

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

April 3, 2015

Mr. Mark Houston, County Administrator
Madison County Board of Supervisors
Post Office Box 608
Canton, Mississippi 39046

Re: Constables' contribution into PERS

Dear Mr. Houston:

Attorney General Jim Hood is in receipt of your opinion request and has assigned it to me for research and reply.

Facts

In your letter you provide the following information:

In September 2013, Madison County Board of Supervisors (MC) passed a resolution to pay the employer portion of PERS, on Constable Fees, for its Constables, under authority provided by Section 25-11-106(1)(b)(iii).

Since that time, in accordance with PERS rules and written and verbal instructions, Madison County withholds 11% of the gross fee from a Constable's Fees. [We understand that this percentage represents an estimated amount of employee and employer contributions due on the Constable Net Fee Income.] This amount is reported to PERS in two components as employer contribution and employee contribution, but fully withheld from the Constable's Fees.

Questions Presented

1. After passing the resolution referenced above, can Madison County directly pay the employer portion of the PERS contribution on Constable Fees and withhold only the employee portion of the contribution from the Constable's Fees?
2. Irrespective of your answer to Question 1 and again after passing the

resolution referenced above, if upon filing an Annual Financial Report (AFR), a Constable has personally paid any part of the employer component of the PERS contribution, can Madison County refund to the Constable the part of employer contribution previously paid by the Constable?

Response

If a county passes a resolution spread upon the minutes to be responsible for the employer contribution on the net fee income of its constables, then the county may determine the portion that constitutes the employer contribution of the eleven percent (11%), which is required to be paid by the constables, and pay this employer portion monthly to PERS. If it is determined that a constable has paid any part of the employer contribution, the county may refund this amount to the constable.

Legal Research and Analysis

Miss. Code Ann., Section 25-11-106 provides, in pertinent part:

(1)(a) Any constable in office as of July 1, 2005, whose position is covered in the Public Employees' Retirement System by virtue of a plan submitted and approved under Section 25-11-105(f) will remain a member of the Public Employees' Retirement System.

(b)(i) The county is responsible for employer contributions on all direct payments to the constable from the county.

(ii) Except as otherwise provided in subparagraph (iii) of this paragraph, the constable is responsible for the employee contributions on direct payments to the constable from the county and both the employer and employee share of contributions on his or her net fee income.

(iii) For contributions required for calendar year 2014 and any calendar year thereafter, the county may elect, by majority vote of the board of supervisors spread upon its minutes, to be responsible for the employer share of contributions on the net fee income of its constables. If the county elects to be responsible for employer contributions under this provision, the election shall be irrevocable until the board of supervisors takes office for the next succeeding term of office at which time the board may elect whether to continue the election. Notice shall be given to the executive director of any election made under this subparagraph (iii) within five (5) days after the election is made.

Miss. Code Ann., Section 25-11-125 further provides, in pertinent part:

(2) If the county elects to be responsible for contributions on the net fee income of the constable, the board of supervisors of the county shall appropriate and include in its budget a sufficient sum to pay to the Public Employees' Retirement System for each constable holding office in that county the required employer contributions on the net fee income and all

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direct payments to the constable from the county, and those contributions shall be handled by the clerk of the board in the manner required by subsection (1) of this section.

Additionally, the Public Employees Retirement System Board approved a policy on August 23, 2005, establishing a withholding rate for constables' gross fee income at a rate of eleven percent (11%), which would equate to the combined employee and employer rates on average net fee income.

In response to your first question, the statutes clearly provide that a county has the authority to be responsible for the employer share of the contributions on the net fee income of its constables. Consequently, if the county passes a resolution spread upon the minutes to be responsible for the employer contribution on the net fee income of its constables, then the county may determine the portion that constitutes the employer contribution of the eleven percent (11%), which is required to be paid by the constables, and pay this employer portion monthly to PERS.

As to your second question, if a county has passed a resolution spread upon its minutes to pay the employer contribution on the net fee income of its constables and it is determined upon filing the Annual Financial Report that a constable has paid any part of the employer contribution during the course of the year, the county may refund that amount to the constable. However, the county is not authorized to refund amounts for prior periods in which the county had not authorized payment of the employer contribution pursuant to Section 25-11-106.

If this office may be of any further assistance to you, please let us know.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:



Avery Mounger Lee
Special Assistant Attorney General