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A BOARD OF EDUCATION MAY UPON WRITTEN CONSENT OF ITS EMPLOYEES WITHHOLD AS PREMIUMS ON AN ANNUITY CONTRACT PART OF THE EMPLOYEES PAY — OPINION 2868, OAG, 1962, §§3917.04, 3319.08, 3319.12, 3319.081, 3319.082, R. C.

SYLLABUS:

1. Pursuant to the powers granted by Chapter 3319., Revised Code, and Section 3917.04, Revised Code, a board of education may enter into a written modification agreement with a teaching and/or non-teaching employee whereby a part of the original compensation to be paid to such employee under his original employment contract will be withheld by the board of education and paid by it, as premiums on an annuity contract, to an insurer designated in said agreement, but the amount so paid by the board of education as premiums may not exceed the amount authorized by the employee to be deducted from his compensation.

2. While a board of education may not make a deduction from a teaching or non-teaching employee's compensation for any purpose specified in Section 3917.04, Revised Code, without the written agreement of the employee, upon such an agreement, the board is under no obligation to enter into an agreement with any insurer for the purchase of annuities for such employee with moneys so authorized to be deducted.

3. The entire compensation called for by the contract of employment between a board of education and a teaching or non-teaching employee should be considered in determining the contributions due from members and employers, and the retirement benefits allowable to members of the State Teachers Retirement System and the School Employees Retirement System under Chapters 3307. and 3309., Revised Code.

Columbus, Ohio, December 4, 1962

Hon. Geo. C. Steinemann, Prosecuting Attorney  
Erie County, Sandusky, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Whereas, due to an amendment of Section 403(b) of the Internal Revenue Code school employees are now included in the category of individuals eligible to receive the tax benefits arising from annuity purchases under this Section and as a consequence this board of education sees the necessity of making certain modifications in employee contracts designed to bring these annuity purchases in line with the requirements of Section 403 (b); and,

“Whereas the Revenue Code specifies that the ‘purchaser’ of such annuities must be the employer, although the employee’s rights in the annuity contract are nonforfeitable, and that funds used by the employer to purchase these annuities are furnished by means of a salary reduction election on the part of the employee or by an election to have the employer purchase an annuity contract in lieu of a salary increase; and,

“Whereas, the State’s Attorney General has already rendered an opinion touching upon this subject (1962 OAG No. 2868) earlier this year, and as the opinion deals only with the authority of boards of education to make ‘deductions’ from the salary of employees to pay for premiums on annuities, and as a Technical Information Release issued by the Internal Revenue Service subsequent to the above opinion (TIR-372 March 22, 1962) emphasized the point that there was no provision in the Code or Regulations which ‘permits an employee to deduct from gross income his contributions for the purchase of an annuity contract, his contributions to a retirement fund, or amounts paid by him in any other manner to provide retirement benefits’, and as this position taken by the Internal Revenue Service would appear to nullify the tax benefits of an annuity purchase made pursuant to a typical salary deduction arrangement; therefore, I request your opinion on the following questions:

“1. Can a board of education, if so requested, modify an employee’s contract so as to reduce the direct amount of compensation to be received by the employee, with further agreement to divert the balance of such employee’s gross compensation to the purchase of a tax sheltered annuity?

"2. Does a board of education have the authority to purchase for the benefit of one of its employees a tax-sheltered annuity if so directed by such individual, the purchase to be made with a portion of the employee's gross compensation entitlement?"

"3. Is the request a mandate to the board or may the board act on its own volition?"

"4. If a reduction is made by contract modification in the direct compensation to be received by an employee in order to establish a tax-sheltered annuity purchase arrangement, will the reduction in compensation actually received affect the employee's State retirement benefits? That is, will the employee's participation in the State Retirement System be determined on the basis of gross compensation entitlement or will it be based on the lesser amount representing the balance after diverting funds for the annuity purchase?"

Since receiving your request for opinion, I have also received a request from the Auditor of State and a request from the Prosecuting Attorney of Trumbull County, both of said requests dealing with the subject contained in your request. I believe that this opinion will be dispositive of all three requests.

