

OPINION NO. 79-076

Syllabus:

1. An employer of an employee eligible to participate in the Ohio Public Employees Deferred Compensation Program may not refuse to implement the program upon application for participation in the program by said eligible employee.
2. A state university need not adopt a separate plan to implement the Ohio Public Employees Deferred Compensation Program since eligible employees of a state university may, for purposes of deferred compensation, be considered employees of the state who therefore qualify under the deferred compensation plan adopted by the State of Ohio.

To: W. Emerson Dusty Rhodes, Chairman, Ohio Public Employees Deferred Compensation Board, Columbus, Ohio
By: William J. Brown, Attorney General, November 9, 1979

I have before me your request for my opinion which reads as follows:

Your opinion is respectfully requested on certain questions arising under Ohio Revised Code Sections 145.71 et seq., the Ohio Public Employees Deferred Compensation Act. Section 145.73(A) of the Ohio Revised Code states that:

The Ohio public employees deferred compensation board shall initiate, plan, expedite, and, subject to an appropriate assurance of the approval of the internal revenue service, promulgate and offer to all eligible employees, and thereafter administer on behalf of all participating employees and continuing members, and alter as required, a program for deferral of compensation, including a reasonable number of options to the employee for the investment of deferred funds, including life insurance, annuities, variable annuities, regulated investment trusts, pooled investment funds managed by the board, or other forms of investment approved by the board, always in such form as will assure the desired tax treatment of such funds.

Pursuant to Section 145.73(B) of the Revised Code "[e]very employer of an eligible employee shall contract with such employee upon application for his participation in a deferred compensation program offered by the board." The term "eligible employee" is defined in Section 145.71(A) of the Ohio Revised Code to include all members of the several public employees retirement systems established under the Ohio Revised Code, with the exception of members of the State Teachers Retirement System.

In order to implement the Ohio Public Employees Deferred Compensation Act, the Board on March 28, 1975, requested the Internal Revenue Service to issue a ruling approving a deferred compensation Plan for the benefit of all eligible public employees in the State of Ohio. On May 8, 1975, however, the Internal Revenue Service informed the Board that although it "would be glad to provide consideration as to the Federal income tax consequences which [would] be encountered by an employee of the State of Ohio if he should participate in [a deferred compensation] Plan, . . . [it would be] unable to issue ["master" or "prototype"] rulings. . . because such rulings [were] requested on behalf of all public employees regardless of the fact that they may not be employees of the State".

Following this directive from the Internal Revenue Service, the Board has carried out its obligation under Section 145.73 of the Ohio Revised Code by obtaining separate rulings from the Internal Revenue Service for the Plan offered by the State of Ohio and for each Plan offered by public employers other than the State. All of said Plans are united by a common program of administration provided by the Board.

Recently, certain eligible employees of Cleveland State University have applied for participation in the Ohio Public Employees Deferred Compensation Program. The University, however, has refused to implement a separate deferred compensation Plan, based upon the argument that its eligible employees are in

actuality state employees who are therefore already encompassed by the State of Ohio's Plan. Therefore, I request your opinion with regard to the following matters:

- (1) May an employer of an eligible employee refuse to implement the deferred compensation program offered by the Board upon said employee's application for participation in the program?
- (2) Must a state university adopt a separate Plan to implement the Ohio Public Employees Deferred Compensation Program or may state university employees be considered employees of the state who therefore qualify under the deferred compensation Plan adopted by the State of Ohio?

It is apparent from an examination of the Ohio Public Employees Deferred Compensation Act in its entirety, R.C. 145.71 et seq., that the General Assembly intended to make deferred compensation a benefit available to all "eligible employees," as defined in R.C. 145.71(A), who desired to participate in such a program.¹ Section 145.73(A) of the Ohio Revised Code provides that the "Ohio public employees deferred compensation board shall initiate, plan, expedite, and . . . promulgate and offer to all eligible employees, and thereafter administer on behalf of all participating employees. . . a program for deferral of compensation. . . ." (Emphasis added.) Correspondingly, R.C. 145.73(B) provides that "[e]very employer of an eligible employee shall contract with such employee upon application for his participation in a deferred compensation program offered by the board." (Emphasis added.)

