

OPINION NO. 72-004**Syllabus:**

1. Unless some other specific exemption is applicable, the only public employees who are exempted from the coverage of the Public Employees Retirement System are those who have made written application for exemption.

2. 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.

To: Claude R. Sowle, Pres. Ohio University, Athens, Ohio
By: William J. Brown, Attorney General, January 25, 1972

I have your request for my opinion concerning the retirement status of university non-academic employees who have not, in the past, participated in the Public Employees Retirement System. Your letter reads in part as follows:

"Ohio University has a number of non-academic employees, with relatively long service, who did not par-

ticipate in PERS when they first were employed here. The reasons they did not participate are not clear. We have not been able to locate a signed waiver for any of them. The periods of non-participation vary from about one to five years.

"The cost of establishing this retirement service-credit for these employees would be considerable. Although the evidence is not clear, it appears most of them were not given a choice on whether or not to participate when they were employed.

"We would appreciate your opinion regarding the following questions:

"(1) In past years were any classes of employees, such as laborers, exempt, as a class, from participation in PERS? If so, please advise source of details.

"(2) Assuming the above employees were given no option on PERS participation when they were hired, is the University now legally obligated to pay the cost of:

- "a. Employer back share?
- b. Employee back share?
- c. Both shares?
- d. Neither share?

"(3) If the University is obligated to pay only the Employer share, who would be responsible for paying the interest cost for establishing back credit?

"(4) If the University is not legally obligated to pay any of the cost, is there a legal restriction against our paying the University's share?"

A "public employee" for the purposes of the Retirement System is, of course, "any person holding an office * * * under the state * * * or employed and paid in whole or in part by the state * * *". Section 145.01, Revised Code. Although as originally enacted the statutes referred to "state employees" rather than "public employees", one of my predecessors held that non-academic employees of a state university were covered by the act. Opinion No. 5540, Opinions of the Attorney General for 1942.

The Retirement System was first enacted into law on May 8, 1933, and Section 486-33, General Code (now Section 145.03, Revised Code), then read as follows:

"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." (Emphasis added.)

Later amendments to the original act, exempting part-time temporary employees from coverage, are paraphrased below for the sake of brevity.

In 1943, the Board was granted the power to exempt "classes or groups of employes engaged in work of a temporary, casual and exceptional nature" (120 Ohio Laws, 40).

In 1951, the 1943 provision was limited to temporary employment of three months (124 Ohio Laws, 620).

In 1953, an extra provision permitted exemption of part-time employees working 20 hours per week or less (125 Ohio Laws, 653).

In 1957, exemption was extended to students whose work did not exceed 800 hours per year (127 Ohio Laws, 304).

In 1959, a part-time worker's exemption was made irrevocable and he was forever barred from claiming any service credit for such time (128 Ohio Laws, 162).

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 before the employer can be excused from the duty to withhold the required amount from the employee's wages. It has been so held by the Supreme Court in State, ex rel. v. Baker, 169 Ohio St. 499 (1959). In that case, the Court allowed a writ of mandamus to compel the Board of County Commissioners of Madison County to pay into the Retirement Systems both the amounts which they failed to deduct from the salary of a deputy sheriff and the amounts of the employer's matching contributions, along with interest to the date of the commencement of the action. The syllabus of the case reads as follows:

"1. Under the provisions of Section 486-33f, General Code (Section 145.48, Revised Code), of the Public Employees Retirement Act of Ohio, it is mandatory that the employer shall pay to the employer's accumulation fund the same rates per cent of the compensation of each employee member employed by it for normal contribution and for the deficiency contribution as the state will be required to pay for its employees in pursuance of the provisions of Sections 486-68a to 486-68e, both inclusive.

"2. Under the provisions of Section 486-68, General Code (Section 145.47, Revised Code), it is likewise mandatory that the employer shall deduct the employee's contribution from his salary and pay it into the retirement system.

"3. The failure to pay the required contribution of an employer or an employee does not relieve the obligation for payment of the other.

"4. Under the provisions of Section 486-33e, General Code, the Board of County Commissioners constituted the 'head of the department' with the obligation

to cause deductions to be made from the salary of a county employee member for payment of his contribution to the retirement fund."

In Opinion No. 2334, Opinions of the Attorney General for 1961, my predecessor relied on the Baker case, supra, in a situation in which the facts were very similar to those you have presented. See, also, Opinion No. 346, Opinions of the Attorney General for 1963. 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."

With respect to your first question, any original member of the Retirement System, or any new member over 50 years of age, might have been exempted under the original act (Section 486-33, supra), by the filing of a timely application. After 1951, however, only employees working three months or less could have been exempt. It appears, however, from your letter that none of the employees in question ever made a written application for exemption.

The answer to your second question is controlled by the decision in the Baker case, supra. Ohio University, as the employer, is responsible for payment of the full amount with interest for the reason set out in that case, at page 502, as follows:

"* * * As in the case of the payment of the employer's contribution, the deduction and remittance from the salary of the employee is unconditional. In other words, the performance of the one duty is not dependent on the performance of the other, and the failure to perform one of them is no excuse for failure to perform the other. In making the performance of each duty mandatory, it was the evident purpose of the General Assembly to avoid hopeless confusion and to maintain the security of the retirement system.

"* * * * * * * *"

In view of the foregoing, there is no need to answer your third and fourth questions.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. Unless some other specific exemption is applicable, the only public employees who are exempted from the coverage of the Public Employees Retirement System are those who have made written application for exemption.

2. 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.