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1. RETIREMENT BOARD, SCHOOL EMPLOYEES RETIREMENT SYSTEM—MAY DETERMINE IN CASES OF DOUBT IF ANY PERSON IS AN “EMPLOYEE”—DECISION FINAL UNLESS HELD INVALID AS A MATTER OF LAW—CONTRACT BUS-DRIVERS—SECTIONS 3309.01 (B), 3309.03 ET SEQ., RC.
2. EMPLOYEES WHO CLAIMED EXEMPTION, IN SERVICE SEPTEMBER 1, 1937—STATUS, PERSONS PROPERLY DECLARED TO BE MEMBERS OF SYSTEM—SECTION 3309.23 (A) RC.
3. RULE OF SYSTEM—DECLARATION 50% TO 65% OF TOTAL COMPENSATION PAID TO CONTRACT BUS OPERATORS SHALL BE CONSIDERED PERSONAL SERVICE SALARY—VALID UNLESS IT IS SHOWN BOARD ABUSED ITS DISCRETION OR UNLESS RULE IS ARBITRARY AND CAPRICIOUS AS TO A CONTRACT OR INDIVIDUAL.

SYLLABUS:

1. The Retirement Board of the School Employees Retirement System created by Section 3309.03 et seq., Revised Code, may, pursuant to the provisions of Section 3309.01 (B), Revised Code, determine in cases of doubt whether any person is an “employee” as defined in said retirement act. Such a decision by the Retirement Board is final unless it is held to be invalid as a matter of law. A determination by said Retirement Board that so-called “contract bus-drivers” are employees within the meaning of the act is not so arbitrary as to be held invalid as a matter of law.

2. Except for the provisions of Section 3309.23 (A), Revised Code, governing employees in service on September 1, 1937 who have claimed exemption, there is no provision in the law governing the School Employees Retirement System, Section 3309.01 et seq., Revised Code, whereby persons who have been properly declared to be members of said system may claim exemption from the provisions of the law.

3. A rule of the Retirement Board of the School Employees Retirement System which declares that 50% to 65% of the total compensation paid to so-called “contract bus operators” shall be considered as personal service salary to bus drivers is valid unless it is shown that the Board abused its discretion in the adoption of said rule, or unless the rule is shown to be arbitrary and capricious as applied to a particular contract or individual.

Columbus, Ohio, March 9, 1956

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio
Hon. Fred F. Fox, Prosecuting Attorney
Noble County, Caldwell, Ohio

Gentlemen:

I have before me two requests for my opinion relating to the same subject matter. The request of the Bureau reads as follows:

“School boards are required to provide transportation for children in accordance with the provisions of RC. 3327.01 et seq. Many boards in Ohio have entered into contracts for such transportation service with contractors who furnish the bus and the driver, together with the operating and maintenance costs of such service.

“The Public School Employees Retirement System, in providing retirement allowance, admits to membership in its system the employees of such independent contractors.

“Such drivers are required to be qualified in accordance with the provisions of R. C. 3327.10 and a school board may procure accident insurance covering all pupils transported under the authority of the school board. The school board further in its providing transportation may designate places as depots at which points they gather the children for transportation to school and adopt a time schedule when such buses are to run.

“Otherwise the contractor in providing such service is independent of the school district. That is, he may purchase any kind of a bus that meets with the approval of the State Board, may purchase his gasoline and other supplies on such terms and from such persons as he wishes and in practically all other respects be independent of such school districts.

“The Retirement System, however, in making the drivers amenable to the provisions of the System has developed a formula to be followed by such contractors which is substantially as follows:

“The School Employees Retirement System in its September 1955 Bulletin for Contract Bus Drivers, a regulation determining retirement status and reporting procedures, provides:

- “1. The Board of Education shall require that the bus owner file with the Clerk-Treasurer the monthly personal service

salary of bus operators for retirement purposes. The total of such salaries shall not be less than 50% nor more than 65% of the monthly amount paid the bus owner under the contract.

