

1584

1. AGENTS—APPOINTED BY TAX COMMISSIONER OF OHIO—COUNTY AUDITORS OR NOT—THESE AGENTS, EMPLOYES OF STATE OF OHIO—AMENABLE TO PUBLIC EMPLOYES RETIREMENT ACT—REQUIRED TO CONTRIBUTE TO SYSTEM ON BASIS OF COMPENSATION RECEIVED—SECTIONS, 5348-2, 5348-2a, 5348-2b G. C.
2. STATE OF OHIO—EMPLOYER—REQUIRED TO PAY INTO PUBLIC EMPLOYES RETIREMENT SYSTEM FUND, EMPLOYER PAYMENTS — BASIS, COMPENSATION RECEIVED BY AGENTS—SECTIONS 486-68a, 486-68d, 5348-2b G.C.

SYLLABUS:

1. Persons appointed agents by the Tax Commissioner of Ohio, under authority of Section 5348-2b, General Code, for the purpose of enforcing the provisions of Sections 5348-2 and 5348-2a, General Code, whether they be county auditors or not, as such agents, are employees of the State of Ohio and are amenable to the Public Employes Retirement Act, and are required to contribute to the Public Employes Retirement System on the basis of the compensation received as such agents.

2. The State of Ohio, as employer, is required to pay into the Public Employes Retirement System fund the employer payments provided for in Sections 486-68a and 486-68d, General Code, based upon the compensation of such agents under the provisions of Section 5348-2b, General Code, whether they be county auditors or not.

Columbus, Ohio, July 1, 1952

Mr. Fred L. Schneider, Executive Secretary,
Public Employes Retirement System
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The retirement board has instructed me to request your opinion whether county auditors serving as agents of the Tax Commissioner of Ohio, under the authority of Senate Bill No. 22, enacted by the 99th General Assembly, are required to become members of Public Employes Retirement System and contribute the regular 6% on that portion of their salaries, i.e., that portion paid as agents of the Tax Commissioner.

"In the event your answer should be in the affirmative, would it follow that the State of Ohio as employer is required to make the employer payments provided in Sections 486-68a and 486-68d of the General Code?"

This inquiry raises the question as to whether such agents so appointed are amenable to the Public Employes Retirement Act, and also whether, in the event county auditors are appointed such agents, they are amenable to the Public Employes Retirement Act.

Senate Bill No. 22, enacted by the 99th General Assembly, mentioned in your request, has been codified as Section 5348-2b, General Code, and reads as follows:

"For the purpose of enforcing the provisions of sections 5348-2 and 5348-2a of the General Code the tax commissioner may appoint agents in the unclassified service who shall perform such duties as shall be prescribed by the tax commissioner, and as compensation therefor shall receive annually four cents per capita for each full one thousand of the first ten thousand of the population of the county and one cent per capita for each full one thousand over ten thousand of the population of the county, as shown by the last federal census, which shall be paid to such agents in the unclassified service in equal monthly installments from the state's share of the undivided inheritance tax in the county treasury on the warrant of the county auditor, any other provision of law to the contrary notwithstanding. Provided, however, that the amount paid to any agent in the unclassified service for duties performed in inheritance tax matters, as directed by the tax commissioner, shall not exceed fifteen hundred dollars in any calendar year."

Section 5348-2b, General Code, was originally enacted into law by the passage of Senate Bill No. 345 by the 97th General Assembly on June 30, 1947. In text no change whatsoever of Section 5348-2b was made by the 99th General Assembly. The passage of Senate Bill No. 22 was occasioned by the fact that old Senate Bill No. 345, by the terms of Section 2 thereof, was effective only until March 1, 1952, whereas Senate Bill No. 22 has no such time limitation as to its effectiveness.

Sections 5348-2 and 5348-2a, General Code, mentioned in Section 5348-2b, have to do generally with the transfer of shares or deposits of decedents and the retention of sufficient amounts to pay all taxes and interest which might be assessed thereon.

Membership in the Public Employes Retirement System is provided for in Section 486-33, General Code, which reads:

“A public employes retirement system is hereby created for the employes of the state of Ohio and of the several local authorities mentioned in section 486-32, General Code. Membership in the public employes retirement system shall be compulsory and shall consist of all public employes upon being appointed. Provided, that the board shall have authority to exempt from compulsory membership in the retirement system, classes or groups of employes engaged in work of a temporary, casual, or exceptional nature, *providing, such employment does not exceed three months*, but individuals in any such class or group so exempted may become members by making application therefor, subject to the approval of the retirement board; provided, however, that any employe who is, or who becomes, a member must continue such membership as long as he is a public employe, even though he may be in or transferred to an exempted class or group.” (Emphasis added.)

