

July 18, 2018

The Honorable Joseph R. Burkard
Paulding County Prosecuting Attorney
120 S. Walnut Street
Paulding, Ohio 45879

SYLLABUS:

2018-018

The Public Employees Retirement Board has the authority to make a final determination whether an employee of a county sheriff is a “deputy sheriff,” as defined in R.C. 145.01(Z), for the purpose of receiving Public Employees Retirement System (PERS) benefits as a “PERS law enforcement officer.”



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OPINION NO. 2018-018

The Honorable Joseph R. Burkard
Paulding County Prosecuting Attorney
120 S. Walnut Street
Paulding, Ohio 45879

Dear Prosecutor Burkard:

You have requested an opinion whether a county auditor, a county sheriff, or the Public Employees Retirement Board is authorized to determine whether an employee of a county sheriff is a “deputy sheriff,” as defined in R.C. 145.01(Z), for the purpose of receiving Public Employees Retirement System (PERS) benefits as a “PERS law enforcement officer.”

Meaning of “Public Employee,” “Deputy Sheriff,” and “PERS Law Enforcement Officer”

Before answering your question, it is helpful to understand the meaning of “public employee,” “deputy sheriff,” and “PERS law enforcement officer,” as those terms are used in R.C. Chapter 145. For the purpose of determining membership in PERS, “public employee” is defined in R.C. 145.01(A). Among others, a person who holds a non-elective office of any county or who is employed and paid in whole or in part by a county, in any capacity not covered by the Ohio Police and Fire Pension Fund (R.C. 742.01), the State Teachers Retirement System (R.C. 3307.01), the School Employees Retirement System (R.C. 3309.01), or the Highway Patrol Retirement System (R.C. 5505.01) is a “public employee.” R.C. 145.01(A)(1).¹ In addition, an employee is not a “public employee” if the employee has been classified as an independent contractor or another classification other than public employee under R.C. 145.036, R.C. 145.037, or R.C. 145.038. For the purpose of R.C. Chapter 145, an “independent contractor” is a person who:

¹ R.C. 145.012 identifies several employees who are not “public employees” as defined in R.C. 145.01(A). A person “[w]ho is employed by a private, temporary-help service and performs services under the direction of a public employer or is employed on a contractual basis as an independent contractor under a personal service contract with a public employer” and a person “[w]ho is an emergency employee serving on a temporary basis in case of fire, snow, earthquake, flood, or other similar emergency” are among those identified as employees who are not “public employees.” R.C. 145.012(A)(1),(2).

- (a) Is a party to a bilateral agreement which may be a written document, ordinance, or resolution that defines the compensation, rights, obligations, benefits and responsibilities of both parties;
- (b) Is paid a fee, retainer or other payment by contractual arrangement for particular services;
- (c) Is not eligible for workers' compensation or unemployment compensation;
- (d) May not be eligible for employee fringe benefits such as vacation or sick leave;
- (e) Does not appear on a public employer's payroll;
- (f) Is required to provide his own supplies and equipment, and provide and pay his assistants or replacements if necessary;
- (g) Is not controlled or supervised by personnel of the public employer as to the manner of work; and
- (h) Should receive an Internal Revenue Service form 1099 for income tax reporting purposes.

2B Ohio Admin. Code 145-1-42(A)(2); *see generally State ex rel. Peyton v. Schumacher*, No. 00AP-78, 2000 Ohio App. LEXIS 5298, at **4-5 (Franklin County Nov. 16, 2000) (discussing factors indicating status as an independent contractor). An "independent contractor" "shall not become a contributor to the [Public Employees Retirement System]." Rule 145-1-42(B)(2).²

² In contrast, as used in R.C. Chapter 145, a "contract employee" is a person who:

- (a) Is a party to a bilateral agreement which may be a written document, ordinance, or resolution that defines the compensation, rights, obligations, benefits and responsibilities of the individual as an employee;
- (b) Is paid earnable salary at a specific periodic rate for services personally performed for the public employer and who appears on the employer's payroll;
- (c) Is eligible for workers' compensation or unemployment compensation;
- (d) May be eligible for employee fringe benefits such as vacation or sick leave;
- (e) Is controlled or supervised by personnel of the public employer as to the manner of work; and
- (f) Should receive an Internal Revenue Service form W-2 for income tax reporting purposes.

