

OPINION NO. 90-002**Syllabus:**

1. The highway patrol retirement board must base its determination of eligibility for disability retirement pursuant to R.C. 5505.18 on the specific job duties and responsibilities of each individual member rather than on the functions of the highway patrol in general.
2. Pursuant to R.C. 5505.18, the disability pension of a retirant under fifty-five years of age must be terminated if the retirant has been physically examined and found capable of performing his duties. This is a factual determination to be made by the highway patrol retirement board pursuant to R.C. 5505.18(C).

To: R. D. Huffman, Executive Director, Ohio State Highway Patrol Retirement System, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, March 7, 1990

I have before me your request for my opinion on the following questions¹:

1. Must the state highway patrol retirement board base its determination of eligibility for disability retirement pursuant to R.C. 5505.18 on the specific job duties and responsibilities of the individual member or must its determination be based on the general job duties and responsibilities of a highway patrolman?

¹ With your concurrence, I have rephrased your questions for ease of analysis.

2. May a member who has been granted a disability pension pursuant to R.C. 5505.18 and who has been rehired by the highway patrol in a civilian capacity with substantially the same job duties as the position from which he retired continue to receive pension benefits?

As a preliminary matter, I note that the highway patrol retirement system was created by statute and that membership in the system is mandatory for all state highway patrol employees.² R.C. 5505.02. The authority for "[t]he general administration and management of the state highway patrol retirement system and the making effective of [Chapter 5505. of the Revised Code]" is vested in the state highway patrol retirement board (hereinafter "the board"). R.C. 5505.04. Among the specific duties of the board is the determination of the eligibility of a member for disability retirement. R.C. 5505.18, which provides for such retirement, reads in part as follows:

(A) Upon the application of a member of the state highway patrol retirement system, or the superintendent of the state highway patrol on behalf of a member, a member who becomes totally and permanently incapacitated for duty in the employ of the state highway patrol, by reason of a personal injury or disease,³ may be retired by the state highway patrol retirement board, provided that after medical examination of the member made by or under the direction of a medical committee consisting of three physicians, one of whom shall be selected by the board, one to be selected by the member, and the third to be selected by the first two physicians so named, the medical committee reports to the board, by majority opinion in writing, that the member is totally incapacitated for duty in the employ of the patrol, that such incapacity will probably be permanent, and that he ought to be retired....

Thus, the board has the authority to retire a member of the state highway patrol retirement system who becomes "totally and permanently incapacitated for duty in the employ of the state highway patrol." *Id.*

Your first question concerns the meaning of the phrase "totally and permanently incapacitated for duty in the employ of the state highway patrol." R.C. 5505.18. In order to answer your question, it is first necessary to determine the meaning of the phrase, "duty in the employ of the state highway patrol." Such a determination requires an examination of the statutes which govern the highway patrol. R.C. 5503.02 sets forth the general responsibilities and powers of the state highway patrol. These responsibilities include enforcement of the motor vehicle laws; regulation of traffic on roads and highways; investigation and reporting of motor vehicle accidents occurring on roads and highways outside municipal corporations; investigation of violations of the law governing the transportation of persons and property; investigation of vandalism of road surfaces or structures and the arrest of persons responsible for such vandalism; enforcement of the criminal laws on all state properties and state institutions; and, when so ordered by the governor in the event of riot, civil disorder or insurrection, the enforcement of the

² "Employee" is defined for purposes of R.C. Chapter 5505 as "any qualified employee in the uniform division of the state highway patrol and any qualified employee in the radio division hired prior to the effective date of this amendment. 'Employee' includes the superintendent of the state highway patrol." R.C. 5505.01(A).

³ The phrase "by reason of a personal injury or disease" was deleted from R.C. 5505.18(A) by Am. Sub. H.B. 340, 118th Gen. A. (1989) (eff. Nov. 2, 1989), which was signed by the governor on August 2, 1989. The phrase appeared intact in the text of Am. Sub. H.B. 377, 118th Gen. A. (1989) (eff. Nov. 2, 1989), also signed by the governor on August 2, 1989. However, my opinion is not affected by the absence or presence of this language in R.C. 5505.18.

criminal law within the area of such riot, civil disorder or insurrection. R.C. 5503.02. The highway patrol may also be directed to provide security for the governor and other officials and to undertake major criminal investigations involving state property interests. *Id.* Additionally, R.C. 5503.07 empowers a state highway patrolman to "arrest any person found committing a misdemeanor within the bounds of rest areas or roadside parks within the limits of the right-of-way of interstate highways and other state highways, or in violation of section 5515.07 of the Revised Code in other areas within the limits of the right-of-way of interstate highways." R.C. 5503.31 further extends the authority of the state highway patrol to turnpike projects.

