

OPINION NO. 88-085**Syllabus:**

Pursuant to R.C. 145.297(A)(3)(c), the board of county commissioners may designate the office of the county engineer as an employing unit, for purposes of a retirement incentive plan established under R.C. 145.297; county employees, other than those employed by the county engineer, are not eligible to participate in the plan established for the office of the county engineer.

To: Alan W. Foster, Adams County Prosecuting Attorney, West Union, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 25, 1988

I have before me your opinion request with respect to the meaning of the term "employing unit," as used in R.C. 145.297, concerning the establishment of retirement incentive plans for certain members of the Public Employees Retirement System (hereinafter PERS). Your specific question is whether "the County Commissioners can identify the employees of one officeholder, specifically the County Engineer, as an employing unit for purposes of a retirement incentive plan, without such designation making all other employees of the county eligible for the

retirement incentive plan." R.C. 145.297(B) provides, in part: "A retirement incentive plan shall provide for purchase by the *employing unit* of service credit for eligible employees who elect to participate in the plan and for payment by the employing unit of the entire cost of the service credit purchased." (Emphasis added.) Pursuant to R.C. 145.297(C)(3), a participating employee must agree to retire under R.C. 145.32, R.C. 145.34, R.C. 145.37, or R.C. 145.33(A) within ninety days after receiving notice from PERS that service credit has been purchased for him under R.C. 145.297.

R.C. 145.297(A), which defines the phrase "employing unit," states:

(A) As used in this section, "employing unit" means:

(1) A municipal corporation, agency of a municipal corporation designated by the legislative authority, park district, conservancy district, sanitary district, health district, township, metropolitan housing authority, public library, county law library, union cemetery, joint hospital, or other political subdivision or unit of local government.

(2) With respect to state employees, any entity of the state including any department, agency, institution of higher education, board, bureau, commission, council, office, or administrative body or any part of such entity that is designated by the entity as an employing unit.

(3)(a) With respect to employees of a community mental health board, the community mental health board.

(b) With respect to employees of a county board of mental retardation and developmental disabilities, the county board of mental retardation and developmental disabilities.

(c) *With respect to other county employees, the county or any county agency designated by the board of county commissioners.*

(4) *In the case of an employee whose employing unit is in question, the employing unit is the unit through whose payroll the employee is paid.* (Emphasis added.)

Since the engineer's employees are county employees, *see generally AFSCME v. Polta*, 59 Ohio App. 2d 283, 394 N.E.2d 310 (Erie County 1977), it is necessary to refer to subdivision (A)(3) of R.C. 145.297, concerning the meaning of "employing unit" with respect to county employees. Under R.C. 145.297(A)(3), the employing unit of county employees, other than those described in R.C. 145.297(A)(3)(a) and (b), is either the county or "any county agency designated by the board of county commissioners."

The term "county agency," as used in R.C. 145.297, is not defined by statute. I note, however, that the term "agency" is also used in subdivision (A)(2) of the same statute to refer to a state entity other than a "department,...institution of higher education, board, bureau, commission, council, office, or administrative body." If the term "agency" were used in the same manner in subdivision (A)(3) of the statute, a county agency would be a county entity other than a department, institution of higher education, board, bureau, commission, council, office or administrative body. Consequently, the "office" of the county engineer, as an entity different from an "agency," would be excluded from the term "county agency" under such a reading. It appears, however, that since the majority of employing entities at the county level are not, by statute, entitled agencies, but rather departments (e.g., the county department of human services), boards (e.g., the county board of mental retardation and developmental disabilities), or merely offices (e.g., county recorder), the legislature did not intend that the term "agency," as used in R.C. 145.297(A)(3), be read as narrowly as in subdivision (A)(2).