- “ 2. 6% of the total monthly personal service salary shall be withheld by the Board of Education from the monthly payments to the bus owner.
- “ 3. The bus owner shall provide the Clerk-Treasurer a list of the drivers and the monthly salary for each. On the basis of this information, the Clerk-Treasurer shall determine the membership contribution of each member. *The remainder, if any, of the amount withheld shall be credited to a membership account for the owner.* (Emphasis added.)

“I have been requested in a letter dated October 28, 1955, by the Clerk Treasurer of the NF EVSD to furnish a copy of the law or a citation to the same wherein it is provided that it is *compulsory* for a contract bus owner to join the Retirement System.

“In this particular school district I might point out that the Board of Education has entered into a contract with a contractor to furnish 3 school buses. The ‘owner’ or contractor is himself not a bus driver. His contract calls for a monthly payment of \$665.00 per month during the school year for furnishing such transportation service. Under the formula set up by the S.E.R.S. he is required to pay not less than 50% nor more than 65% of this sum for salaries of the bus drivers. Assuming that he would pay the minimum of 50%, this would mean that his salaries for services would total \$332.50 on which amount 6% would be applied for the S.E.R.S.

“However, he actually pays the bus drivers as follows:

1 Driver.....	\$20.00	per month
1 Driver.....	\$40.00	per month
1 Driver.....	\$76.00	per month

Or a total of \$136.00 to the three drivers. He, the contractor, is not a bus driver. However, again by applying rule 3 of the S.E.R.S. on this matter the difference in this case, \$196.50 (\$332.50 less \$136) is credited to a membership account for the owner.

“Thus, such owner receives not \$655.00 on his contract but 94% of such amount, 6% being retained by the School District’s Clerk-Treasurer and paid by the Clerk-Treasurer into the School Employees Retirement System Fund. It is likewise assumed that the school’s contribution to the School Employees Retirement System Fund is properly paid by withholding from the allocable Foundation Fund moneys.

“In discussing this matter with a representative of the School Employees Retirement System on the phone a day or so ago, he

advised me that your office had some time ago rendered an informal opinion on this matter. I do not have a copy of such opinion.

"In view of the questions raised, and so that our school examiners may make an intelligent audit, it is respectfully requested that you render an opinion upon:

- "1. Whether or not an independent contractor who has a contract with the school district for the furnishing of transportation for students is amenable to the making of contributions to the School Employees Retirement System for such bus drivers as he has hired.
- "2. Whether such contributions may be withheld from his contract price and paid to the School Employees Retirement System directly by the Clerk.
- "3. Whether the School Employees Retirement System may lawfully determine, assuming your answers to 1 and 2 are in the affirmative, a percentage of the consideration paid for such contract to be for 'personal service' such as the bus driver's salaries and may determine that the balance of such contract shall cover other operational expenses, depreciation and profit.
- "4. What difference would be made, if any, in your opinion if such contractor paid his share and deducted from his employees Federal Social Security payments.
- "5. Whether or not such bus drivers could exempt themselves from the operation of the School Employees Retirement System and what recourse the owner-contractor might have for deducting from such bus drivers the amount withheld by the Clerk-Treasurer for such contributions."

The request of the Honorable Fred F. Fox reads as follows:

"Would you please give me an opinion based on the following facts?

"Caldwell Exempted Village School District has a contract with 'A' for transportation of pupils. Under the law the School District is required to withhold part of the money paid to 'A' for [School] Employees Retirement System. 'A' is objecting to this because he hires 'B' to drive the school bus and claims that he pays Social Security on 'B'. The question is 'Is the school district required to hold the percentage for [School] Employees Retirement System from the money it pays 'A' for transportation of pupils?'"

The first question to be answered concerns the status of the contract bus drivers in question under the School Employees Retirement Act. I

have had occasion to consider this question administratively in advising with certain United States officials as to their status under the Social Security Act. On September 15, 1955, I addressed a letter to Mr. C. C. Darby, District Manager, Bureau of Old Age and Survivors Insurance, Columbus, Ohio. That letter provided as follows:

“I have before me copies of certain correspondence between you and Mr. Ward Ashman, secretary of the School Employees Retirement System of Ohio. Mr. Ashman has referred the matter to me for my information and possible comment.

