

## OPINION NO. 75-003

## Syllabus:

1. State agencies are liable for interest pursuant to R.C. 4141.241(D)(2), 4141.241(B)(5), and 4141.23, when payments required by R.C. 4141.241(D)(1) in lieu of contributions are not paid when due.

2. When payments required by R.C. 4141.241(D)(1) in lieu of contributions are not paid when due, the proper collection procedure is to certify the unpaid amounts to the Attorney General, who shall then institute a civil action pursuant to R.C. 4141.27 for the collection of such amounts, including interest.

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To: William E. Garnes, Administrator, Ohio Bureau of Employment Services,  
Columbus, Ohio

By: William J. Brown, Attorney General, January 24, 1975

I have before me your request for my opinion, which reads as follows:

"Effective January 1, 1972, the General Assembly of the state of Ohio enacted Section 4141.241, Revised Code.

"By virtue of Paragraph (D) of Section 4141.241, Revised Code, the state of Ohio, in lieu of contributions required of employers under Chapter 4141 of the Revised Code is required to pay to the Administrator of the Bureau of Employment Services an amount equal to the amount of regular benefits, plus one-half of the extended benefits paid from the unemployment compensation fund attributable to covered employment with the state of Ohio.

"In accordance with Paragraph (B) of such section, a quarterly bill is submitted to the appropriate state agency with payment due not later than 30-days after mailing date of such bill.

"There have been instances where such bills have not been paid within the 30 day period.

"Your opinion is requested in regard to the following queries:

"(1) Is interest chargeable

to the appropriate state agency, in accordance with Section 4141.23, Revised Code?

"(2) If interest is chargeable, then what methods of collection are available to the Bureau of Employment Services in order to collect interest so charged?"

For purposes of R.C. Chap. 4141. the term "employer" has been defined by R.C. 4141.01 to include the state and its instrumentalities. That Section reads in part as follows:

"As used in sections 4141.01 to 4141.46 of the Revised Code, unless the context otherwise requires:

"(A) (1) 'Employer' means the state, its instrumentalities, its political subdivisions and their instrumentalities, and any individual or type of organization including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, \* \* \*.

"\* \* \* \* \* \* \* \*"

(Emphasis added.)

R.C. 4141.241, which provides for payments in lieu of contributions by nonprofit organizations and by the state and its instrumentalities, reads in pertinent part as follows:

"(B) Except as provided in division (I) of section 4141.29 of the Revised Code, benefits based on service with a nonprofit organization granted a reimbursing status under this section shall be payable in the same amount, on the same terms, and subject to the same conditions, as benefits payable on the basis of other service subject to Chapter 4141. of the Revised Code. Payments in lieu of contributions shall be made in accordance with this division and division (D) of section 4141.24 of the Revised Code.

"(1) (a) At the end of each calendar quarter, or at the end of any other period as determined by the administrator under division (D) (2) of section 4141.24 of the Revised Code, the administrator shall bill each nonprofit organization or group of such organizations which has elected to make payments in lieu of contributions for an amount equal to the full amount of regular benefits plus one half of the amount of extended benefits paid during such quarter or other prescribed period which is attributable to service in the employ of such organization.

"\* \* \* \* \* \* \* \*"

"(2) Payment of any bill rendered under division (B) (1) of this section shall be made

not later than thirty days after the bill was mailed to the last known address of the organization or was otherwise delivered to it, unless there has been an application for review and redetermination in accordance with subdivision (4) of this division.

\* \* \* \* \*

"(5) Past due payments of amounts in lieu of contributions shall be subject to the same interest rates, penalties, and collection procedures that apply to past due contributions under sections 4141.23 and 4141.27 of the Revised Code. In case of failure to file a required wage report within the time prescribed by the administrator, the nonprofit organization shall be assigned a ten dollar forfeiture for each report that is filed after the due date.

"All interest, forfeitures, and penalties collected under this division shall be paid into the unemployment compensation special administrative fund as provided in section 4141.11 of the Revised Code.

\* \* \* \* \*

"(D) (1) In lieu of contributions required of employers under Chapter 4141. of the Revised Code, the state, its instrumentalities, its political subdivisions and their instrumentalities, shall pay to the administrator for deposit in the unemployment compensation fund an amount equal to the amount of regular benefits plus one half of the extended benefits paid from such fund, which is attributable to service, as defined in division (B) of section 4141.01 of the Revised Code, in the employ of the state or such political subdivision.

"(2) The determination of the amount to be paid, and all other factors pertaining to such payments, including their collection, shall be the same as provided in division (B) of this section, provided that, in establishing the conditions under which these payments are to be made, the administrator shall coordinate such conditions with the state department of finance, or the appropriate officials of the political subdivision. The conditions shall include the manner of keeping sub-accounts for accounting and statistical purposes." (Emphasis added.)