Absent statutory definition, the meaning of the term "county agency" may be determined by examination of the statutory scheme established by R.C. 145.297. R.C. 145.297 states in part:

(B) An employing unit may establish a retirement incentive plan for its employees. In the case of a county or county agency, decisions on whether to establish a retirement incentive plan for any employees other than employees of a community mental health board or county board of mental retardation and developmental disabilities and on the

terms of the plan shall be made by the board of county commissioners. In the case of a municipal corporation or an agency of a municipal corporation, decisions on whether to establish a retirement incentive plan and on the terms of the plan shall be made by the legislative authority.

Thus, with respect to county employees, other than employees of a community mental health board¹ or county board of mental retardation and developmental disabilities, and regardless of the composition of the employing unit, the board of county commissioners is authorized to determine whether to institute a retirement incentive plan and to prescribe the terms of any such plan. It is significant that the General Assembly has vested in the board of county commissioners authority to decide whether to designate a county agency as a separate employing unit, R.C. 145.297(A)(3)(c), and further to determine for the county, as well as for any county agency which it has designated as an employing unit, whether to adopt a retirement incentive plan and, if so, to dictate the terms of such plan, R.C. 145.297(B). Pursuant to R.C. 145.297, every employing unit, other than a county or municipal agency,² may independently determine whether to establish a retirement incentive plan. As set forth above, however, for all county employees, except those listed in R.C. 145.297(A)(3)(a) and (b), regardless of the department, agency, office, or other county employing entities by which they are employed, the decision as to whether they are entitled to participate in a retirement incentive plan in accordance with R.C. 145.297 is left to the discretion of the board of county commissioners.

The broad discretion granted to the board of county commissioners under R.C. 145.297 appears to have been intended to afford the board the greatest flexibility in designing a retirement incentive plan, within the structure and limitations imposed by R.C. 145.297 and other statutory procedures, for the entire county. For example, R.C. 145.297(B) states in part: "No employing unit shall have more than one retirement incentive plan in effect at any time." R.C. 145.297(B) also requires "payment by the employing unit of the entire cost of the service credit purchased." (Emphasis added.) Concerning eligibility to participate in such plan, R.C. 145.297(C) states in part:

Participation in the plan shall be available to all eligible employees³ except that the employing unit may limit the number of

¹ R.C. Chapter 340 provides for the establishment and operation of community mental health service districts, either within a single county or on a multi-county basis. See R.C. 340.01. Pursuant to R.C. 340.02, for each such district, whether single-county or joint-county, there is appointed a community mental health board. R.C. 145.297(A)(3)(a) appears, therefore, to refer only to persons employed by a community mental health board of a single-county mental health service district. See generally 1986 Op. Att'y Gen. No. 86-048 (discussing the differences between single-county and joint-county community mental health service districts).

² R.C. 145.297(A)(1) defines the term "employing unit" as meaning, in part, "a municipal corporation...[or] agency of a municipal corporation designated by the legislative authority." Concerning retirement incentive plans for municipal employees, R.C. 145.297(B) states: "In the case of a municipal corporation or an agency of a municipal corporation, decisions on whether to establish a retirement incentive plan and on the terms of the plan shall be made by the legislative authority." Compare R.C. 145.297(A)(1) and R.C. 145.297(A)(3) with R.C. 145.297(A)(2) (designating as an employing unit, "[w]ith respect to state employees, any entity of the state including any department, agency, institution of higher education, board, bureau, commission, council, office, or administrative body or any part of such entity that is designated by the entity as an employing unit").

³ R.C. 145.297(C) establishes criteria for qualifying as an employee eligible to participate in a retirement incentive plan established under R.C. 145.297.

participants in the plan to a specified percentage of its employees who are members of the public employees retirement system on the date the plan goes into effect. The percentage shall not be less than five per cent of such employees. If participation is limited, employees with more total service credit have the right to elect to participate before employees with less total service credit. (Footnote added.)