“The subject matter of this correspondence is certain school bus drivers who operate in various capacities for the boards of education in this state. The question at issue is whether all or any of these drivers are performing service ‘as members of any coverage group in positions covered by a retirement system’ as that language is used in the Social Security Act (Title 42, Section 418 (d) (1), United States Code).

“The State of Ohio, by the provisions of Chapter 3309, Revised Code, has created a Public School Employees Retirement System. Section 3309.01, Revised Code, defines an ‘employee’ within that retirement system as follows:

“ ‘Employee’ means any person regularly employed in the public schools of the state who is not a teacher * * *. In all cases of doubt the school employees retirement board shall determine whether any person is an employee, as defined in this division, and its decision shall be final. * * *’

“Acting pursuant to the predecessor of the quoted statute (Section 7896-64, General Code), the retirement board on December 17, 1948 adopted the following resolution:

“I. *BUS DRIVERS*:

1. “The following persons regularly driving vehicles used in the transportation of pupils for a board of education shall be considered as employes under the provisions of Section 7896-64 of the General Code of Ohio:
 - a. The driver of a school bus which belongs to the board of education.
 - b. The driver of a school bus who has contracted with the board of education to furnish and drive the school bus.
 - c. The driver of a school bus owned or controlled by one who has a contract with the board of education to furnish the bus and driver.

2. The following persons regularly driving vehicles used in the transportation of pupils for a board of education shall not be considered as employes under the provisions of Section 7896-64 of the General Code of Ohio:
 - a. The driver of a private passenger vehicle as distinguished from a school bus.
 - b. The driver of a vehicle owned or controlled by a motor transportation company as defined in Section 614-84 of the General Code and supervised and regulated by the Public Utilities Commission of Ohio.
3. The provisions of this resolution shall become effective on and after July 1, 1949."

Instructions will be forwarded on or about September 1, 1949 on the procedure for handling contributions where the driver is not paid directly by the board of education.'

"Under the law of Ohio, this decision is final as to the membership of these drivers in the retirement system unless it is held by the Attorney General or by a court to be outside the powers of the retirement board as a matter of law. Although it might be argued that the board has attempted to cover certain situations which are not properly within a common-law relationship of employer-employee, it is my opinion that they have not exceeded their authority as the administrators of the retirement fund.

"It should be noted that various provisions of law and rules of administrative officers cover almost every detail of the transportation of school pupils so as to remove all trace of the traditional freedom of movement of the independent contractor from these drivers, whatever might be the details of their financial arrangements. Section 4511.76, Revised Code, a part of the Uniform Traffic Act, provides that the department of education shall adopt regulations governing the operation of school buses; Sections 3327.01 and 3327.03, Revised Code, provide that the board of education shall set the schedules and stopping places of school buses under their jurisdiction; Section 3327.10, Revised Code, provides that a bus driver, whether hired directly by a board of education or not, must give a bond, must have a certificate of good character from the board, and must pass a physical examination provided by the board.

"Finally, it must be remembered that the board is charged with the responsibility of administering the retirement fund under a uniform set of regulations. It is almost impossible for a retirement board to inquire into the minutia of employment of every applicant for retirement, and to make a separate case of each one. In its administrative capacity I believe that the board is justified

in classifying persons according to the services which they perform for the boards of education.

“From the above it follows that in my opinion school bus drivers who come within the provisions of the quoted resolution of December 17, 1948 are ‘covered by a retirement system’ within the meaning of Section 418 (d) (1) of Title 42, United States Code.”

It is my understanding that the views expressed above have been accepted by the officials of the Social Security Administration. I adopt the language of the above letter as my opinion to you in this matter.

