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EMPLOYER-EMPLOYE—CASH CONTRIBUTIONS PAID EXCLUSIVELY BY EMPLOYER INTO PENSION FUND—BENEFIT OF EMPLOYES—NOT WAGES—CONTRIBUTIONS NEED NOT BE REPORTED TO INDUSTRIAL COMMISSION OF OHIO —PREMIUM NOT TO BE PAID INTO STATE INSURANCE FUND.

SYLLABUS:

Cash contributions paid exclusively by an employer into a pension fund for the benefit of its employees cannot properly be considered as wages, and such contributions need not be reported to the Industrial Commission of Ohio and premiums paid thereon into the state insurance fund.

Columbus, Ohio, July 26, 1946

The Industrial Commission of Ohio
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

"The Auditing Section of The Industrial Commission respectfully requests your opinion on the following problem:

Effective January 1, 1944 an Ohio employer executed a Pension Trust Fund Agreement under Section 165 of the Internal Revenue Code. By the terms of this agreement an Ohio bank was named Trustee and the contributions to the trust fund were to be invested in retirement income insurance.

The agreement provided that all of the contributions to said fund were to be made by the company for the purpose of establishing a pension plan for the sole and exclusive use and benefit of those employees of the company who would qualify under the terms of this agreement as participants. Participation in said fund was to be purely voluntary on the part of employees and any employee was eligible to participate if he was more than thirty and less than sixty-five years of age, had an annual income of $1000.00 and had been on a full-time basis of active employment for five years immediately prior to his participation.

The agreement further provided that if an employee terminated his employment except because of death before the completion of two years, his interest in the fund should cease. If the employment terminated after he had been in the fund two years,

he was entitled to a vested interest in the cash value of any contract up to 25%; after three and less than four years, 50%; after four and less than five years, 75%; and after five years' participation the agreement provided that he had a full 100% vested right in the cash value of such contract.

There were numerous other provisions as to the investing of the fund and the administration of the fund.

The agreement provided that the company could discontinue this trust by notice served on the managing committee and the Trustee thirty days before termination.

Under the foregoing facts we desire your opinion as to the following questions:

(1) Are the cash contributions which are paid into this pension fund exclusively by the employer, to be considered as wages paid to the employees under the Workmen's Compensation Act of Ohio so that such contributions need be reported by the employer to the Industrial Commission and premium paid thereon into the State Insurance Fund?

(2) If your answer to the foregoing question be in the affirmative, then are such payments to be reported and the premium paid into the State Insurance Fund at the time,

(a) When the employer pays such contributions into the fund, or

(b) When the employee's right to his portion of the contribution becomes vested, or,

(c) When the employee actually draws from said fund such portion thereof as, under the terms of the agreement, he actually receives?"

Your attention is first invited to Section 1465-53 of the General Code, which provides for what is known as the basic premium rate, and which reads as follows:

"The industrial commission of Ohio shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry sufficiently large to provide an adequate fund for the compensation provided for in this act, and to maintain a state insurance fund from year to year, provided, however, that where the payroll cannot be obtained or, in the opinion of the commission, is not an adequate

> measure for determining the premium to be paid for the degree of hazard, the commission may determine the rates of premium upon such other basis, consistent with insurance principles, as shall be equitable in view of the degree of hazard, and whenever in this sub-chapter reference is made to payroll or expenditure of wages with reference to fixing premiums such reference shall be construed to have been made also to such other basis for fixing the rates of premium as the commission may in the foregoing instances determine."

Sections 1465-53a and 1465-54b also have some bearing upon the fixing and maintaining of rates of premium and the duty of the employer with regard to records reflecting all payroll expenditures; and in the introductory portion of Section 1465-55, General Code, and paragraphs 2, 3, 4 and 6 (a) and (b) thereof confer the right upon the Industrial Commission to adopt rules and regulations with respect to the collection, maintenance and disbursement of the State Insurance Fund, but shed no further light upon a proper construction of the language involved.

The basic rate is defined in your rules as the rate printed in the manual (Rule II) and is predicated on payroll. But nowhere in the Workmen's Compensation Act has the General Assembly provided a *definition* of the words "wages" or "payroll." Nor does the case law of this state supply the deficiency. Their meaning, therefore, will have to be sought elsewhere. Where the legislature has not defined words used in the Act, the meaning of the language must then be determined as best it can in accordance with the intent so as to prevent absurdities and advance justice. Horack's Sutherland Statutory Construction, 3rd Ed., Sect. 4815. In the absence of a legislative intent to the contrary, common terms in a statute are presumed to have been used in their common sense. Ibid. Sec. 4919.

Webster's New International Dictionary (2d. Ed.) defines wages, first, as "pay given for labor, usually manual or mechanical, at short stated intervals, as distinguished from salaries or fees." Under its second meaning it is stated:

> "This economic or technical sense of the word *wages* is broader than the current sense, and it includes not only amounts actually paid to laborers, but the remuneration obtained by those who sell the products of their own work, and the wages of management or superintendence * * *."

