

**Note from the Attorney General's Office:**

The syllabus paragraph 2 of 1973 Op. Att'y Gen. No. 73-118 was rejected and not followed by 2013 Op. Att'y Gen. No. 2013-026.

## OPINION NO. 73-118

## Syllabus:

1. When a township fails to deduct, from the wages of a highway superintendent, the employee's statutory contribution to the Public Employees Retirement System, it has an obligation to make up the deficiency and may appropriate money to do so from the road fund, from which the superintendent's salary is derived, from the township general fund, or from any funds held by the county auditor for distribution to the township;

2. A township does not have the right to seek reimbursement from an employee of monies paid the Public Employees Retirement System as a result of its failure to withhold the employee's contribution from his salary.

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To: Joseph R. Grunda, Lorain County Pros. Atty., Elyria, Ohio  
By: William J. Brown, Attorney General, November 20, 1973

I have before me your request for my opinion which may be summarized as follows:

When a township fails to deduct from an employee's wages the employee's statutory contribution to the Public Employees Retirement System, the township has an obligation to make up these deficiencies plus the interest and other costs. See Opinion No. 72-004, Opinions of the Attorney General for 1972. From what source does the township obtain the funds necessary to make such payment?

The employee was employed as Road Superintendent. Can road and bridge funds be used to repay the Public Employees Retirement System or must general fund monies be used?

Finally, does the township have the right to seek reimbursement of monies paid the Public Employees Retirement System from such employees?

As you note, Opinion No. 72-004, Opinions of the Attorney General for 1972, which relied on State, ex rel. Board v. Baker, 169 Ohio St. 499 (1959), held that the retirement fund is made up of contributions from both the employer and employees; that the employer is required to withhold the employee's share from his wages and pay it into the fund; and that if the employer fails to withhold the employee's share he must make up the deficiency out of his own pocket. Your first question is, from what source does a township obtain the money necessary to make such a payment.

Provision for the appropriation and payment by a township of its contributions to the retirement fund as an employer is made by R.C. 145.12 which reads in part as follows:

The public employees retirement board shall prepare and submit \* \* \* to the board of township trustees of each township \* \* \*, and to each employer, except the state of Ohio, mentioned in division (D) of section 145.01, of the Revised Code \* \* \* a certification of the rate necessary

accruing during the year \* \* \*. \* \* \* [t]he board of township trustees of each township \* \* \* shall appropriate sufficient funds to provide for such obligations \* \* \*. \* \* \* [T]he board of township trustees of each township \* \* \* may reimburse the fund from which such appropriation is made by transferring to such fund from any other fund of such sub-division the proportionate amount of such appropriation that should be chargeable to such fund whether such fund is derived from taxation or otherwise.

Such payment may be made directly out of any funds, whether derived from taxation or otherwise, from which the salaries or compensation of employees, [on] account of whom such payments are to be made, are payable. Upon certification by the public employees retirement board of the amount due by an employer within any county who is subject to sections 145.01 to 145.57, inclusive, of the Revised Code, such payment shall be made from any fund or funds in the hands of the county auditor for distribution to such employer. (Emphasis added.)

And provision for payment of the salary of the township highway superintendent appears in R.C. 5571.04, which provides in part as follows:

\* \* \*The board of township trustees shall fix the compensation of the [township highway] superintendent for time actually employed in the discharge of his duties, which compensation shall be paid from the township road fund.

A careful reading of these two Sections leads to the conclusion that the township may pay its contribution to the fund, as employer of the highway superintendent, directly from the township road fund since the superintendent's salary is derived from that source. Or it may appropriate the money from the general fund and reimburse that fund later from the road fund. And it should be noted that

the last sentence of R.C. 145.12 permits the money to be paid to the Retirement System out of any funds in the hands of the county auditor for distribution to the township. See also R.C. 145.51. The same reasoning applies to the superintendent's share which was not withheld by the township. Under the holding of the Baker case and Opinion No. 72-004, supra, this has become the obligation of the township. The answer to your first and second questions is, therefore, that the funds necessary to make up the deficiencies may be paid from the general fund, from the road fund, or from any funds held by the county auditor for distribution to the township.

The present R.C. 145.12 is successor to G.C. 486-33. It has, however, been considerably altered by amendment. One of my predecessors, in Opinion No. 5727, Opinions of the Attorney General for 1942, held that payments to the Retirement System could be made only from the general fund of the subdivision, but the Section was amended by the General Assembly five months later to permit the present expanded authority to appropriate the necessary funds. 120 Ohio Laws, 281.

In answer to your third question, that is, does a township have the right to seek reimbursement of monies paid the Public Employees Retirement System from such employe, your attention is directed to R.C. 145.47 and 145.48. The former provides in part:

\* \* \* [T]he fiscal officer of each local authority subject to Chapter 145. of the Revised Code, shall deduct from the compensation of each member on every payroll of such member for each payroll period subsequent to the date such employee became a member an amount equal to the applicable per cent of such member's earnable salary or compensation \* \* \*.

And the latter Section provides in part:

Each employer described in division (D) of section 145.01 of the Revised Code shall pay to the employers' accumulation fund an amount which shall be a certain per cent of the earnable compensation of all members to be known as the "employer contribution. \* \* \*

In the Baker case, supra, the Supreme Court concluded that there is nothing in the unambiguous language of R.C. 145.48 to indicate anything optional or conditional about the payment of the employers' contribution and that under the provisions of R.C. 145.47, the deduction and remittance from the salary of the employee is unconditional. The employer's payment into the employers' accumulation fund and the withholding of the employee's contribution is mandatory, and the township may not seek reimbursement from the employee of monies paid the Public Employees Retirement System as a result of failure to withhold the employee's share. In reliance on this holding, I concluded in Opinion No. 72-004, supra, as follows:

If the employer fails to deduct from an employee's wages the full amount of the employee's statutory contribution to the Public Employees Retirement System, and fails to make the employer's contribution, the employer has an obligation to make

up these deficiencies plus the interest and any other costs out of his own pocket. (Emphasis added.)

Accordingly, in specific answer to your request, it is my opinion, and you are so advised, that:

1. When a township fails to deduct, from the wages of a highway superintendent, the employee's statutory contribution to the Public Employees Retirement System, it has an obligation to make up the deficiency and may appropriate money to do so from the road fund, from which the superintendent's salary is derived, from the township general fund, or from any funds held by the county auditor for distribution to the township

2. A township does not have the right to seek reimbursement from an employee of monies paid the Public Employees Retirement System as a result of its failure to withhold the employee's contribution from his salary.