R.C. 4141.241(D) (1) requires the state and its instrumentalities to make payments in lieu of contributions to the administrator of the Bureau of Employment Services, and R.C. 4141.241 (D) (2) provides that all factors pertaining to such payments, including their collection, shall be the same as provided in division (B) of R.C. 4141.241. Division (B) of R.C. 4141.241 provides in subdivision (2) that payments shall be made within thirty days after billing and in subdivision (5) that past due payments shall be subject to the same interest rates, penalties, and collection procedures applicable under R.C. 4141.23 and 4141.27. R.C. 4141.23, which provides for the payment of interest on past

due accounts, and for unpaid contributions to become a lien upon the property of the employer, reads in part as follows:

\* \* \* \* \*

"Any contribution or payment in lieu of contribution due from an employer shall, if not paid when due, bear interest at the rate of seven and one-half per cent per annum until paid. In such computation any fraction of a month shall be considered as a full month.

"Any contribution, interest, or forfeiture required to be paid under such sections by any employer shall, if not paid when due, become a lien upon the real and personal property of such employer. \* \* \*"

\* \* \* \* \*

(Emphasis added.)

Thus it appears that the state and its instrumentalities, including state agencies, are liable for interest pursuant to R.C. 4141.241(D)(2), 4141.241(B)(5), and 4141.23, when payments required by R.C. 4141.241(D)(1) in lieu of contributions are not paid when due. It has long been held that a state is not liable for interest except where it has placed itself in a position of liability, either by statute or by contract. The court in State, ex rel. Parrott v. Board of Public Works, 36 Ohio St. 409 (1881), stated this principle in the fourth branch of the syllabus, which reads as follows:

"In the absence of a statute requiring it, or a promise to pay it, interest cannot be adjudged against the state for delay in the payment of money."

See also State, ex rel. Williams v. Glander, 148 Ohio St. 188 (1947). Since in the instant case there is specific statutory authority creating liability for interest, I must conclude that interest is chargeable to state agencies pursuant to R.C. 4141.23.

In your second question you ask what methods of collection are available to the Bureau of Employment Services to collect such interest. R.C. 4141.27, which is made applicable to the state and its instrumentalities by R.C. 4141.241(B)(5), reads in part as follows:

"If the administrator of the bureau of employment services finds that any person, firm, corporation, or association is, or has been, an employer subject to sections 4141.01 to 4141.46, inclusive, of the Revised Code, which determination of liability has become final pursuant to the provisions of section 4141.26 of the Revised Code, and has failed to comply with such sections, such administrator shall determine the period during which he or it was such an employer, which finding and determination is for all purposes of such sections prima-facie evidence thereof. The administrator shall forthwith give notice of said action to the employer who shall immediately thereafter furnish

the administrator with a payroll covering the period included in said finding, and shall forthwith pay the amount of contribution determined and fixed by the administrator.

"If said employer fails to furnish such payroll and pay the contribution for such period within ten days after receiving such notice, the administrator shall then determine the amount of contribution due from said employer for the period the administrator found him or it to be subject to sections 4141.01 to 4141.46, inclusive, of the Revised Code, including interest, and shall notify said employer of the amount thereof and shall order it to be paid. If said amount is not paid within ten days after receiving notice, the administrator shall certify his finding relative to such employer to the attorney general, who shall forthwith institute a civil action against such employer in the name of the state for the collection of such contribution and interest. \* \* \*" (Emphasis added.)

Thus it appears that the proper procedure would be to certify the unpaid amounts to the Attorney General, who shall then institute a civil action, pursuant to R.C. 4141.27, for the collection of such amounts, including interest. Such an action would require the Attorney General to represent both parties to the action, thus giving rise to a possible conflict of interest. However, a Federal District Court in Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio, 1971), affirmed 450 F. 2d 480 (1971), held at 352-353 that a conflict of interest arising by operation of law is unavoidable, and does not prevent the Attorney General from representing both parties to the action. For a discussion of this case see my Opinion No. 73-029, Opinions of the Attorney General for 1973. For another case in which the Attorney General represented both parties see State, ex rel. Glander v. Ferguson, 148 Ohio St. 581, 584 (1947).

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

1. State agencies are liable for interest pursuant to R.C. 4141.241(D)(2), 4141.241(B)(5), and 4141.23, when payments required by R.C. 4141.241(D)(1) in lieu of contributions are not paid when due.

2. When payments required by R.C. 4141.241(D)(1) in lieu of contributions are not paid when due, the proper collection procedure is to certify the unpaid amounts to the Attorney General, who shall then institute a civil action pursuant to R.C. 4141.27 for the collection of such amounts, including interest.