

**OPINION NO. 2003-031****Syllabus:**

R.C. 145.38(D)(2) requires a PERS retirant, as defined in R.C. 145.38(A)(1), who is employed by a public employer, as defined in R.C. 145.01(D), to obtain "primary health, medical, hospital, or surgical insurance coverage from the retirant's employer, if the employer provides coverage to other employees performing comparable work," whether or not the employer charges its employees a fee for such insurance coverage, unless "the retirant has coverage comparable to that provided by the employer from a source other than the employer or the public employees retirement system."

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**To: C. David Warren, Athens County Prosecuting Attorney, Athens, Ohio**  
**By: Jim Petro, Attorney General, October 16, 2003**

You have submitted an opinion request concerning health insurance coverage for a Public Employees Retirement System (PERS) retirant who, after retiring, becomes a county employee. By way of background, you state that Athens County has employed an individual who has retired through PERS from prior public service. As a county employee, this individual is now entitled to receive health insurance coverage that is provided by the county for its employees. In order to obtain this insurance coverage, however, each employee must pay a fee. Based upon these facts, you ask, "may a county employee who is a PERS retirant decline the county's health insurance when the county employee must pay an additional sum for that insurance?"

Let us begin by examining the general framework governing membership in and retirement under the Public Employees Retirement System. With limited exceptions not here applicable, every public employee, including a county employee, is a member of PERS. *See generally* R.C. 145.01(A) (defining "public employee" as including, among others, individuals employed and paid in whole or in part by a county in any capacity not covered by the Ohio Police and Fire Pension Fund, the State Teachers Retirement System, the School Employees Retirement System, or the State Highway Patrol Retirement System); R.C. 145.01(B) (defining "member"). Pursuant to R.C. 145.03(A), with limited exceptions for certain student employment, "membership in the system is compulsory upon being employed and shall continue as long as public employment continues." During public employment, both the public employee and the public employer are required to make contributions to PERS based upon the amount of the employee's compensation. *See generally, e.g.,* R.C. 145.47 (employee contributions); R.C. 145.48 (employer contributions). After completing the required number of years of service and attaining the necessary age, the employee may be entitled to retire under one of the retirement plans established in R.C. Chapter 145. *See, e.g.,* R.C. 145.32 (voluntary and compulsory retirement); R.C. 145.34 (commuted age and service allowance). *See also* R.C. 145.36 (disability retirement).

PERS provides health care insurance for certain eligible retirants<sup>1</sup> in accordance with R.C. 145.58,<sup>2</sup> which authorizes PERS to enter into agreements that provide health care insurance for, among others, "PERS retirants employed under [R.C. 145.38], for coverage of benefits in accordance with [R.C. 145.38(D)(2)]."

Let us now turn to R.C. 145.38, which governs the employment of PERS retirants by public employers.<sup>3</sup> As provided in R.C. 145.38(B)(1):

<sup>1</sup>R.C. 145.58(A) excludes from coverage certain former members who receive benefits under R.C. 145.32, R.C. 145.33, R.C. 145.331, R.C. 145.34, or R.C. 145.46 for whom eligibility is established after June 13, 1981, and who, at the time of establishing eligibility, have accrued less than ten years of service credit, exclusive of various types of purchased service credit; the spouses of such former members; and the beneficiaries of former members receiving benefits pursuant to R.C. 145.46.

<sup>2</sup>R.C. 145.58 states, in pertinent part:

(B) The public employees retirement board may enter into agreements with insurance companies, health insuring corporations, or government agencies authorized to do business in the state for issuance of a policy or contract of health, medical, hospital, or surgical benefits, or any combination thereof, for those individuals receiving age and service retirement or a disability or survivor benefit subscribing to the plan, or *for PERS retirants employed under [R.C. 145.38], for coverage of benefits in accordance with [R.C. 145.38(D)(2)]*.... If all or any portion of the policy or contract premium is to be paid by any individual receiving age and service retirement or a disability or survivor benefit, the individual shall, by written authorization, instruct the board to deduct the premium agreed to be paid by the individual to the company, corporation, or agency.