Having determined that the drivers in question are amenable to the provisions of the Act, we turn now to the question of employee contributions. Before considering those contributions in detail, we should first dispose of the subsidiary question of whether a person subject to the provisions of the Act can claim an exemption and thus be excused from making contributions. Section 3309.01, Revised Code, defines an “employee” as follows:

“(B) ‘Employee’ means any person regularly employed in the public schools of the state who is not a teacher as defined in division (A) of section 3319.09 of the Revised Code; * * *.”

Section 3309.23, Revised Code, provides for membership in the retirement system as follows:

“The membership of the school employees retirement system shall consist of:

“(A) All employees in service on September 1, 1937, except employees who have filed with their employer a statement in writing requesting exemption from membership or employees who are excluded by sections 3309.01 to 3309.68, inclusive, of the Revised Code.

“(B) All employees who became employees or who were reappointed employees after September 1, 1937, except employees who are excluded by such sections. * * *

“(D) All other employees who become contributors.”

Section 3309.25, Revised Code, provides as follows:

“The school employees retirement board may deny the right to become members to any class of employees who are on a temporary basis, and it may also make optional with employees in any such class their individual entrance into membership.”

It can be seen that the above statutes make only one provision for claiming exemption from membership as a matter of right. I am informed that the Retirement Board has not sought to deny membership to the drivers in question, but on the contrary contends that they should be contributing members. Consequently, it is my opinion that with the exception of those drivers who were in service on September 1, 1937 and who have filed a statement in writing requesting exemption from membership, contract drivers who are subject to the provisions of the Act and the regulations of the Board may not claim exemption therefrom.

We turn now to the question of contributions. Section 3309.47, Revised Code, provides in part as follows :

“Each employee who is a member of the school employees retirement system shall contribute six per cent of his compensation to the employees’ savings fund. Such contributions, by the direction of the school employees retirement board, shall be deducted by the employer from the compensation of each contributor on each payroll of such contributor for each payroll period and shall be an amount equal to six per cent of such contributor’s compensation.

“* * * Every member shall be deemed to consent and agree to the deductions made and provided for in this section and shall receipt in full for his salary or compensation, and payment less said deductions is a full and complete discharge and acquittance of all claims and demands whatsoever for the services rendered by such person during the period covered by such payment. * * *”

Section 3309.48, Revised Code, provides as follows :

“Each employer of an employee who is a member of the school employees retirement system shall pay to the employers’ accumulation fund a certain per cent of the earnable compensation of each such employee to be known as the ‘normal contribution,’ and a further per cent of the earnable compensation of each such employee to be known as the ‘deficiency contribution.’ The rates per cent of such contribution shall be fixed on the basis of the liabilities of the system and shall be certified to the employers by the school employees retirement board after each actuarial valuation. The normal rate as fixed under the terms of section 3309.49 of the Revised Code shall be subject to the approval of the division of insurance.”

Section 3309.03, Revised Code, provides in part :

“* * * The board may * * * do all things necessary to carry out sections 3309.01 to 3309.68, inclusive, of the Revised Code. * * *”

Section 3309.04, Revised Code, provides as follows:

“The general administration and the management of the school employees retirement system and the making effective of sections 3309.01 to 3309.68, inclusive, of the Revised Code, are hereby vested in the school employees retirement board which may make all necessary rules and regulations.”

Apparently acting under the authority of the last two sections quoted above, the Retirement Board has adopted the following rule:

“For any period of employment *on and after July 1, 1955*, the monthly personal service salary for [contact] bus operators shall be in an amount not less than 50% nor more than 65% of the monthly contract payment on the vehicle.”

Pursuant to this rule the Board has required contributions under the above sections to be computed for each driver according to the stated percentages of the monthly contract payment for the vehicle which each driver operates. You have now asked my opinion as to the validity of this rule in a situation in which the owner of the buses in question contends that he is paying less than 50% of his contract receipts as salaries to his bus drivers.

