

OPINION NO. 87-061**Syllabus:**

1. During the years 1966 through 1971, eligible employees who wished to be exempt from compulsory membership in the Public Employees Retirement System were required to file a written application for exemption with the PERS Board within one month after being employed.
2. During the years 1966 through 1971, an employer was required to pay an employee's contribution to the Public Employees Retirement System where the employer failed to deduct such contribution from the employee's compensation.

To: Thomas D. White, Holmes County Prosecuting Attorney, Millersburg, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, August 20, 1987

I have before me your predecessor's request for my opinion concerning the obligation of the county hospital to make retirement contributions on behalf of an employee who worked part-time from 1966 until 1971. The request letter states that during this period of time, no employee or employer contributions were paid to the Public Employees Retirement System (PERS) on behalf of the employee, and that no application form exempting the employee from PERS membership can be found.

Your predecessor's questions with regard to this matter are as follows:

1. During 1966 to 1971 was there a requirement in the law that an exemption form be signed by the employee before exclusion from PERS could take place?
2. Did the law which was in effect during 1966 to 1971 require the employer to also pay the employee's portion of PERS when an employer fails to deduct employee contributions?

I turn now to your first question concerning whether there was a requirement during the years 1966 through 1971 that employees sign a form in order to be exempted from PERS membership.

In 1966, R.C. 145.03 read as follows:

A public employees retirement system is hereby created for the employees of the state and of the several local authorities mentioned in section 145.01 of the Revised Code. Membership in the system shall be compulsory and shall consist of all public employees upon being appointed. Provided, a student whose employment will not exceed eight hundred hours in any calendar year or any new employee, not a member at the time of his employment, whose employment will not exceed twenty hours per week, may be exempted from compulsory membership by filing a written application for exemption with the public employees retirement board within one month after being employed. Such an application for exemption, when approved, shall be irrevocable while the employee continuously is employed in such part-time capacity and the employee shall forever be barred from claiming or purchasing membership rights or credit for the particular period covered by such exemption. Any employee who is, or who becomes a member must continue such membership as long as he is a public employee, even though he may be in or transferred to an exempted class or group.

1959 Ohio Laws 157, 162 (Am. S.B. 160, eff. Aug. 1, 1959). R.C. 145.03, as set forth above, was in effect during the entire time about which you ask. See note 1, *infra*. Thus, those employees whose employment did not exceed twenty hours per week were eligible for exemption from compulsory membership in PERS. In order to be exempt, however, employees were required to file a written application for exemption with the Public Employees Retirement Board within one month after being employed. City of Lancaster v. PERS, No. 52-CA-86 (Ct. App. Fairfield County May 18, 1987) (slip op. at 6-7) (upon examination of the PERS membership requirements during the period of February 1, 1962, to December 31, 1982, the court concluded: "There is no statutory provision for a waiver of PERS membership by any procedure than a written waiver filed within one month of employment. Having expressly created a procedure for waiver of membership, the statute cannot be construed as permitting waiver by any other method").

In 1972 Op. Att'y Gen. No. 72-004, my predecessor stated at 2-14: "I stress that the law, as originally enacted and as later amended, has always required a written application from an eligible employee for an exemption from participation in the Public Employees Retirement System..." (emphasis in original).¹ Cf. 1939 Op. Att'y Gen. No. 832, vol. II, p. 1085, 1088 ("in order to obtain exemption from membership in the public employees retirement system, any original member must have filed a written application for such exemption with the retirement board within three months of the effective date

¹ The version of R.C. 145.03 under discussion in this opinion was also in effect when 1972 Op. Att'y Gen. No. 72-004 was rendered. As set forth above, the version of R.C. 145.03 that was in effect during the years 1966 through 1971 was enacted in 1959 Ohio Laws 157, 162 (Am. S.B. 160, eff. Aug. 1, 1959). R.C. 145.03 was not amended again until 1973. See 1973 Ohio Laws 1722, 1730 (Am. H.B. 430, eff., in part, Nov. 20, 1973).

of the act. No exceptions to this requirement were prescribed by the Legislature").²

From the foregoing, it is apparent that during the years 1966 through 1971, eligible employees who wished to be exempt from compulsory membership in PERS were required to file a written application for such exemption with the PERS board within one month after being employed.