2B Ohio Admin. Code 145-1-42(A)(1). A "contract employee," as defined in rule 145-1-42(A)(1), "is a public employee and shall become a contributor to the public employees retirement system." Rule 145-1-42(B)(1)(a).

As used in R.C. Chapter 145, the term “deputy sheriff” means:

any person who is commissioned and employed as a full-time peace officer by the sheriff of any county, and has been so employed since on or before December 31, 1965; any person who is or has been commissioned and employed as a peace officer by the sheriff of any county since January 1, 1966, and who has received a certificate attesting to the person’s satisfactory completion of the peace officer training school as required by [R.C. 109.77]; or any person deputized by the sheriff of any county and employed pursuant to [R.C. 2301.12] as a criminal bailiff or court constable who has received a certificate attesting to the person’s satisfactory completion of the peace officer training school as required by [R.C. 109.77] of the Revised Code.

R.C. 145.01(Z). Thus, after January 1, 1966, a person who is commissioned and employed as a peace officer by a county sheriff and who has satisfactorily completed peace officer training school is a “deputy sheriff” as defined in R.C. 145.01(Z). A person employed as a criminal bailiff or court constable by a court of common pleas pursuant to R.C. 2301.12, and who has been deputized by a county sheriff and satisfactorily completed peace officer training school, is also a “deputy sheriff” as defined in R.C. 145.01(Z).

A “deputy sheriff,” as defined in R.C. 145.01(Z), may be a “PERS law enforcement officer” or a “PERS public safety officer.” A deputy sheriff is a “PERS law enforcement officer” if his “primary duties are to preserve the peace, protect life and property, and enforce the laws of this state[.]” R.C. 145.01(YY). Alternatively, a deputy sheriff is a “PERS public safety officer” if his “primary duties are other than to preserve the peace, protect life and property, and enforce the laws of this state[.]” R.C. 145.01(AAA). The significance of being categorized as a “PERS law enforcement officer” or as a “PERS public safety officer” is that some of the rules regarding PERS benefits are applied to a “PERS law enforcement officer” or a “PERS public safety officer” differently than the way those rules apply to a “public employee” who is not a “PERS law enforcement officer” or a “PERS public safety officer.” For example, after January 1, 2003, all employees who are members of PERS shall elect to participate in either the PERS defined benefit plan or a PERS defined contribution plan. R.C. 145.19(A). If the employee is a “PERS law enforcement officer” or a “PERS public safety officer,” the employee is ineligible to make an election under R.C. 145.19. R.C. 145.19(D). *See* R.C. 145.191(F) (a “PERS law enforcement officer” or a “PERS public safety officer” is ineligible to make an election to participate in a PERS defined contribution plan under R.C. 145.191(A)). Another example is found in R.C. 145.35. PERS is required to provide disability coverage to each member with at least five years of total service credit. R.C. 145.35(B). However, if the member is a “PERS law enforcement officer” or a “PERS public safety officer,” the member shall receive disability coverage for on-duty illness or injury regardless of the member’s length of service. *Id.* A third example of a difference between benefits for a public employee and a public employee who is a “PERS law enforcement officer” or a “PERS public safety officer” is that eligibility for age and service retirement for a “PERS law enforcement officer” or a “PERS public safety officer” is determined under R.C. 145.332, instead of under R.C. 145.32. R.C. 145.332.

Taking all of the above together, a person who is employed by a county sheriff may be a person who is excluded under R.C. 145.012 from the definition of “public employee,” an “independent contractor,” under rule 145-1-42,³ or a “public employee,” as defined in R.C. 145.01(A). If the person is a “public employee” and satisfies the definition of “deputy sheriff” in R.C. 145.01(Z), the person may be a “PERS law enforcement officer” or “PERS public safety officer.”⁴

Authority of County Sheriff and County Auditor to Make Determinations Regarding a County Employee’s Participation in the Public Employees Retirement System

Membership in PERS is compulsory for every “public employee.”⁵ R.C. 145.03(A); *State ex rel. Altman-Bates v. Pub. Emps. Ret. Bd.*, 148 Ohio St. 3d 21, 2016-Ohio-3100, 68 N.E.3d 747, at ¶ 20. “The head of each department⁶ shall submit to the public employees retirement board a statement showing the name, sex, title, earnable salary, duties, date of birth, and length of service as a public employee of every public employee in his department.” R.C. 145.15 (footnote added). In addition, the head of each department shall keep the Public Employees Retirement Board informed on a monthly basis of the department’s employment of new “public employees.” R.C. 145.17. This means that an initial determination whether employees are “public employees” is made by the head of the department.