The paragraph on synonyms which follows lists only Hire, Salary, Stipend, Pay Emolument, and includes the statement:

> "PAY, which is often general in its sense, may be equivalent esp. to wages (as in payday, payroll, etc.)"

This same lexicon defines "payroll" as:

> "1. A paymaster's list of those entitled to receive compensation at a given time and of the amounts due to each;
>
> 2. The sum necessary for distribution to those on a pay roll (sense 1); also, the money to be distributed."

The meaning of the phrase "on the pay roll" is given as "in the service, employ or hire."

Turning now in this same volume to the word "pension", its modern usage is found to mean:

> "A stated allowance or stipend made by a government or business organization in consideration of past services or of the surrender of rights or emoluments, to one retired from service"

and more particularly,

> "a. A provision by insurance for a retiring allowance to an employee.
>
> b. The portion of an employee's retirement income provided by the employer's contributions under a contributory plan."

The Workmen's Compensation Act was enacted for the purpose of providing a state insurance fund for the benefit of injured, and the dependents of killed employees and requiring contributions thereto by employers. The Acklin Stamping Co. v. Kutz, 98 O. S., 601, at page 608. Provision for the establishment of rates of premium is found only in the statutes I have mentioned, which premium rates are grounded on payroll or expenditure for wages. Obviously, the matter of degree of hazard is not involved in the consideration of your question.

The precise question you ask has not been made the subject of judicial determination in this state. In fact, the only discussion of any issue even remotely similar is to be found in the case of State of Ohio v. Ford Motor Co., 114 O. S., 221. There an action was brought to recover an

amount claimed due the Workmen's Compensation Fund, by reason of omission of specified payroll items from the company's records furnished to the commission over a certain period. The defense set forth was that, although shown on the payroll, the items involved were not wages, but represented a system of further payments to such of its workmen and operatives as complied with certain requirements of the defendant, which further payments were in addition to the wages which the defendant contributed and agreed to pay to its employees. The court held, however, that analysis of the schedule and the explanation thereof did not reveal that the additional payments were in the nature of gratuities and said that if those additional payments were even of a contingent nature the contingency was not made to appear in the defense itself. The conclusion was therefore reached that the additional payments were definitely agreed to be paid.

May I point out that the employee's wage is not only the norm used for premium rates but that it is also the sole basis for the computation of benefits. If the employer's contributions are wages for the one purpose, then it follows that they must be so regarded for the other. My reference is, of course, to Section 1465-84, General Code, the first paragraph of which I quote:

> "The average weekly wage of the injured person at the time of the injury shall be taken as the basis upon which to compute the benefits."

This situation has been recognized by your Commission in its adoption of Rule XX, Manual Premium Rules and Rates, which I quote:

> "Where bonuses, commissions, tips, gratuities, rent, housing or similar advantages are *received as* or a *portion of, the remuneration* of an employee, they shall be considered as *wages* and must be included in the *payroll report.*
>
> When tips and gratuities are received (in part or solely) as the remuneration of an employee, the employer shall periodically and not less than once each month ascertain from such employee the amount of tips or gratuities, or a reasonable estimate thereof, received by him or her during the period in question. Such information obtained by the employer shall be impounded and used as reportable payroll for premium purposes. Such records shall also be used in ascertaining the earnings of an employee in the establishment of his average weekly wage.

> Bonuses paid in consideration of services rendered in, and/or based on the earnings of, a past year shall be evenly applied over such year or that part thereof in which the employee was paid for such services." (Emphasis added.)

It is notable that the word "pension" does not appear in this rule.

Section 1465-84, General Code, is a mandatory statute and does not invest the Industrial Commission with a discretion to apply its own rule in determining the factor on which compensation shall be based. Neither do the statutes heretofore cited, which are likewise mandatory, bestow upon the Industrial Commission a discretion to apply its own rule in determining the base on which contributions by employers shall be grounded. Therefore, unless the employer's contributions to the pension trust fund under the agreement you site may be considered payroll expenditures or wages, the Industrial Commission is without authority to compel the reporting to it of such contributions and the basing of premiums thereupon.

Paragraphs (a) and (b), Section 165 of the Internal Revenue Code (26 U. S. C. A.), which you cite, so far as pertinent, read:

> (a) A trust forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall not be taxable under this supplement and no other provision of this supplement shall apply with respect to such trust or to its beneficiary—
>
> (1) if contributions are made to the trust by such employer, or employees, or both, for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;
>
> (2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries;
>
> (3) if the trust, or two or more trusts, or the trust or trusts and annuity plan or plans are designated by the employer as constituting parts of a plan intended to qualify under this subsection which benefits either—

(A) 70 per centum or more of all the employees, or 80 per centum or more of all the employees who are eligible to benefit under the plan if 70 per centum or more of all the employees are eligible to benefit under the plan, excluding in each case employees who have been employed not more than a minimum period prescribed by the plan, not exceeding five years, employees whose customary employment is for not more than twenty hours in any one week, and employees whose customary employment is for not more than five months in any calendar year, or

(B) such employees as qualify under a classification set up by the employer and found by the Commissioner not to be discriminatory in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees;

and

(4) if the contributions or benefits provided under the plan do not discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees.

