1986;
- (ii) The employer pays the retirement system an amount specified by the retirement board equal to the additional liability resulting from the payments. (Emphasis added.)

R.C. 145.01(R)(2)(g). Since the payments the county board of mental retardation and developmental disabilities intends to make are for the purpose of encouraging the early retirement of its employees, the terms of R.C. 145.01(R)(2)(g) would exclude such payments from the employee's "earnable salary," and thus, from the employee's "final average salary," for purposes of R.C. Chapter 145.

<sup>3</sup> Pursuant to R.C. Chapter 3307, like R.C. Chapter 145, a member's retirement benefit is based in part upon the members "final average salary."

Based on the foregoing, it is my opinion, and you are hereby advised that, a county board of mental retardation and developmental disabilities may establish a cash payment retirement incentive program as a form of compensation to its employees, regardless of the provisions of R.C. 145.297 and R.C. 3307.35.

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*See, e.g.*, R.C. 3307.38 (service retirement); R.C. 3307.43 (allowance upon disability retirement). R.C. 3307.01(J) defines "final average salary," for purposes of R.C. Chapter 3307, as meaning in part: "the sum of the annual compensation for the three highest years of compensation for which contributions were made by the member, divided by three." The meaning of the term "compensation" is set forth in R.C. 3307.01(V), which states in part:

(1) Except as otherwise provided in this division, "compensation" means all salary, wages, and other earnings paid to a member by reason of his employment including compensation paid pursuant to a supplemental contract....

(2) *Compensation does not include any of the following:*

...

(g) *Anything of value received by the member that is based on or attributable to retirement or an agreement to retire [with specific exceptions]. (Emphasis added.)*

Again, as mentioned in note 2, *supra*, the cash payments about which you ask, being made as an early retirement incentive, would fall outside the meaning of "compensation," and thus, would not be included in a member's "final average salary," for purposes of R.C. Chapter 3307.