I turn now to your second question, whether, during the years 1966-1971, public employers were required to pay an employee's contribution to PERS where the employer had failed to deduct such contribution from the employee's compensation.

R.C. 145.47 provides for employee contributions to PERS, and in 1966, read, in pertinent part:

Beginning January 1, 1960, and until December 31, 1966, each public employee who is a member of the public employees retirement system shall contribute seven per cent of his earnable salary or compensation to the employees' savings fund. Fees and commissions, paid to employees for special services, over and above the regular salary, or fees and commission paid as sole compensation for services, are not to be included as earnable salary. The head of each state department, institution, board, and commission, and

² At the time 1939 Op. Att'y Gen. No. 832, vol. II, p. 1085 was rendered, G.C. 486-33 (now R.C. 145.03) read:

A state employes retirement system is hereby created for the employes of the state of Ohio. Membership in the state employes retirement system shall be compulsory and shall consist of all state employes, either as original members or as new members upon being regularly appointed. Provided, however, that any original member may be exempted from membership by filing written application for such exemption with the retirement board within three months after this act goes into effect; and any new member over the age of fifty years may be exempted from membership by filing written application for exemption with the retirement board within three months after being regularly appointed as a state employe. And provided further, 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, but individuals in any such class or group so exempted may become members by making application therefore, 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 state employe, even though he may be in or transferred to an exempted class or group.

1937-1938 Ohio Laws 57, 59-60 (Am. S.B. 253, approved March 25, 1937).

the 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. The head of each state department and the fiscal officer of each local authority subject to Chapter 145. of the Revised Code, shall transmit promptly to the secretary of the public employees retirement board a report of member deductions at such intervals and in such form as the board shall require, showing thereon all deductions for the public employees retirement system made from all the earnings, salary, or compensation of each member employed together with warrants or checks covering the total of such deductions. A penalty of five per cent of the total amount due for the particular reporting period shall be added when such report together with warrants or checks to cover the total amount due from the compensation of all amenable employees of such employer are filed sixty or more days after the last day of such reporting period. Such penalty shall be added to and collected on the next succeeding regular employer billing. Interest at the rate of six per cent shall be charged on the amount of the penalty in case such penalty is not paid within three months after it is added to the regular employer billing. The secretary of the board after making a record of all such receipts shall deposit them with the treasurer of state for use as provided by Chapter 145. of the Revised Code. In addition to the periodical reports of deduction required by this section, the fiscal officer of each local authority subject to Chapter 145. of the Revised Code, shall submit to the board at least once each year, a complete listing of all noncontributing appointive employees. Where an employer fails or refuses to deduct contributions for any employee and to transmit such amounts to the retirement system, the retirement board may make a determination of the employees' liability for contributions and certify to the employer the amounts due for collection in the same manner as payments due the employers' accumulation fund, provided that any amounts so collected shall be a penalty against the employer and held in trust pending receipt of contributions from such employees for the period involved as provided by law and, thereafter, the amount in trust shall be transferred to the employers' accumulation fund as a credit of such employer. The fiscal officer shall require each new member to submit to the board a detailed report of all his previous service as a public employee along with such other facts as the board requires for the proper operation of the public employees retirement system.

....

Beginning January 1, 1967, the member rate of contribution shall be adjusted as required by section 145.482 of the Revised Code. (Emphasis added.)

1965 Ohio Laws 165, 1731 (Am. Sub. H.B. 225, eff. Nov. 13, 1965). R.C. 145.47 was amended in 1967-1968 Ohio Laws, Part I, 175, Part II-III, 2794 (Am. Sub. H.B. 959, eff., in part, July

1, 1968) and in 1969-1970 Ohio Laws, Part I, 1178, 1195 (Am. S.B. 409, eff. Nov. 21, 1969). See note 3, infra. These amendments, however, are not pertinent to an analysis of your question. Further, R.C. 145.48(F) provided that an employer's obligation to make payments to the employers' accumulation fund under that section "shall include the normal and deficiency contributions and employer liability resulting from omitted member contributions required under section 145.47 of the Revised Code but not made by payroll deduction." See Am. Sub. H.B. 225 at 167; 1969-1970 Ohio Laws, Part II, 1408, 1423 (Am. S.B. 502, eff. Sept. 4, 1970). Thus, the employer of each employee covered by PERS was required to deduct from the employee's compensation the member's contribution to PERS. If the employer failed to deduct such contributions, the employer was held responsible for paying the contributions to PERS.