Included with the request of the Auditor of State was a copy of a letter to the Pupil Personnel and Retirement Consultant, Akron Public Schools, Akron, Ohio, from the Acting Director, Tax Rulings Division, United States Treasury Department, Internal Revenue Service, Washington, D.C., which reads, in part, as follows:

"The Senate Finance Committee Report on Section 23 (a) of the Technical Amendments Act of 1958, refers to the Income Tax Regulations at section 1.403 (a)-1(a) (3). These regulations provide, to the extent here pertinent, that an employee is not required to include in his gross income the amount paid for an annuity contract at the time such amount is paid by the employer if the employer is an organization described in section 501(c) (3) and exempt under section 501(a), provided the purchase of the annuity contract is merely a supplement to past or current compensation. Among the factors mentioned as to whether an annuity contract is a supplement to past or current compensation is whether the annuity contract is purchased as a result of an agreement for a reduction of the employee's salary or whether it is purchased at his request instead of an increase in current compensation to which he might otherwise be entitled. In such case, the regulations state that the amount paid for the contract is to be considered current compensation. However, the Senate Finance Committee Report states, in part: 'Your com-

mittee intends the objective 20 percent rule set forth above as a complete substitute for these rules in the regulations (at section 1.403(a)-1(a) (3)).'

"In view of the foregoing, we conclude that if an employee of the Akron Public Schools agrees to take a reduction in his monthly cash compensation in return for contributions by the employer towards the purchase of an annuity contract for the employee, in the manner proposed by the Board, and if no more than one such agreement is entered into each year, then the employer will be deemed to have purchased an annuity contract for the employee, within the meaning of Code section 403(b), as amended, to the extent that the amounts so contributed by the employer are not in lieu of any amount earned by the employee before the reduction agreement became effective. If all the conditions described in the third preceding paragraph of this letter are met at the time annuity premiums are paid by the employer, the amounts so paid would be excludable from the employee's current income to the extent of the 'exclusion allowances' provided under Code section 403(b) (2). Amounts contributed by the employer in excess of the 'exclusion allowance' are includible in the employee's gross income in accordance with Code section 403(c)."

It is, of course, apparent that any interpretation of Federal law which will be binding upon Federal officials must be made by the courts or by Federal officers. I, therefore, make no comment upon whether the proposed employment contract modification will permit Section 403 of the Internal Revenue Code of 1954 (26 U.S.C. Section 403) to be applicable to the moneys used in the purchase of annuities thereunder. The quote from the above letter to the Akron Public Schools is made primarily for informational purposes.

There can be no doubt that a board of education has only those powers granted by statute as well as those reasonably implied therefrom. *Board of Education v. Ferguson*, 68 Ohio App., 514.

The syllabus of Opinion No. 2868, Opinions of the Attorney General for 1962, issued March 13, 1962, reads as follows:

"Under Section 3917.04, Revised Code, a board of education may make deductions from the salaries and wages of employees who authorize the deductions in writing to pay premiums to an insurer on an annuity contract, and the section does not require that such annuity insurance be given to a group under the group plan, or salary savings plan, before such deductions may be made. Opinion No. 2778, Opinions of the Attorney General for

1940, page 878, and Opinion No. 38, Opinions of the Attorney General for 1959, page 10, overruled in part.”

Section 3917.04, Revised Code, reads, in part, as follows:

“If any employee of a political subdivision or district of this state, or of an institution supported in whole or in part by public funds, or any employee of this state, authorizes in writing the auditor or other proper officer of the political subdivision, district, institution, or the state, of which he is an employee, to deduct from his salary or wages the premium or portion thereof agreed to be paid by him to an insurer authorized to do business in the state for life, endowment, accident, health, or health and accident insurance, annuities, or hospitalization insuring a group under the group plan, or salary savings plan, such political subdivision, district, institution, or the state of which he is an employee may deduct from his salary or wages such premium, or or portion thereof, agreed to be paid by said employee, and pay the same to the insurer. \* \* \*”

It is apparent from the above quotation from Opinion No. 2868, *supra*, and Section 3917.04, *supra*, that the answers to your first two questions depend upon whether the modification of the employment contract proposed therein would amount to a written authorization to deduct certain moneys from the salary or wages of the employee in accordance with Section 3917.04, *supra*, and whether such agreement would violate any of the requirements of law pertaining to such contracts. The additional statutory provisions which I believe to be pertinent here are found in Sections 3319.08, 3319.12, 3319.081, and 3319.082, Revised Code.