The board may contract for coverage on the basis of part or all of the cost of the coverage to be paid from appropriate funds of the public employees retirement system. The cost paid from the funds of the system shall be included in the employer's contribution rate provided by [R.C. 145.48 and R.C. 145.51]. The board may by rule provide coverage to ineligible individuals if the coverage is provided at no cost to the retirement system. The board shall not pay or reimburse the cost for coverage under this section or [R.C. 145.325] for any ineligible individual.

....

(E) The board shall make all other necessary rules pursuant to the purpose and intent of this section. (Emphasis added.)

<sup>3</sup>R.C. 145.38 states, in pertinent part:

(A) As used in this section and [R.C. 145.381 and R.C. 145.384]:

(1) "PERS retirant" means a former member of the public employees retirement system who is receiving one of the following:

(a) Age and service retirement benefits under [R.C. 145.32, R.C. 145.33, R.C. 145.331, R.C. 145.34, or R.C. 145.46];

(b) Age and service retirement benefits paid by the public employees retirement system under [R.C. 145.37];

(c) Any benefit paid under a PERS defined contribution plan.

*Subject to this section and [R.C. 145.381],<sup>4</sup> a PERS retirant or other system retirant may be employed by a public employer. If so employed, the PERS retirant or other system retirant shall contribute to the public employees retirement system in accordance with [R.C. 145.47], and the employer shall make contributions in accordance with [R.C. 145.48]. (Emphasis and footnote added.)*

Thus, the employment of a PERS retirant by a public employer is subject to, among other things, the requirements and limitations set forth in R.C. 145.38.

The availability of health care insurance through PERS for a PERS retirant who is employed by a public employer is governed by R.C. 145.38(D)(1), which states, in part: "Except as specified in division (D)(2) of this section, the retirant is *not* eligible to receive health, medical, hospital, or surgical benefits under [R.C. 145.58] for employment subject to this section," (emphasis added). R.C. 145.38(D)(1) thus establishes the general rule that PERS retirants who become public employees are not entitled to receive medical insurance through PERS, except as provided in R.C. 145.38(D)(2).

Pursuant to R.C. 145.38(D)(2):

*A PERS retirant subject to this section shall receive primary health, medical, hospital, or surgical insurance coverage from the retirant's employer, if the employer provides coverage to other employees performing comparable work. Neither the employer nor the PERS retirant may waive the employer's coverage, except that the PERS retirant may waive the employer's coverage if the retirant has coverage comparable to that provided by the employer from a source other than the employer or the public employees retirement system. If a claim is made, the employer's coverage shall be the primary coverage and shall pay first. The benefits provided under [R.C. 145.58] shall pay only those medical expenses not paid through the employer's coverage or coverage the PERS retirant receives through a source other than the retirement system. (Emphasis added.)*

Accordingly, with one exception,<sup>5</sup> a PERS retirant, once employed by a public employer that provides health, medical, hospital, or surgical insurance coverage to employees performing work that is comparable to that of the PERS retirant, shall receive his primary health, medical, hospital, or surgical insurance coverage through his employer. *See generally State v. Golphin*, 81 Ohio St. 3d 543, 545-46, 692 N.E.2d 608 (1998) ("use of the term 'shall' in a statute or rule connotes the imposition of a mandatory obligation unless other language is included that evidences a clear and unequivocal intent to the contrary").

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We will assume, for purposes of discussion, that the individual about whom you ask is a "PERS retirant," as that term is defined in R.C. 145.38(A)(1).

<sup>4</sup>R.C. 145.381, enacted in Am. Sub. H.B. 95, 125th Gen. A. (2003) (eff., in pertinent part, Sept. 26, 2003), concerns the employment of a PERS retirant in a position of public employment "that is customarily filled by a vote of members of a board or commission or by the legislative authority of a county, municipal corporation, or township," R.C. 145.381(A).

