

OPINION NO. 80-063

Syllabus:

A county board of mental retardation is an "employer" for purposes of R.C. 145.01(D) and as such must bear financial responsibility for any delinquent contributions owed PERS pursuant to R.C. 145.48(F) and 145.483 which arise out of employment with the board.

To: Arthur M. Elk, Ashland County Pros. Atty., Ashland, Ohio
By: William J. Brown, Attorney General, October 15, 1980

I have before me your request for a formal opinion which is based upon the following facts:

On September 1, 1965, the Ashland County Department of Welfare hired a custodian. When the Ashland County Board of Mental Retardation was formed on July 26, 1967, said custodian became an employee of that Board. On May 19, 1978, the custodian retired without ever having contributed to the Public Employees Retirement System (hereinafter PERS). Shortly thereafter, citing R.C. 145.483, PERS submitted a statement of delinquent contributions to the Ashland County Auditor; the statement requested the payment of both employer and employee contributions not paid during the period of employment beginning September 1, 1965, and lasting through May 19, 1978.

Your specific inquiry in regard to the foregoing situation is whether the Ashland County Board of Mental Retardation (which is organized pursuant to R.C. Chapter 5126 and is hereinafter referred to as the county board) bears any financial responsibility in connection with the delinquent contributions due PERS.¹

In consideration of your request, I note first that it is clear under relevant provisions of the law that the "employer" of the individual in question must bear the burden of paying delinquent moneys owed PERS. R.C. 145.48(F) specifically provides that the "employer obligation 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." In addition, R.C. 145.483, which becomes operative only upon a finding that an "employer" has "failed to deduct employee contributions during a period of employment for which employee contributions were required" obviously considers the delinquent charges to be an obligation of the "employer." See also, e.g., *State ex rel. Public Employees Retirement System v. Baker*, 169 Ohio St. 499, 160 N.E. 2d 262 (1959); 1972 Op. Atty Gen. No. 72-004.

The answer to your question, therefore, depends upon whether the county itself or the county board of mental retardation is the "employer" of the employee in question for purposes of payments due PERS. The term "employer" is, for purposes of R.C. Chapter 145, defined at R.C. 145.01(D), which provides as follows:

"Employer" means the state or any county, municipal corporation, park district, conservancy district, sanitary district, health district, township, metropolitan housing authority, state retirement board, Ohio historical society, public library, county law library, union cemetery, joint hospital, institutional commissary, state medical college, state university, or board, bureau, commission, council, committee, authority, or administrative body as the same

¹It is my understanding that no one is questioning the authority of PERS to collect such contributions in these circumstances. Accordingly, this opinion will not address that issue. Likewise, because no question concerning the role of the county department of welfare has been presented, any responsibilities of that entity will not be detailed.

are, or have been, created by action of the general assembly or by the legislative authority of any of the units of local government named in this division not covered by section 3307.01 or 3309.01 of the Revised Code. In addition, "employer" means the employer of employees described in division (A) of this section.

The foregoing provision expressly recognizes both a "county" and any "board. . . created by action of the general assembly" as an "employer." That county boards of mental retardation are created by action of the General Assembly is made clear by the plain meaning of R.C. Chapter 5126 which begins, at R.C. 5126.01, as follows: "There is hereby created in each county a county board of mental retardation. . ." (emphasis added). Although employees of a county board of mental retardation are in the county service for some purposes, the county board of mental retardation itself is the entity which has the specific authority to employ county board employees. See Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31, 406 N.E. 2d 1098 (1980) (finding that employees of a county board of mental retardation are employed in the various offices of the county service for purposes of R.C. 124.38, but holding that the county board of mental retardation has the power to employ such persons, including the power to fix compensation). Using the definition of "employer" contained in R.C. 145.01(D), in conjunction with the Ebert analysis, it is clear that the county board of mental retardation is the "employer" for purposes of R.C. Chapter 145.

Such a reading is supported, as a practical matter, by the fact that the county boards operate largely independently of the counties along whose boundaries they are organized. For example, county boards have been granted broad powers of appointment and control over employees. See R.C. 5126.03; R.C. 5126.04; 1974 Op. Att'y Gen. No. 74-091. Moreover, a county board is authorized to fix the compensation for, and procure group health insurance to cover, its employees. Ebert v. Stark County Board of Mental Retardation; 1979 Op. Att'y Gen. No. 79-064. Such a high degree of control in connection with employee matters is not granted to all county agencies. For example, the authority of a county welfare department in connection with employee matters is shared with the board of county commissioners. See, e.g., Abbott v. Myers, 20 Ohio App. 2d, 65, 71, 251 N.E. 2d 869, 874 (1960); R.C. 329.02; 1956 Op. Att'y Gen. No. 6316, p. 152.

Thus, it is appropriate, for the foregoing reasons, to conclude that a county board is an "employer" for purposes of R.C. 145.01(D) and as such is financially responsible for any delinquent contributions due PERS under R.C. 145.48 and R.C. 145.483. As I stated in the syllabus of an earlier opinion, Op. No. 72-004:

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 contributions, the employer has an obligation to make up these deficiencies plus the interest and any other costs out of his own pocket. (Emphasis added.)

However, it is noteworthy that such liability extends only to those employer contributions not made or employee contributions not deducted during a period of employment requiring contributions to PERS. Thus, the county board is financially liable for only that period of time during which the custodian was in its employ. See 1946 Op. Att'y Gen. No. 850, p. 240, the syllabus of which provides as follows:

Where a person is an "employee" within the definitions contained in the Public Employees' Retirement Act, of two governmental units, the obligation to contribute to the employer's accumulation fund, as provided in Section 486-68, General Code, rests upon both employers in proportion to the amounts paid by them respectively to such employe.

Accordingly, in the situation you describe, the county board is not responsible for any delinquent contributions due PERS for the period during which the employee in question was employed by the Ashland County Department of Welfare.

Thus, it is my opinion, and you are advised, that a county board of mental retardation is an "employer" for purposes of R.C. 145.81(D) and as such must bear financial responsibility for any delinquent contributions owed PERS pursuant to R.C. 145.48(F) and R.C. 145.483 which arise out of employment with the board.