The highway patrol is administered by the superintendent of the patrol, with the approval of the Director of Highway Safety. R.C. 5503.03. The superintendent has the power to appoint the number of highway patrolmen and radiomen necessary to carry out sections 5503.01 to 5503.06 of the Revised Code. R.C. 5503.01. The authority of the superintendent also includes the power to assign members of the patrol to various districts of the state, to transfer members among the districts, and to "classify and rank members of the patrol."⁴ R.C. 5503.03. Additionally, the superintendent may fix the hours of duty and develop rules for instruction, discipline, and administration. *Id.* The superintendent, therefore, has a broad grant of authority to administer the highway patrol in a manner which fulfills its statutory responsibility.

Thus, the superintendent of the patrol determines how and by whom the various functions of the patrol will be performed. You have provided me with the information that the superintendent has assigned certain members to positions which do not require them to perform all of the duties of members assigned to road duty, but which require them to perform other functions of the highway patrol. Such assignments sometimes are made to accommodate physical disabilities which make it impossible for some members to function on road duty, but which allow them to function fully in the jobs to which they are assigned.

Returning to your first question, I note that R.C. 5505.18, which authorizes the board to retire a member who becomes "permanently and totally incapacitated for duty in the employ of the state highway patrol" does not provide a definition of "duty," nor is "duty" defined elsewhere in R.C. Chapter 5505. Because "duty" is not statutorily defined, it should be accorded its natural, literal, common or plain meaning. R.C. 1.42; *State v. Dorso*, 4 Ohio St. 3d 60, 446 N.E.2d 449 (1983). The dictionary defines "duty" as "[a] service, function, or task assigned to one, especially in the armed forces." *The American Heritage Dictionary* (2d college ed. 1976). Pursuant to this definition, "duty" must be determined in terms of the job functions of the individual member rather than in terms of the responsibility of the highway patrol in general.⁵ The duty of a member, therefore, is the member's particular

⁴ Neither "classify" nor "rank" is defined in R.C. 5503.03 or elsewhere in R.C. Chapter 5503. Absent statutory definition, words generally should be accorded their natural, literal, common or plain meaning. R.C. 1.42; *State v. Dorso*, 4 Ohio St. 3d 60, 446 N.E.2d 449 (1983). The dictionary defines "classify" as "[t]o arrange or organize according to a class or category" and "rank" as "[t]o give a particular order or position to." *The American Heritage Dictionary* (2d college ed. 1976). The superintendent has the authority, therefore, to organize the highway patrol according to various categories or classes of members and to assign such members to particular positions within the patrol.

⁵ This construction of the term "duty" is consistent with the administrative rules of the state highway patrol. The rules refer to the "assigned duties" of members. *See, e.g.*, 6 Ohio Admin. Code 4501:2-6-02(B)(4) and (T)(1) (designated rules by reference pursuant to R.C. 103.05(A)). Implicit in the use of the term "assigned duties" is the understanding that each member does not perform each and every function of the highway patrol but instead is assigned to particular duties.

job assignment, regardless of how many or how few of the functions of the highway patrol that assignment encompasses. Thus, a patrolman who is unable to perform all of the various functions of the highway patrol, but who is able to perform the functions of his particular assignment, is not incapacitated for duty in the employ of the highway patrol.

The determination of the duty of each individual member is a question of fact for the board to consider on a case-by-case basis. In so considering, the board must determine what functions the member may reasonably be expected to perform as a part of that member's particular assignment. This construction is supported by the language of R.C. 5505.18(C), which reads in part as follows:

(C) A member placed on disability pension who has not attained the age of fifty-five years shall be subject to reexamination by physicians appointed by the board at such times as the board considers necessary. A retirant who has been on disability pension, and who has been physically examined and *found capable of performing his duties*, shall be restored to the rank which he held at the time he was pensioned and all previous rights shall be restored, including his civil service status, and his disability pension shall terminate.... (Emphasis added.)

Thus, a retirant who, after examination, has been found capable of performing his duties, shall be employed by the highway patrol and his disability pension shall terminate. The determining factor is one's ability to perform his duties.

Legislative intent is to be determined primarily from statutory language. *Stewart v. Board of Elections*, 34 Ohio St. 2d 129, 296 N.E.2d 676 (1973). The language of R.C. 5505.18(C) indicates that the intent of the legislature with respect to disability retirement pursuant to R.C. 5505.18 is to limit such retirement to persons who are unable to perform their duties. Use of the limiting term "totally" in R.C. 5505.18(A) ("totally and permanently incapacitated") indicates that the legislature intended that anything less than total incapacity for duty would not qualify an applicant for retirement pursuant to R.C. 5505.18.

You have expressed some concern that portions of the collective bargaining agreement entered into between the State of Ohio and the Fraternal Order of Police, Ohio Labor Council, Inc. pursuant to R.C. Chapter 4117 could affect your determination of disability. The portions of the contract that concern you require that patrolmen participate in a health and physical fitness program. This program requires patrolmen to maintain a certain level of physical fitness, and it provides for disciplinary action if that level is not maintained. The program permits no permanent medical deferrals for any patrolman, including those with physical disabilities. However, upon the recommendation of a qualified physician and approval of the chief medical examiner of the division of highway patrol, a ninety-day deferral from the program may be permitted, and, if necessary, further ninety-day deferrals may be allowed. Your concern arises from the situation of a physically disabled patrolman who is able to function in his job assignment but who is unable to meet the requirements of the health and physical fitness program. The question, therefore, is whether the highway patrol retirement board is bound by the consequences of a provision in a collective bargaining agreement.