<sup>5</sup>The one situation in which the public employer of a PERS retirant or the PERS retirant may waive the employer's insurance for that employee is "if the retirant has coverage comparable to that provided by the employer from a source other than the employer or the public employees retirement system," R.C. 145.38(D)(2).

Nothing in R.C. 145.38(D)(2) suggests that the duty imposed upon a PERS retirant to obtain insurance available through his public employer is limited to only those instances in which such coverage is provided at no cost to the employees. We cannot, therefore, read into R.C. 145.38(D)(2) any such limitation. *See generally State v. Waddell*, 71 Ohio St. 3d 630, 631, 646 N.E.2d 821 (1995) (in interpreting a statute, one “must give effect to the words of a statute and may not modify an unambiguous statute by deleting words used or inserting words not used”). Rather, R.C. 145.38(D)(2) establishes only one exception to the requirement that a PERS retirant receive his primary health insurance coverage through his public employer when such insurance is available through that employer, *i.e.*, if the retirant “has coverage comparable to that provided by the employer from a source *other than* the employer or *the public employees retirement system.*” R.C. 145.38(D)(2) says nothing about waiving the requirement to obtain primary health insurance coverage available through a PERS retirant’s employer due to the cost to the retirant of obtaining such coverage.

The language of R.C. 145.38(D)(2) plainly illustrates the General Assembly’s intent that a PERS retirant who is employed by a public employer participate in any health insurance coverage available to the PERS retirant through such employer. *See generally Cline v. Ohio Bureau of Motor Vehicles*, 61 Ohio St. 3d 93, 96, 573 N.E.2d 77 (1991) (“[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory interpretation”). Specifically, the health insurance coverage that a PERS retirant must possess in order to waive coverage that is made available to him through his public employer is limited to coverage “from a source *other than* the employer or the *public employees retirement system,*” R.C. 145.38(D)(2) (emphasis added). By its express terms, R.C. 145.38(D)(2) provides that possession of health insurance coverage only through PERS does not entitle a PERS retirant to waive health insurance coverage available through his public employer.

Because the General Assembly has provided only one exception to the prohibition in R.C. 145.38(D)(2) against a PERS retirant’s or a public employer’s waiver of health insurance coverage available to the retirant through the public employer, we must conclude that the General Assembly intended no other exceptions to the prohibition against the waiver of health care insurance available through a PERS retirant’s public employer.<sup>6</sup> In addition, because that exception is wholly unrelated to the cost to the PERS retirant of such insurance coverage through his employer, we find that R.C. 145.38(D)(2) does not authorize a PERS retirant to waive health, medical, hospital, or surgical insurance coverage provided by the retirant’s public employer, even if the employer charges a fee for such coverage, unless that employee “has coverage comparable to that provided by the employer from a source other than the employer or the public employees retirement system.”

Based upon the foregoing, it is my opinion, and you are advised that, R.C. 145.38(D)(2) requires a PERS retirant, as defined in R.C. 145.38(A)(1), who is employed by a public employer, as defined in R.C. 145.01(D), to obtain “primary health, medical, hospital, or surgical insurance coverage from the retirant’s employer, if the employer provides cover-

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<sup>6</sup>*See Thomas v. Freeman*, 79 Ohio St. 3d 221, 224-25, 680 N.E.2d 997 (1997) (the rule of statutory construction, “*expressio unius est exclusio alterius*,” means that “the expression of one thing is the exclusion of the other,” and “[u]nder this maxim, ‘if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded’” (citations omitted)). *See also Scheu v. State of Ohio*, 83 Ohio St. 146, 157-58, 93 N.E. 969 (1910) (“we must observe the rule that an exception to the provisions of a statute not suggested by any of its terms should not be introduced by construction from considerations of mere convenience”).

age to other employees performing comparable work," whether or not the employer charges its employees a fee for such insurance coverage, unless "the retirant has coverage comparable to that provided by the employer from a source other than the employer or the public employees retirement system."