Section 3319.08, Revised Code, reads in part:

“The board of education of each city, exempted village, and local school district shall enter into contracts for the employment of all teachers and shall fix their salaries which may be increased but not diminished during the term for which the contract is made, except as provided in section 3319.12 of the Revised Code. \* \* \*”

Section 3319.12, Revised Code, states in part:

“Each board of education shall cause notice to be given annually not later than the first day of July to each teacher who holds a contract valid for the succeeding school year, as to the salary to be paid such teacher during such year. Such salary shall not be lower than the salary paid during the preceding school year unless such reduction is a part of a uniform plan affecting the

entire district. This section does not prevent increases of salary after the board’s annual notice has been given.

“\* \* \* \* \* \* \* \* \*”

Section 3319.081, Revised Code, provides in part:

“In all school districts wherein the provisions of section 143.01 to 143.48, inclusive, of the Revised Code do not apply the following employment contract system shall control for employees whose contracts of employment are not otherwise provided by law:

“(A) Employees, with at least one year of service in the school district, provided their employment is continued, shall be employed for a period of not less than one year nor more than five years.

“\* \* \* \* \* \* \* \* \*”

Section 3319.082, Revised Code, states:

“In all school districts wherein the provisions of sections 143.01 to 143.48, inclusive, of the Revised Code do not apply, each board of education shall cause notice to be given annually not later than the first day of July to each non-teaching school employee, who holds a contract valid for the succeeding school year, as to the salary to be paid such school employee during such year. Such salary shall not be lower than the salary paid during the preceding school year unless such reduction is a part of a uniform plan affecting the non-teaching employees of the entire district. This section does not prevent increases of salary after the board’s annual notice has been given.”

From the foregoing statutory provisions, it can be seen that a board of education must enter into a contract with teaching and non-teaching employees for a period of at least one year at a stipulated salary or wage and that such compensation can not be reduced during the year nor can such board of education reduce the compensation to be paid to teaching and non-teaching employees for the ensuing year unless such reduction is a part of a uniform plan affecting all similar employees of the school district. It appears that such procedure is contemplated in the instant question and that contracts complying with the foregoing provisions of law as to compensation as well as all others as to qualification, notification, acceptance, and the like will be entered into prior to any attempt at modification. Such contracts, prior to modification, would clearly be lawful and would impose upon a board of education an obligation to pay from

public funds as consideration for the services rendered thereunder, the full compensation payable thereunder. Furthermore, the contract imposing the obligation upon the board of education to pay the entire amount of such compensation and the right of the employee to receive the same, contains, as a necessary condition imposed by law, the rights and obligations set forth in Section 3917.04, *supra*. While said section requires that the authorization for a deduction of salary or wages be in writing, there is no provision contained therein which would limit the nature of the contract containing the annuity plan or the rights of the employee thereunder.

I know of no theory of law which would preclude the parties to a contract to modify said contract by a subsequent writing so as to provide for a different method of paying the compensation thereunder which was part of the consideration for such contract; and Section 3917.04, *supra*, permits such a modification. Since the board of education would be obligated to expend public funds as compensation for the original contract, is precluded from reducing such amount of compensation, and is required to make deductions from such compensation pursuant to Section 3917.04, *supra*, I am of the opinion that a board of education may enter into a written modification agreement with a teaching and/or non-teaching employee whereby a part of the compensation to be paid to such employee under his original employment contract will be withheld by the board of education and paid by it to an insurance company with whom such board of education has a contract for the purchase of annuities for such employees, and so long as the amount so paid by the board of education does not exceed the amount authorized by the employee to be deducted from his compensation, the expenditure of public funds would be lawful.