A very similar issue was decided by the Supreme Court of Ohio in *Fair v. School Employees Retirement System*, 53 Ohio St. 2d 118, 372 N.E.2d 814 (1978). In *Fair*, the Court held that employment regulations promulgated by the state board of education were not binding on the school employees retirement board. In that case, the employer, the state board of education, denied the plaintiff's application for a certificate authorizing him to continue as a school bus driver on the basis of a regulation which disqualified, for the position of school bus driver, those applicants affected with diabetes. The retirement board, however, denied the plaintiff's application for disability retirement on the basis of a medical finding that the plaintiff's diabetic condition would not prevent him from performing his duties as a school bus driver. The court held that it was solely within the province of the retirement board to determine the eligibility of the plaintiff for disability retirement.

To hold that regulations promulgated by the state board pursuant to R.C. 3327.10(A) are binding on the School Employees Retirement System would not only lack a statutory base, but also would place the determination of eligibility for disability retirement within the province of an agency having no responsibilities whatsoever for the administration and control of the retirement funds. Such a result clearly does not comport with the scheme created by the General Assembly which established a separate and independent agency to oversee and manage the school employees retirement funds under R.C. Chapter 3309.

53 Ohio St. 2d 118, 121, 372 N.E.2d 814, 816.

Similarly, a collective bargaining agreement cannot be read to impose restrictions which do not exist in the law upon the authority of the board. Therefore, the board's determination of eligibility for disability retirement pursuant to R.C. 5505.18 is not controlled by the collective bargaining agreement.

In summary, I find that the highway patrol retirement board must base its determination of disability pursuant to R.C. 5505.18 on the specific job duties and responsibilities of each individual applicant rather than on the functions of the highway patrol in general. This determination is a factual one to be made on a case-by-case basis, and must include a determination of the functions that the applicant can reasonably be expected to perform in his particular assignment.

Your second question asks whether an individual who has been granted a disability retirement pursuant to R.C. 5505.18 and who has been rehired by the highway patrol in a civilian capacity which encompasses substantially the same job duties may continue to receive pension benefits. I assume, for purposes of this question, that the state highway patrol has the authority to hire a civilian to fill the position in question, and I do not address that issue in this opinion.⁶ I also do not address the issue of whether a disability retiree may become a member of another public retirement system upon the retiree's employment by a new public employer.

In general, there is nothing in R.C. Chapter 5505 to preclude a member of the highway patrol who is receiving a disability pension pursuant to R.C. 5505.18 from becoming employed again. Clearly, a person incapacitated for duty and eligible for a disability retirement with respect to one position might be capable of performing other work. In fact, the legislature has contemplated this possibility. For example, R.C. 145.03 makes membership in the Public Employees Retirement System mandatory, with few exceptions not applicable here, for all public employees. Yet R.C. 124.85 states that "[n]o person who is receiving a disability benefit or service retirement pension or allowance from any state or municipal public retirement system in Ohio, shall be eligible for membership in any other state or municipal retirement system of this state." This is evidence of an awareness on the part of the legislature that a retired person might seek employment.

In the question you have posed, however, the retiree wishes to return to a job with substantially the same job duties as that from which he retired. Although this fact does not automatically preclude the continued receipt of disability pension benefits, it may be significant. R.C. 5505.18(C) mandates that the disability pension of a retiree under fifty-five years of age be terminated if the retiree has been physically examined and found "capable of performing his duties." If a retiree is capable of assuming a position with substantially the same duties as the position from which he retired, logic would indicate that the retiree is probably "capable of performing his duties." This determination is, however, a question of fact for the board to consider pursuant to R.C. 5505.18(C).

⁶ I may only advise the board with respect to the board's duties. See 1988 Op. Att'y Gen. No. 88-008. The question of whether the highway patrol may hire a civilian to fill a particular position does not fall within the duties of the board.

I find, therefore, that the disability pension pursuant to R.C. 5505.18 of a retirant under fifty-five years of age must be terminated if the retirant has been physically examined and found "capable of performing his duties." R.C. 5505.18(C). The mere fact that a retirant has become employed in a new position does not preclude the continued receipt of disability pension benefits; however, the fact that a retirant is employed in a job with substantially the same job duties as that from which the retirant retired may indicate that the retirant is capable of performing former job duties. This determination is one of fact to be made in each case by the board pursuant to R.C. 5505.18(C).

It is, therefore, my opinion and you are hereby advised:

1. The highway patrol retirement board must base its determination of eligibility for disability retirement pursuant to R.C. 5505.18 on the specific job duties and responsibilities of each individual member rather than on the functions of the highway patrol in general.
2. Pursuant to R.C. 5505.18, the disability pension of a retirant under fifty-five years of age must be terminated if the retirant has been physically examined and found capable of performing his duties. This is a factual determination to be made by the highway patrol retirement board pursuant to R.C. 5505.18(C).