

OPINION NO. 92-044**Syllabus:**

1. A board of a joint solid waste management district, which exercises its authority pursuant to R.C. 343.01(B) to appoint employees of the district, is the "appointing authority" of such employees, as defined in R.C. 124.01(D), for purposes of R.C. Chapter 124.
2. If a board of a joint solid waste management district "uses" the employees of a participating county to perform services for the joint district pursuant to R.C. 343.01(B), the "appointing authority" of such employees, as defined in R.C. 124.01(D), is the county officer, commission, board or body having the power of appointment and removal of such employees as have been provided for the use of the joint solid waste management district.
3. A board of a joint solid waste management district, which exercises its authority pursuant to R.C. 343.01(B) to appoint employees, to fix their compensation, and to compensate such employees directly, is the "employer" of such employees, as defined in R.C. 145.01(D) for purposes of R.C. Chapter 145.
4. If a board of a joint solid waste management district "uses" employees of a participating county and agrees to share in their compensation by reimbursing the county for such use of the employees pursuant to R.C. 343.01(B), the participating county that directly compensates such employees is the "employer," as defined in R.C. 145.01(D) for purposes of R.C. Chapter 145.
5. If a board of a joint solid waste management district "uses" employees of a participating county pursuant to R.C. 343.01(B), but agrees to share in their compensation by compensating such employees directly for services provided to the joint district, the joint district is an "employer" as defined in R.C. 145.01(D) for purposes of R.C. Chapter 145.
6. If a county employee is "used" by a board of a joint solid waste district pursuant to R.C. 343.01(B) and both the joint district and the county compensate such employee directly, both the joint district and the county are "employers," as defined in R.C. 145.01(D), whose obligations for purposes of R.C. 145.47, 145.48, and 145.483 are determined in proportion to the respective amounts paid by them directly to such employee.

To: Kevin J. Baxter, Erie County Prosecuting Attorney, Sandusky, Ohio
By: Lee Fisher, Attorney General, September 22, 1992

You have requested an opinion regarding the status of joint solid waste management districts under R.C. Chapter 145, governing the public employees retirement system (PERS), and under R.C. Chapter 124, governing civil service. Specifically, you ask:

1. Is a joint solid waste [management] district created under the auspices of Chapter 3734 or Chapter 343 a public employer within the meaning of section 145.01(D) of the Ohio Revised Code?
2. Is a joint solid waste [management] district created under the auspices of Chapter 3734 or Chapter 343 an appointing authority under section 124.01(D) of the Revised Code?

Joint Solid Waste Management Districts

Pursuant to R.C. 343.01(A) and R.C. 3734.52(B), the board of county commissioners of each county in Ohio must establish and maintain a solid waste management district either singly or jointly with other counties. R.C. 343.01(B) provides that "[t]he boards of county commissioners of the counties establishing a joint district constitute, collectively, the board of directors of the joint district...." This board of directors is specifically authorized to "appoint and fix the compensation of employees." *Id.* R.C. 343.01(B) further states:

Employees of the district shall be considered county employees for the purposes of Chapter 124. of the Revised Code and other provisions of state law applicable to employees. Instead of or in addition to appointing employees of the district, the board of directors may agree to use employees of one or more of the participating counties in the service of the joint district and to share in their compensation in any manner that may be agreed upon.

This language clearly provides that individuals who are employees of a joint solid waste management district (joint district) are to be accorded the rights, duties and benefits of county employees under any Ohio statute dealing with employees. This is not dispositive, however, of the question of what specific governmental authority within the county is vested with sufficient authority and control over such employees to be identified as their "employer" for various statutory purposes. R.C. 343.01(B) itself indicates that, in addition to the employees of the district, employees of a participating county may also perform services for the district. Accordingly, whether the joint district or a participating county is the "employer" or "appointing authority" with respect to such employees will depend on how the joint district board exercises the options available to it under R.C. 343.01(B).

Determination of Appointing Authority Under R.C. 124.01(D)

For purposes of civil service law as set out in R.C. Chapter 124, an "appointing authority" is "the officer, commission, board, or body having the power of appointment to, or removal from, positions in any office, department, commission, board, or institution." R.C. 124.01(D). Thus, the appointing authority of a county employee is not the county in general, but rather the specific officer or body vested by statute with the power of appointment and removal. There are numerous appointing authorities in each county. *See, e.g.*, R.C. 305.13-.16 (county commissioners); R.C. 309.06 (county prosecuting attorney); R.C. 313.05 (county coroner); *see generally* 1984 Op. Att'y Gen. No. 84-092 (recognizing that the board of county commissioners is not the appointing authority for all county employees).