The rules of the Retirement Board are not subject to the provisions of the Administrative Procedure Act, Sections 119.01 to 119.13, Revised Code, so we do not have here any question as to the regularity of the adoption of this rule. Since the subject matter of the rule is clearly within the field of the administration of the retirement system, I cannot say that as a matter of law it is beyond the power of the Retirement Board and therefore void. It is my opinion that the rule is valid so far as the Bureau and the school officials which it undertakes to advise are concerned, unless it can be shown by some person adversely affected to be invalid as applied to a particular set of facts, or unless the Board can be shown clearly to have abused its discretion. It is beyond the scope of this opinion to undertake to pass upon the possible factual situations that might be presented, or to substitute the discretion of this office for that which is lodged in the Retirement Board.

I cannot assume to take judicial notice of the factual situation which may have led the Board to adopt such a rule. I can, however, direct attention to the request of the Bureau so as to emphasize the problem facing the Board in attempting to administer the retirement system: It

has been represented to me that under a particular contract calling for a total payment of six hundred sixty-five dollars (\$665.00) per month for furnishing three school buses and drivers, the three drivers employed are receiving twenty dollars (\$20.00), forty dollars (\$40.00), and seventy-six dollars (\$76.00) per month respectively. With four plus weeks in a month and five school days in a week, this would mean that the drivers were being paid less than one dollar (\$1.00), less than two dollars (\$2.00), and less than four dollars (\$4.00) per day respectively. This I decline to accept as an accurate statement of fact. Rather, that representation appears to be a palpable attempt to evade the provisions of the law, or an effort to enjoy the substantial survivor benefits and minimum pensions provided by the retirement system without making commensurate payment therefor.

Until such time as a driver-member or a contracting employer can show facts which make the above rule invalid as applied to him, it is my opinion that it should be followed by the appropriate school officials.

One matter remains to be considered—the question of the contribution based on the difference, if any, between 50% of the contract payment price and the amount of the payroll submitted by the contractor. The Retirement Board has ruled that the contribution on this amount should be computed and credited to an account for the owner-contractor, whether or not he is also a driver.

It is my opinion that this ruling, being purely arbitrary in its standards, cannot be sustained. Holding as I have above concerning the validity of the Board's rule on percentage of contract price, I believe that the Board could require that the contribution in question be applied to the drivers actually employed according to some uniform rule. Such a procedure is in fact necessary if the rule which I have sustained is to be properly enforced. In effecting such enforcement, however, the Board is not justified in arbitrarily imposing membership on a person not otherwise qualified.

Holding as I have concerning the validity of the Board's rules concerning membership and contributions, I believe I have answered your questions as to the propriety of withholding from the contractor the amount of the employee contributions. Section 3309.47, *supra*, makes the deduction from a member's salary mandatory, and since the money with which he is paid originates as public funds, the proper public official is

the logical person to make the deduction. The contractor cannot complain inasmuch as he is authorized to pass on the deduction in making payments to the drivers. In my opinion that question is one of administration which does not involve the abrogation of contract rights.

In view of the above it is therefore my opinion that :

1. The Retirement Board of the School Employees Retirement System created by Section 3309.03 et seq., Revised Code, may, pursuant to the provisions of Section 3309.01 (B), Revised Code, determine in cases of doubt whether any person is an "employee" as defined in said retirement act. Such a decision by the Retirement Board is final unless it is held to be invalid as a matter of law. A determination by said Retirement Board that so-called "contract bus-drivers" are employees within the meaning of the act is not so arbitrary as to be held invalid as a matter of law.

2. Except for the provisions of Section 3309.23 (A), Revised Code, governing employees in service on September 1, 1937 who have claimed exemption, there is no provision in the law governing the School Employees Retirement System, Section 3309.01 et seq., Revised Code, whereby persons who have been properly declared to be members of said system may claim exemption from the provisions of the law.

3. A rule of the Retirement Board of the School Employees Retirement System which declares that 50% to 65% of the total compensation paid to so-called "contract bus operators" shall be considered as personal service salary to bus drivers is valid unless it is shown that the Board abused its discretion in the adoption of said rule, or unless the rule is shown to be arbitrary and capricious as applied to a particular contract or individual.

Respectfully,

C. WILLIAM O'NEILL

Attorney General