Every “public employee” is required to contribute at least eight percent of the contributor’s⁷ earnable salary to the employee’s savings fund. R.C. 145.47(A). The fiscal officer of a local authority

³ One of the factors that determines whether a person is an independent contractor is that the person “[i]s not controlled or supervised by personnel of the public employer as to the manner of work[.]” Rule 145-1-42(A)(2)(g). A deputy sheriff who serves under the control and direction of the county sheriff will not constitute an “independent contractor” as defined in rule 145-1-42(A)(2).

⁴ It is also possible for a “PERS law enforcement officer” or a “PERS public safety officer” to hold an additional, separate employment as a “public employee.” That situation is not addressed in this opinion.

⁵ R.C. 145.03(B) provides an exception from the compulsory membership in the Public Employees Retirement System (PERS) for students who are employed with a school, college, or university.

⁶ As used in R.C. Chapter 145, a “head of the department” is “the elective or appointive head of the several executive, judicial, and administrative departments, institutions, boards, and commissions of the state and local government as the same are created and defined by the laws of this state or, in case of a charter government, by that charter.” R.C. 145.01(C).

⁷ A “contributor” is “any person who has an account in the employee’s saving fund created by [R.C. 145.23]. When used in the sections listed in [R.C. 145.82(B)], ‘contributor’ includes any person participating in a PERS defined contribution plan.” R.C. 145.01(F).

“shall transmit to [PERS] for each contributor ... an amount equal to the applicable per cent of each contributor’s earnable salary[.]” R.C. 145.47(B). In addition, the fiscal officer, “shall transmit promptly to [PERS] a report of contributions at such intervals and in such form as [PERS] shall require, showing thereon all the contributions and earnable salary of each contributor employed, together with warrants, checks, or electronic payments covering the total of such deductions.” *Id.* At least once per year, the fiscal officer of a local authority “shall submit to [PERS] ... a complete listing of all noncontributing appointive employees.” R.C. 145.47(E). Thus, a fiscal officer of a local authority also has a role in making an initial determination whether an employee of a county officer is a “public employee.” Logically, however, the fiscal officer’s determination about membership in PERS is informed by the classification made by the employee’s head of the department.

With respect to an employee of a county sheriff, the head of the department is the county sheriff and the fiscal authority is the county auditor. Therefore, an initial determination whether an employee of a county sheriff is a “public employee” and, thereby, a contributor to PERS, is made by the county sheriff and the county auditor.

Authority of the Public Employees Retirement Board to Make Determinations Regarding a County Employee’s Participation in the Public Employees Retirement System

“The general administration and management of the public employees retirement system and the making effective of [R.C. Chapter 145],” are vested in the Public Employees Retirement Board. R.C. 145.04(A). The decision whether a person is a “public employee,” as defined in R.C. 145.01(A), or an independent contractor, shall be made by the PERS Board, and those decisions are final. R.C. 145.01(A) (“[i]n all cases of doubt, the public employees retirement board shall determine under [R.C. 145.036, R.C. 145.037, or R.C. 145.038] whether any person is a public employee, and its decision is final”). *See generally* 2B Ohio Admin. Code 145-1-41(A) (“[i]n making any determination as to whether an individual is a contract employee or independent contractor under [R.C. 145.036], the public employees retirement board shall review, including but not limited to, the elements described in [rule 145-1-42(A)(1) and (A)(2)]”).