See also State ex rel. Bd. of Educ. v. Miller, 102 Ohio App. 85, 86, 141 N.E.2d 301, 302 (Lawrence County 1956) ("general rule is that the power of removal is incident to the power to appoint"); *accord* 1992 Op. Att'y Gen. No. 92-017 at 2-60.

As indicated previously, R.C. 343.01(B) permits the board of a joint district to appoint employees directly, to "use" employees of a participating county, or to meet the needs of the district by some combination of these methods. The determination of who is the "appointing authority" with respect to any particular individual performing services for the joint district is thus dependent upon how that individual's services were acquired. If the board of a joint district directly appoints an employee pursuant to R.C. 343.01(B), the board is the appointing authority for purposes of R.C. 124.01(D). When, however, the board of a joint district "uses" an employee of a participating county, the appointing authority for such employee will be whatever county "officer, commission, board, or body" provides the "use" of such employee to the joint district.

General Principles for Determination of Employer Under R.C. 145.01(D)

For purposes of PERS, "[e]mployer'...means...any county...or board...as the same are, or have been, created by the action of the general assembly or by the legislative authority of any of the units of local government named in this division...." R.C. 145.01(D). A joint solid waste management district board is authorized by the general assembly and is created by the legislative authorities of the participating counties. Thus, pursuant to R.C. 145.01(D), the joint district board or a participating county can be an "employer" for purposes of PERS. Generally, the determination of which entity is the "employer" of a given employee for purposes of R.C. 145.01(D) must be determined on a case-by-case basis for each employee.

Although R.C. Chapter 145 does not set out the specific characteristics of an employer, it does impose certain responsibilities from which the necessary characteristics can be inferred. An employer's primary responsibilities under R.C. Chapter 145 are deduction of each employee's contribution to PERS from that employee's salary, R.C. 145.47, and payment of the employer's contribution to PERS, R.C. 145.48. R.C. 145.47 provides that "the fiscal officer of each local authority subject to this chapter, shall deduct from the earnable salary of each contributor on every payroll of such contributor for each payroll period subsequent to the date of coverage, an amount equal to the applicable per cent of the contributor's earnable salary." Under R.C. 145.48, "[e]ach employer shall pay to the employers' accumulation fund an amount which shall be a certain per cent of the earnable salary of all contributors to be known as the 'employer contribution,'..." An employer who fails to make the employee payroll deductions required under R.C. 145.47 becomes liable for the employee contributions not deducted, in addition to the "employer contribution." R.C. 145.483. *See generally City of Lancaster v. Public Employees Retirement Sys.*, 40 Ohio App. 3d 135, 532 N.E.2d 144 (Fairfield County 1987); 1980 Op. Att'y Gen. No. 80-063. Thus, the duties and liabilities of an "employer" for purposes of PERS arise from the act of compensating an employee. It follows that for individuals designated as county employees, their "employer" is the entity within the county vested with sufficient statutory authority over an individual county employee's compensation to comply with the requirements of R.C. Chapter 145.

Because of the variations in statutory authority over compensation, not all county employees have the same employer for purposes of PERS, and some county employees may have several employers. For example, in Op. No. 80-063, the Attorney General determined that a county board of mental retardation, rather than the county itself, was an "employer" for purposes of PERS, even though individuals working for the board were nominally in the county service. In reaching this conclusion, the opinion noted that a board of mental retardation has "broad powers

of appointment and control over employees," including the power to fix compensation for employees. *Id.* at 2-258. The authority of the county board of mental retardation over employee compensation was contrasted with the lesser authority of a county welfare department, which shares its authority with the board of county commissioners. *Id.*

In 1946 Op. Att'y Gen. No. 850, p. 240, however, the Attorney General noted that some public employees, who are classified as state, county or municipal employees for general purposes, are directly compensated by more than one governmental entity. In such a situation, the PERS statutes do not provide that only one of these entities may be identified as the employer. Rather, the employee will have more than one employer for purposes of PERS. As stated in 1946 Op. No. 850:

this obligation to make a deduction from the employee's compensation is not limited to the head of the department to which the employe primarily belongs but extends to every head of department whose duty it may be to make out a payroll including the name of the person in question. Manifestly, an employe of a municipality upon whom the law casts some duty by way of service to the county or state for which the county or state is to pay a salary or compensation directly to the employe, will have his name on the payroll not only of the municipality but also on the payroll of the county or state, and the duty to make this deduction falls equally upon both the municipality of which he is primarily an employe and upon the county or state which has the obligation to pay him a certain compensation. The fact that a certain officer...may be denominated, for the purposes of general law, an officer of that city and not an officer of the state, does not prevent him...from being, for purposes of the retirement act [PERS], an employe both of the municipality and of the state.