Ordinarily the use of the word "shall" in a statute carries with it the presumption that it is used in the mandatory rather than the directive sense, but the character and context of the legislation may require that the word "shall" be interpreted as merely directory if to do otherwise would frustrate the intent of the legislature. 2A Sutherland, Statutory Construction § 57.03 (4th ed. 1973). There is nothing in the context of the Ohio Public Employees Deferred Compensation Act which would indicate that the General Assembly merely intended to enable (as opposed to require) public employers to offer a deferred compensation program to eligible employees. On the contrary, it would be illogical to conclude that the General Assembly intended to impose a duty upon the Deferred Compensation Board to initiate, plan, expedite, promulgate and offer a program for deferral of compensation to all eligible employees while, at the same time, allowing the employers of employees who desire to participate the option of refusing to implement such a program.

With regard to the relationship between a state university and the state, it is well settled that state universities are mere agents or instrumentalities of the state. Thacker v. Bd. of Trustees of Ohio State Univ., 35 Ohio St. 2d 49 (1973); Wolf v. Ohio State Univ. Hospital, 170 Ohio St. 49 (1959). Because a state university is an instrumentality of the state, one of my predecessors, in 1965 Op. Att'y Gen.

¹You have not asked whether any employees of a state university are "eligible employees" within the definition appearing in R.C. 145.71(A). Accordingly, I shall not address that question except to note that, as you indicated in your letter, members of the State Teachers Retirement System established under R.C. Chapter 3307 (teaching personnel generally) are not "eligible employees" for purposes of R.C. 145.71 et seq., but that members of the School Employees Retirement System established under R.C. Chapter 3309 (non-teaching personnel) and persons paid from state university rotary funds who are not covered by the State Teachers Retirement System are "eligible employees" under the definition appearing in R.C. 145.71(A). See R.C. 145.01(A); R.C. 3309.01; 1965 Op. Att'y Gen. No. 65-079. Hence, each state university will have both employees who are eligible for participation in the Ohio Public Employees Deferred Compensation Program and employees who are not eligible.

No. 65-079, concluded that employment in the service of a state university is state service within the meaning of the civil service laws (now R.C. Chapter 124), and I reiterated this view in 1978 Op. Att'y Gen. No. 78-052. See also 1975 Op. Att'y Gen. No. 75-094, in which I noted that faculty members of state universities are employed by the state within the meaning of R.C. 9.44, which states that "a person. . .employed by the state. . .earning vacation credits currently, is entitled to have his prior service with [the state] counted as service with the state. . .for the purpose of computing the amount of his vacation leave."

It follows from the fact that state universities are instrumentalities of the state that persons employed by state universities may be considered to be employees of the state for purposes of the Ohio Public Employees Deferred Compensation Program. Thus, for an eligible employee of a state university to participate in the Ohio Public Employees Deferred Compensation Program it is not necessary for the university to request a separate ruling from the Internal Revenue Service for a deferred compensation plan. As an employee of the state, a university employee is encompassed by the ruling issued by the Internal Revenue Service on the State of Ohio's plan. All that is necessary to implement the deferred compensation program for state university employees is for the university to perform the administrative functions necessary to effectuate the deferral of compensation by its eligible employees pursuant to the deferred compensation plan adopted by the State of Ohio.

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

1. An employer of an employee eligible to participate in the Ohio Public Employees Deferred Compensation Program may not refuse to implement the program upon application for participation in the program by said eligible employee.
2. A state university need not adopt a separate plan to implement the Ohio Public Employees Deferred Compensation Program since eligible employees of a state university may, for purposes of deferred compensation, be considered employees of the state who therefore qualify under the deferred compensation plan adopted by the State of Ohio.