This section was last amended by the passage of Senate Bill No. 96 by the 99th General Assembly, effective June 14, 1951. The language emphasized in the above quotation was added to the statute at such time. Prior to such amendment there does not appear to have been any limitation placed on the right of the Retirement Board, acting within its sound discretion, to exempt classes or groups of employes engaged in work of a temporary, casual or exceptional nature. Under the present statute such exemption may only be granted where “such employment does not exceed three months.” I am not informed as to whether or not, prior to June 14, 1951, the Retirement Board had taken any action exempting such employes as being engaged in work of a temporary, casual or exceptional nature. In any event, it is clear that the employment here under consideration is not limited to a period of three months or less and that the Retirement Board is now limited, in exempting classes or groups of employes engaged in work of a temporary, casual or exceptional nature, to situations where such employment does not exceed three months. It would seem then that if such agents so appointed are “public employes,” they are amenable to the Public Employes Retirement Act. “Public employe” is defined in Section 486-32, General Code, as follows:

“4. ‘Public employe’ shall mean any person holding an office, not elective, under the state of Ohio, any county, municipality, park district, conservancy district, sanitary district, health district, township, metropolitan housing authority, state retirement

board or public library, or employed and paid in whole or in part by the state of Ohio or any of the above named authorities in any capacity whatsoever.

“In all cases of doubt the retirement board shall determine whether any person is a public employe as defined in this paragraph, and its decision shall be final.”

It would seem perfectly obvious that those agents appointed by the Tax Commissioner under Section 5348-2b, General Code, are employes of the State of Ohio, and are paid in whole or in part by the State of Ohio since they are appointed by the Tax Commissioner, paid their compensation out of state funds, that is, from the state's share of the undivided inheritance tax in the county treasury, and are placed in the unclassified service.

Although the question as to whether such agents were employes was not squarely presented, they were so considered in Opinion No. 2420, Opinions of the Attorney General for 1947, page 582, wherein it was held :

“An agent of the Tax Commissioner appointed under the provisions of Section 5348-2b, General Code (Amended Senate Bill No. 345, 97th General Assembly), is entitled to draw monthly compensation equal to one-twelfth of his annual salary, computed according to the statutory formula, for each month actually served as such agent, and in no case shall such compensation exceed \$125 per month.”

While no doubt exists in my mind that such agents are employes, doubtful cases are to be decided by the Retirement Board and not by this office. See Opinion No. 1290, Opinions of the Attorney General for 1949, page 931.

Under Section 486-32(4), General Code, previously noted, elected officials are excluded from the definition of “public employe,” but under Section 486-48, General Code, elected officials, by making application and on their own volition, may become members, any other provisions of law notwithstanding. County auditors then, *as such*, being elected officials, are not members of the Public Employes Retirement System, unless they elect to become such members.

Referring back to Section 5348-2b, it will be observed that there is no requirement that the Tax Commissioner appoint county auditors as such agents. Obviously, a person other than a county auditor, so ap-

pointed, would meet all of the qualifications of a "public employe," as defined by Section 486-32(4), and thus his membership in the Public Employes Retirement System would be compulsory, as provided in Section 486-33, General Code. The fact that the Tax Commissioner has chosen to select county auditors as such agents and the fact that such auditors, *as auditors*, are elected officials and not "public employes," as defined by Section 486-32(4), does not mean that in their capacity as such agents they are elected officials. In such capacity it is clear that they are but employes of the State of Ohio.

You further inquire as to whether the State of Ohio, as employer, is required to make the employer payments provided for in Sections 486-68a and 486-68d, General Code. Having decided that such agents are employes of the State of Ohio, it necessarily follows that the State of Ohio is required to make employer contributions to the retirement fund under the provisions of Sections 486-68a and 486-68d, General Code. Section 486-68a reads in part as follows:

"Beginning January 1, 1939, each county, municipality, park district, conservancy district, health district, state retirement board and public library as employers, and beginning January 1, 1945, the state of Ohio, as employer, and beginning October 1, 1943, each township as employer, and beginning July 1, 1949, each metropolitan housing authority as employer, shall pay to the employers' accumulation fund a certain percentum of the compensation of each employe member, to be known as the 'normal contribution' and a further percentum of the earnable compensation of each such member to be known as the 'deficiency contribution.' * * *"

Section 486-68d reads in part as follows:

"On and after January 1, 1939, each county, municipality, park district, conservancy district, health district and public library, or on and after January 1, 1945, the state and on or after October 1, 1943, each township, and on and after July 1, 1949, each metropolitan housing authority shall pay into the employer's accumulation fund, in such monthly or less frequent installments as the retirement board shall require * * *."

In conclusion it is my opinion that:

1. Persons appointed agents by the Tax Commissioner of Ohio, under authority of Section 5348-2b, General Code, for the purpose of enforcing the provisions of Sections 5348-2 and 5348-2a, General Code,

whether they be county auditors or not, as such agents, are employes of the State of Ohio and are amenable to the Public Employes Retirement Act, and are required to contribute to the Public Employes Retirement System on the basis of the compensation received as such agents.

2. The State of Ohio, as employer, is required to pay into the Public Employes Retirement System fund the employer payments provided for in Sections 486-68a and 486-68d, General Code, based upon the compensation of such agents under the provisions of Section 5348-2b, General Code, whether they be county auditors or not.

Respectfully,

C. WILLIAM O'NEILL
Attorney General