Similarly, pursuant to R.C. 145.297(D), "[a] retirement incentive plan shall provide for purchase of the same amount of service credit for each participating employee," with certain exceptions. In light of the limitations imposed upon the design of a retirement incentive plan, particularly as to the availability of such plan to eligible employees, and the fact that each employing unit is responsible for payment of the cost of participation by its employees in such plan, it appears that the legislature intended to allow the board of county commissioners as much flexibility as possible in determining the composition of county employing units, by allowing certain county agencies to be designated as separate employing units, in order to offer retirement incentive plans which would be most beneficial to employees county-wide. Thus, it appears unreasonable to restrict the power of the board of county commissioners to designate only an entity which is specifically entitled an "agency" as a separate employing unit under R.C. 145.297.⁴

Further support for a broad reading of the term "county agency" is found in R.C. 145.297(A)(4), which states: "In the case of an employee whose employing unit is in question, the employing unit is the unit through whose payroll the employee is paid." At the county level, it appears that each appointing authority, whether a county agency or some other entity of county government, prepares its own payroll through which its employees are paid. See 1960 Op. Att'y Gen. No. 1278, p. 269 (syllabus, paragraph two) ("[R.C. 325.17] authorizes the county engineer to appoint and discharge employees and the board of county commissioners is without authority to delete from a payroll submitted by the engineer the name of an employee appointed by such engineer"). See generally 1987 Op. Att'y Gen. No. 87-067 (concerning payroll records maintained by county appointing authorities). Thus, since a county appointing authority is the entity through whose payroll county employees are paid, R.C. 145.297(A)(3)(c) authorizes a board of county commissioners to designate a county appointing authority as an employing unit, for purposes of that statute. In the specific situation about which you ask, since the county engineer is a county appointing authority, see R.C. 325.17, the board may designate the office of the county engineer as an employing unit.

⁴ Support for this conclusion may be found in [1987-1988 Monthly Record] Ohio Admin. Code 145-15-04, which discusses "subordinate employing units" as follows:

(B)(1)(a) Upon adoption of a retirement incentive plan, an employing unit shall immediately notify the public employees retirement system of such adoption....

(b) Notwithstanding paragraph (B)(1)(a) of this rule, in the event a subordinate designation of an employing unit is made:

(i) If by a state entity, notice to the retirement system shall be submitted by the appointing authority and include the signature of the fiscal officer reporting to the retirement system and head of the subordinate employing unit; or

(ii) If by a county board of commissioners, notice to the retirement system shall be submitted by the commissioners and include the signatures of the county auditor and head of the subordinate employing unit....

(2) The plan must be in writing and meet the following minimum requirements:

...
(e) No more than one plan shall be in effect at one time for an employing unit or subordinate employing unit;

The second portion of your question concerns the availability of such a plan to county employees, other than those employed by the county engineer. In this regard, I note that R.C. 145.297(C) establishes eligibility for participation in an early retirement incentive plan, in part, as follows: "Any classified or unclassified employee of the employing unit who is a member of the public employees retirement system shall be eligible to participate in the retirement incentive plan established by his employing unit" (emphasis added), if he meets the specified criteria. Thus, pursuant to R.C. 145.297(C), only PERS members employed by the employing unit establishing the retirement incentive plan are eligible to participate in that plan. In the circumstances you describe, therefore, county employees, other than those employed by the county engineer, are not eligible to participate in the plan implemented for the employees of the county engineer's office.

Based on the foregoing, it is my opinion, and you are hereby advised that, pursuant to R.C. 145.297(A)(3)(c), the board of county commissioners may designate the office of the county engineer as an employing unit, for purposes of a retirement incentive plan established under R.C. 145.297; county employees, other than those employed by the county engineer, are not eligible to participate in the plan established for the office of the county engineer.

(f) Be offered to not less than five per cent of the employing unit or subordinate employing unit's employees who are members of the retirement system as of the date the plan goes into effect....

Pursuant to rule 145-15-04, PERS appears to contemplate that a retiremer incentive plan may be established on the county level for units smaller than an "employing unit," defined in rule 145-15-04(A)(3) as: "an employer as defined in [R.C. 145.297(A) or R.C. 145.298], and if any subordinate designation of an employing unit is made[,] then the retirement system shall be notified in accordance with paragraph (B) of this rule...."