Id. at 243. Accordingly, all governmental entities who carry an employee on their payrolls are required, as "employers," to make the required payroll deductions, and the employer's contribution, in an amount based proportionately on the amount of compensation paid by each entity. *Id.* at 240 (syllabus) and at 243.

Determination of Employer under R.C. 145.01(D) in the Context of Joint Solid Waste Management Districts

Under R.C. 343.01(B), governing joint solid waste management disposal districts, the participating counties are given great flexibility in determining the allocation of control over compensation between the joint district board and any particular county. It is clear that the joint district board may appoint and compensate employees directly. In such instances, the position of the joint district board would be analogous to that of the county board of mental retardation discussed in Op. No. 80-063, making the joint district board would be the "employer" for purposes of R.C. Chapter 145.

The joint district board may, however, choose to "use" employees of a participating county and "to share in their compensation in any manner that may be agreed upon." R.C. 343.01(B). Such an agreement might leave all matters directly relating to compensation under the control of the specific county, with the joint district reimbursing the county for the amounts involved. In such circumstances, while the amount agreed on might include amounts to cover the employer liability under PERS, the county would be the entity directly responsible to PERS for performance of the employer's responsibility and would thus be the "employer" for purposes of R.C. Chapter 145. The joint district board's position under such circumstances would be similar to that of the county welfare department in Op. No. 80-063.

Alternatively, a joint district board agreeing to share in the compensation of a county employee pursuant to R.C. 343.01(B), could agree to compensate such employee directly for services performed for the joint district. Under such circumstances, the employee might be solely on the payroll of the joint district and the joint district would be the "employer" for purposes of PERS. It is also possible that the employee might perform some services for the joint district and some for the county or that the board and the county might agree to split the compensation for services to the board. As a result, the employee might be carried on the payrolls of both the joint district and the county. Under these circumstances, both the county and the joint district would be an "employer" for purposes of R.C. Chapter 145, and be responsible for payroll deductions and employer contributions to PERS in proportion to the amount of compensation directly paid by each to the employee. *See generally* 1946 Op. No. 850.

Conclusion

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

1. A board of a joint solid waste management district, which exercises its authority pursuant to R.C. 343.01(B) to appoint employees of the district, is the "appointing authority" of such employees, as defined in R.C. 124.01(D), for purposes of R.C. Chapter 124.
2. If a board of a joint solid waste management district "uses" the employees of a participating county to perform services for the joint district pursuant to R.C. 343.01(B), the "appointing authority" of such employees, as defined in R.C. 124.01(D), is the county officer, commission, board or body having the power of appointment and removal of such employees as have been provided for the use of the joint solid waste management district.
3. A board of a joint solid waste management district, which exercises its authority pursuant to R.C. 343.01(B) to appoint employees, to fix their compensation, and to compensate such employees directly, is the "employer" of such employees, as defined in R.C. 145.01(D) for purposes of R.C. Chapter 145.
4. If a board of a joint solid waste management district "uses" employees of a participating county and agrees to share in their compensation by reimbursing the county for such use of the employees pursuant to R.C. 343.01(B), the participating county that directly compensates such employees is the "employer," as defined in R.C. 145.01(D) for purposes of R.C. Chapter 145.
5. If a board of a joint solid waste management district "uses" employees of a participating county pursuant to R.C. 343.01(B), but agrees to share in their compensation by compensating such employees directly for services provided to the joint district, the joint district is an "employer" as defined in R.C. 145.01(D) for purposes of R.C. Chapter 145.
6. If a county employee is "used" by a board of a joint solid waste district pursuant to R.C. 343.01(B) and both the joint district and the county compensate such employee directly, both the joint district and the county are "employers," as defined in R.C. 145.01(D), whose obligations for purposes of R.C. 145.47, 145.48, and 145.483 are determined in proportion to the respective amounts paid by them directly to such employee.