As was summarized in Op. No. 72-004:³

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.

(syllabus, paragraph two). See State ex rel. Public Employees Retirement Board v. Baker, 169 Ohio St. 499, 160 N.E.2d 262 (1959) (syllabus, paragraph two) ("[u]nder the provisions of Section 486-68, General Code (Section 145.47, Revised Code), it is...mandatory that the employer shall deduct the employee's contribution from his salary and pay it into the retirement system");⁴ City of Lancaster v. PERS, supra; 1973 Op. Att'y Gen. No. 73-118 at 2-452 ("the withholding of the employee's contribution is mandatory, and the [employer] 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").⁵ See also 1980 Op. Att'y Gen. No.

³ The version of R.C. 145.47 which was in effect when Op. No. 72-004 was issued may be found in 1969-1970 Ohio Laws, Part I, 1178, 1195 (Am. S.B. 409, eff. Nov. 21, 1969).

⁴ The versions of G.C. 486-68 or R.C. 145.47 in effect during the years in question in State ex rel. Public Employees Retirement Board v. Baker, 169 Ohio St. 499, 160 N.E.2d 262 (1959) are found in 1945-1946 Ohio Laws 207, 219 (Am. Sub. S.B. 187, approved June 25, 1945), 1947 Ohio Laws, 192, 207 (Am. Sub. S.B. 57, approved June 5, 1947), and 1951 Ohio Laws 617, 635 (Am. Sub. S.B. 96, approved June 14, 1951). Each version required employers to deduct members' contributions from their compensation for each payroll period.

⁵ See 1969-1970 Ohio Laws, Part I, 1178 (Am. S.B. 409, eff. Nov. 21, 1969).

The conclusion in 1973 Op. Att'y Gen. No. 73-118 that an employer could not seek reimbursement from its employees for delinquent employee contributions was based on language in Op. No. 72-004, which, in turn, relied on an

80-063 at 2-257 ("it is clear under relevant provisions of the law that the 'employer' [of a county employee who never contributed to PERS] must bear the burden of paying delinquent moneys owed PERS").⁶

In response to your second question, therefore, I conclude that during the years 1966 through 1971, an employer was required to pay an employee's contribution to PERS where the employer failed to deduct such contribution from the employee's compensation.

In conclusion, it is my opinion, and you are so advised, that:

1. During the years 1966 through 1971, eligible employees who wished to be exempt from compulsory membership in the Public Employees Retirement System were required to file a written application for exemption with the PERS Board within one month after being employed.
2. During the years 1966 through 1971, an employer was required to pay an employee's contribution to the Public Employees Retirement System where the employer failed to deduct such contribution from the employee's compensation.

interpretation of State ex rel. Public Employees Retirement Board v. Baker. Op. No. 72-004 states at 2-15:

I am aware that Section 145.47, Revised Code, which was considered by the Supreme Court in Baker, supra, was amended in 1957 to provide that the amount of the employee's contribution, which had never been withheld by the employer and which was eventually collected from the employer in cases like this, should be credited back to the employer after receipt of payment of the employee's liability from the employee himself. However, the statute made no provision for collection of the non-withheld liability from the employee. The dissenting opinion in Baker, supra (169 Ohio St. at 504) - which was decided two years after the amendment - shows that the Court was urged to hold that such an interpretation of the amendment amounted to unjust enrichment of the employee. The Court was not moved by the argument, and the majority opinion states that, in adopting Section 145.47, supra, "it was the evident purpose of the General Assembly to avoid hopeless confusion and to maintain the security of the retirement system."

⁶ See 1975-1976 Ohio Laws, Part II, 2091, 2139 (Am. Sub. H.B. 268, eff., in part, Aug. 20, 1976) (version of R.C. 145.47 in effect at time 1980 Op. Att'y Gen. No. 80-063 was issued).