(5) A classification shall not be considered discriminatory within the meaning of paragraphs (3) (B) or (4) of this subsection merely because it excludes employees the whole of whose remuneration constitutes 'wages' under section 1426(a) (1) (relating to the Federal Insurance Contributions Act) or merely because it is limited to salaried or clerical employees. Neither shall a plan be considered discriminatory within the meaning of such provisions merely because the contributions or benefits of or on behalf of the employees under the plan bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of such employees, or merely because the contributions or benefits based on that part of an employee's remuneration which is excluded from 'wages' by section 1426(a) (1) differ from the contributions or benefits based on employee's remuneration not so excluded, or differ because of any retirement benefit created under State or Federal law. * * *

> (b) The amount actually distributed or made available to any distributee by any such trust shall be taxable to him, in the year in which so distributed or made available, under section 22(b) (2) as if it were an annuity the consideration for which is the amount contributed by the employee * * *."

From the wording of the statute it seems clear that when sums of money are actually distributed or made available to a distributee under a plan such as you describe, they shall be reported, for purposes of taxation, as an annuity or pension. Nowhere in the Act appears any language that would warrant a construction of income to an employee from such a fund as taxable salary or wages.

Examining the terms of the agreement under the foregoing statutes, as you have set them forth, here we find an employer's pension plan or program of retirement benefits for its employees generally, operated entirely on a voluntary basis, all of the contributions being made by the company. No employee has any vested interest in the fund until he has been a participant for two full years. The plan, which is being operated with and under the Internal Revenue Bureau's approval, is open only to employees of designated age groups and a minimum income bracket who have been on a full time basis of active employment for five years immediately prior to participation. Discontinuance of the trust on thirty days notice is provided for in the agreement. It is impossible to say just when an employee will become a distributee under this plan; it may or may not occur while he is still in the employ of the company. The restrictive and contingent character of the participation and the difficult, if not unworkable, situation that would arise if an attempt should be made to use such a figure in fixing an average weekly wage is at once apparent.

In this connection, the attitude of the National Wage Stabilization Board on a question recently presented to it is of interest. This tribunal went so far as to hold that payroll deductions by the electrical industry for the purpose of building a worker's pension fund would not constitute a wage rise, hence the board and the law had nothing to say about it. National Electrical Contractors Association and National Brotherhood of Electrical Workers, N. W. S. B. Case No. 42-11, 138 (May 6, 1946). From the Wage Stabilization Law (Act of Oct. 2, 1942, Pub. Law 729, 77th Congress, 2d Session, 56 Stat. 765, c. 578), the board quoted this definition found in Section 10 of the Act, which reads:

> "When used in this act, the term 'wages' and 'salaries' shall include additional compensation, on an annual or other basis, paid to employees by their employers for personal services (*excluding insurance and pension benefits* in a reasonable amount * * *)."

The Opinion asserted:

> "This review of the statutory provisions and administrative precedents can leave no doubt as to the proper disposition of the subject case. * * * The agreement is of a type which Congress has expressly withdrawn from the jurisdiction of any wage stabilization agency. There is accordingly no bar to its being put into effect in accordance with the conclusion of the parties."

Applying several major tests which suggest themselves, I am left in no doubt as to the appropriate answer to your question.

1. The agreement comprehends pension or insurance benefits in that it sets up a plan and also calls for payments into a fund rather than to individual employees generally.

2. The payments are in accordance with the purposes for such funds, intended by the legislation to which you refer, and also the wage stabilization laws then in effect, since in substance they cover what amounts to insurable risks against interruption of a worker's earnings, including death, retirement, injury, illness or unemployment.

3. It does not appear that the proposed benefits are unreasonable or discriminatory or designed to evade legislative or administrative controls.

4. The contributions are earmarked for pensions only and are segregated in the hands of a bank trustee from any company or employee funds.

5. The agreement provides that the fund shall be "for the purpose of establishing a pension plan for the sole and exclusive use and benefit" of employees qualifying thereunder. There are no payroll check-offs, no deductions from wages and no worker contributions. There is no provision for a fixed bonus or a definite profit sharing method whereby general individual remuneration is certain to result.

6. By limiting the fund solely for pension benefits, the agreement

also provides for proper administration and control of the fund and against diversion.

Even if I should not come readily to this conclusion out of my own logic, the foregoing criteria would lead me to say that cash contributions paid into a pension fund exclusively by the employer for the benefit of workers who choose to participate therein, can not properly be considered as wages paid to employees under the Workmen's Compensation Act of Ohio and that such contributions need not be reported to the Industrial Commission and premiums paid thereon into the State Insurance Fund.

In view of the preceding discussion, it is unnecessary to answer your further questions.

Respectfully,

HUGH S. JENKINS,
Attorney General