In addition, staff of the Public Employees Retirement Board are authorized “to make determinations required under [R.C. Chapter 145], including, but not limited to, membership, exemptions or exclusions from membership, earnable salary, benefits, and employer reporting.” 2B Ohio Admin. Code 145-1-09(A) (Supplement 2017-2018).⁸ A staff determination may be appealed to

⁸ Moreover, any person may make a request to PERS for a determination whether the person is eligible for membership in the system. 2B Ohio Admin. Code 145-1-10(A) (Supplement 2017-2018). A determination made in response to a request under rule 145-1-10(A) is a staff determination. Rule 145-1-10(B).

PERS for a senior staff determination. *Id.* A senior staff membership determination may be appealed to the Public Employees Retirement Board pursuant to 2B Ohio Admin. Code 145-1-11 (Supplement 2017-2018).⁹ Rule 145-1-10(C). Determinations by the Public Employees Retirement Board under rule 145-1-11 are “final and determinative[.]” Rule 145-1-11(D). If a staff or senior staff determination is not timely appealed pursuant to rule 145-1-10 or rule 145-1-11, the determination shall be final. Rule 145-1-09(A).

Thus, the Public Employees Retirement Board and its staff are authorized to make determinations that are necessary to implement the provisions R.C. Chapter 145. In carrying out that authority, the Public Employees Retirement Board is not required to accept an employer’s classification of an employee as a “public employee.” Indeed, the Board is expressly authorized to make its own determination whether an employee is a “public employee” and to determine which provisions of R.C. Chapter 145 apply to the employee. That authority includes authority to interpret and apply sections of the Revised Code that must be relied upon to determine whether an employee is eligible for membership in PERS and to determine the terms upon which PERS benefits will be provided. *State ex rel. Mallory v. Pub. Emps. Ret. Bd.*, 82 Ohio St. 3d 235, 240, 694 N.E.2d 1356 (1998) (“there is nothing in R.C. 145.01(A) that limits the [Public Employees Retirement Board] to interpreting only those statutes that the board administers. Therefore, the board erred in concluding that it did not have the statutory authority to construe R.C. Chapter 120 to determine whether appellant was a public employee for purposes of PERS during her employment at the [Franklin County Public Defender’s Office]”).

Although a county sheriff has authority to appoint a deputy sheriff, R.C. 311.04, and authority to determine initially whether that person is a “public employee,” the Public Employees Retirement Board has the authority to make the final determination as to a deputy sheriff’s eligibility for membership in PERS, the types of benefits that a deputy sheriff may receive from PERS, and the terms upon which those benefits may be provided to a deputy sheriff.

Insofar as there is no statutory right to an appeal to a court, a final determination by the Public Employees Retirement Board may be reviewed by a court through a petition for a writ of mandamus. *State ex rel. Altman-Bates v. Pub. Emps. Ret. Bd.* at ¶ 21; *State ex rel. Keyes v. Ohio Pub. Emps. Ret. Sys.*, 123 Ohio St. 3d 29, 2009-Ohio-4052, 913 N.E.2d 972, at ¶ 10. A writ of mandamus will be issued if it is shown that the Public Employees Retirement Board abused its discretion. *State ex rel. Altman-Bates v. Pub. Emps. Ret. Bd.* at ¶ 22. “The board has not abused its discretion if there is ‘some evidence’ to support its determination.” *Id.*; *State ex rel. Schaengold v. Ohio Pub. Emps. Ret. Sys.*, 10th Dist. No. 05AP-1002, 2006-Ohio-5093, 2006 Ohio App. LEXIS 5049, at ¶ 11.

⁹ Authority to hear an appeal to the Public Employees Retirement Board pursuant to 2B Ohio Admin. Code 145-1-11 (Supplement 2017-2018) may be delegated to an independent hearing examiner. Rule 145-1-11(C)(1). Written objections to the report of the hearing examiner may be considered by the Public Employees Retirement Board. Rule 145-1-11(C)(2), (4).

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that the Public Employees Retirement Board has the authority to make a final determination whether an employee of a county sheriff is a “deputy sheriff,” as defined in R.C. 145.01(Z), for the purpose of receiving Public Employees Retirement System (PERS) benefits as a “PERS law enforcement officer.”

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large initial 'M' and a long, sweeping tail.

MICHAEL DEWINE
Ohio Attorney General