Your third question asks, "Is the request a mandate to the board or may the board act on its own volition?" As to this, Section 3917.04, Revised Code, gives the employee the right to request a deduction and imposes a duty upon him to pay the premium when so requested. Certainly, no deduction (modification of the original employment contract) could be made without the employee's written agreement. On the other hand, the type of annuity agreement apparently necessary to meet the requirement of Section 403 of the Internal Revenue Code of 1954, is one between the board of education and the company writing the annuity contract. As I have indicated by inference earlier herein, a board of

education could enter into such an agreement as a power incident to its powers relating to employment and its duties under Section 3917.04, *supra*; however, there is no statutory obligation placed upon a board of education to enter into such an agreement. (While it is possible that the language of Section 3917.04, *supra*, might be construed to impose a mandatory duty upon a board of education to cause a deduction to be made from the compensation due an employee and the payment of the amount so deducted to an insurance company for premiums due on an annuity contract between such employee and such insurance company, it is apparent that said question is not necessary to this opinion and I, therefore, express no opinion thereon.)

Accordingly, in answer to your third question, while a board of education may not make a deduction from a teaching or non-teaching employee's compensation for any purpose specified in section 3917.04, Revised Code, without the written agreement of the employee, a board of education is under no obligation to enter into an agreement with any insurance company for the purchase of annuities for such employees with moneys so authorized to be deducted.

Your last question relates to the effect of any contract modification referred to above upon the rights and obligations of the employees and boards of education in connection with the State Teachers Retirement System and the School Employees Retirement System. As pointed out earlier, the lawfulness of the expenditure of public funds for a proposed tax-sheltered annuity is dependent upon a pre-existing but later modified contractual obligation on the part of the board of education to pay such funds in money directly to the employees as compensation. But for such obligation, such payment would be unlawful.

Section 3307.51, Revised Code, requires each member of the State Teachers Retirement System to pay seven per cent of his compensation to said system. Also, the amount of his retirement allowance is, in most instances, dependent in part upon his final average salary which is an average of his five highest compensation years. Section 3307.21, Revised Code. Similarly, the employer contribution in the State Teachers Retirement System is based upon the earnable compensation of all teachers and faculty within the school district. Section 3307.53, Revised Code. The contributions and benefits required by Chapter 3309., Revised Code, for members of the School Employees Retirement System are similar to

those mentioned above and may be found in Sections 3309.47, 3309.01, and 3309.49, Revised Code.

The compensation or earnable compensation referred to in said statutes is presently, and has apparently always been, determined upon the total amount of compensation payable to the employee regardless of whether such employee authorizes a deduction from such compensation for the payment of hospitalization, insurance, annuity or the like. Since any modification agreement entered into between a board of education and an employee for the purpose of affecting a proposed tax-shelter annuity plan would not modify the obligation of the board of education to make payment of the entire compensation theretofore agreed upon, or the employee's right to the proceeds of the annuities purchased thereby, the entire compensation called for by the contract of employment between a board of education and a teaching or non-teaching employee should be considered in determining the contributions due from members and employers, and the retirement benefits allowable to members of the State Teachers Retirement System and School Employees Retirement System under Chapters 3307. and 3309., Revised Code.

In summation and in accordance with the above, I am of the opinion and you are advised:

1. Pursuant to the powers granted by Chapter 3319., Revised Code, and Section 3917.04, Revised Code, a board of education may enter into a written modification agreement with a teaching and/or non-teaching employee whereby a part of the original compensation may be paid to such employee under his original employment contract will be withheld by the board of education and paid by it, as premiums on an annuity contract, to an insurer designated in said agreement, but the amount so paid by the board of education as premiums may not exceed the amount authorized by the employee to be deducted from his compensation.

2. While a board of education may not make a deduction from a teaching or non-teaching employee's compensation for any purpose specified in Section 3917.04, Revised Code, without the written agreement of the employee, upon such an agreement, the board is under no obligation to enter into an agreement with any insurer for the purchase of annuities for such employee with moneys so authorized to be deducted.

3. The entire compensation called for by the contract of employment between a board of education and a teaching or non-teaching employee

should be considered in determining the contributions due from members and employers, and the retirement benefits allowable to members of the State Teachers Retirement System and the School Employees Retirement System under Chapters 3307. and 3309., Revised Code.

Respectfully,

MARK McELROY

Attorney General