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#95099

NO.
STATE OF NEBRASKA
OFFICIAL
DEC 21 1995
DEPT. OF JUSTICE

DATE: December 20, 1995

SUBJECT: Membership by the Governor and the Governor's Staff in the State Employees Retirement System

REQUESTED BY: John Breslow
Nebraska Auditor of Public Accounts

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

You have requested our opinion with respect to two issues involving the State Employees Retirement System (the "Retirement System"), ***Neb. Rev. Stat. §§*** 84-1301 through 84-1331 (1994, Supp. 1995). While we are unsure as to the impetus for your opinion request since your office has no direct authority to administer the general operation of the Retirement System, we must assume, absent any other indication in your correspondence, that our opinion is needed in connection with some audit function performed by your office. Consequently, our views concerning the questions which you raised are set out below.

1. <u>Right of appointees of the Governor to elect out of the Retirement System.</u>

The final sentence of ***Neb. Rev. Stat. §*** 84-1301(1) (1994) provides that, "[a]ny individual appointed by the Governor may elect not to become a member of such [State Employees] retirement system." Your first question involves that statutory provision, and you ask:

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> What constitutes an appointment by the Governor for the purpose of this Statute? More specifically, would positions such as Mansion Director, Governor's staff assistants and legal counsel, be considered appointments?

There are no Nebraska cases which deal with the meaning of the final portion of § 84-1301(1) quoted above, nor are there previous opinions from this office which discuss the question which you have presented. However, in Nebraska, in the absence of anything indicating to the contrary, statutory language will be given its plain and ordinary meaning, and no interpretation is necessary when the words of a statute are plain, direct and unambiguous. ***Rosse v. Rosse***, 244 Neb. 967, 510 N.W.2d 73 (1994). In that regard, "appointment" is defined in BLACK'S LAW DICTIONARY (5th ed. 1979) as, "[t]he designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust." Similarly, WEBSTER'S NEW WORLD DICTIONARY (2nd College Ed. 1982) defines the verb form of "appoint" as "to name or select officially for an office, position, etc." It seems to us that, under both of those definitions, "appointment" generally involves some official action or exercise of authority to designate or select a person for an office. As a result, we believe that the reference in § 84-1301(1) to "individual[s] appointed by the Governor" is a reference to state officers appointed in that manner. Such officers have the option under the final sentence of § 84-1301(1) to elect not to become a member of the Retirement System. On the other hand, under the same statutory section, state employees, including those employed on the Governor's staff, must become members of the System since they are persons employed by the State of Nebraska "whose compensation is paid out of state funds."

Our conclusion regarding the nature of the appointments referenced in § 84-1301 is supported in two respects. First of all, ***Neb. Rev. Stat. §*** 81-107 (1994) provides, as is pertinent:

> The Governor shall, in each [state] department, have the power to appoint such deputies, assistants, employees, and clerical help, as shall be necessary or essential to the economical, efficient and proper enforcement and administration of the laws of the state, and shall at the same time fix the salaries of such appointees and prescribe their duties. . . . Such an appointee may be required to serve in one or more departments and may be transferred from one department to another from time to time as an efficient and economical administration shall require. The Governor shall confer with the heads of the several departments who shall make recommendations to the Governor, from time to time, relative to appointments, services, salaries, and duties of the appointees for their respective departments.

In addition, ***Neb. Rev. Stat.* §** 81-1302(19) (1994), a part of the State Personnel System, provides that, "[a]ppointment shall mean the act by which a candidate for employment shall become an employee of the state." Under the terms of those statutes, all persons employed by the state agencies or departments under the Governor's control are "appointed" by and "appointees" of the Governor. Therefore, all such persons would be able to elect out of the Retirement System if the phrase "appointed by the Governor" in § 84-1301(1) is read broadly. We do not believe that such a broad right of waiver was intended with respect to membership in the Retirement System, and therefore, § 84-1301(1) should be read more narrowly to include only state officers appointed by the Governor.

The meager legislative history of the portion of § 84-1301(1) which is at issue also supports our conclusion. The final sentence of that section referencing appointments by the Governor was added to the statute by LB 905 in 1974, and the actual language came in as an amendment to the original bill which was proposed during floor debate by Senator Mahoney. His explanation of the amendment, which is the only discussion of the language under consideration, was:

> What it does Mr. President is takes those appointments by the Governor and as we well know Governors last four years some last eight some last less, it would make them be able to join the federal program or choose between the two, but at least it would not require that their check for the very short time that they serve ***in this particular office***, not have to join the state system of retirement.

Floor Debate on LB 905, 83rd Neb. Leg., 2nd Sess. 5849 (February 28, 1974) (Statement of Senator Mahoney) (emphasis added). We believe that Senator Mahoney's reference to service "in this particular office" during his explanation of his amendment supports a construction of § 84-1301(1) which would allow only state officers appointed by the Governor to elect out of the state Retirement System.

In our view, therefore, while § 84-1301(1) permits state officers appointed by the Governor to elect out of the state Retirement System, employees "appointed" by the Governor, including members of his staff, must participate in that program. In that regard, the Nebraska Supreme Court has discussed the indicia of a public office. An office is a public station or employment, conferred by the appointment of government; and embraces the ideas of tenure, duration, emolument and duties. ***State ex rel. O'Connor v. Tusa***, 130 Neb. 528, 265 N.W. 524 (1936). An office can also be considered "a governmental position, the duties of which invest the incumbent with some aspect of the sovereign power." ***State ex rel.***

Spire v. Conway, 238 Neb. 766, 772, 472 N.W.2d 403, 407 (1991). Those indicia must be applied to determine whether a particular official or staff member appointed by the Governor is a state officer who may elect out of the Retirement System.

Generally, we do not believe that the Governor's staff members referenced in your opinion request letter such as the mansion director, staff assistants and legal counsel are state officers, for several reasons. First, their positions are not created by statute; second, they have no statutory term of office; and third, they have no statutory duties which involve the exercise of the sovereign power of the state. On the other hand, by way of example, state department or agency heads such as the Director of Administrative Services are clearly state officers who are appointed by the Governor and who may elect not to participate in the Retirement System. Their positions are created by statute; they have statutory duties; and those duties do involve exercise of the sovereign power of the state. As a result, it appears to us that the members of the Governor's staff referenced in your opinion request letter should participate in the state Retirement System.

2. <u>Participation of the Governor in the Retirement System</u>.

Your second question involves the participation of the Governor in the Retirement System. You state, " . . . it is our understanding that elected officials are required to join the Plan upon meeting eligibility requirements." You then ask, "[i]s the Governor required to join the State Retirement System upon completing two years of service and having attained the age of 30?" We believe that the answer to your second question is "yes."

§ 84-1301, discussed above, contains the statutory definitions which control with respect to the Retirement System. Subsection (1) of that section defines employee as follows:

> Employee shall mean . . . any person ***or officer*** employed by the State of Nebraska whose compensation is paid out of state funds or funds controlled or administered by a state department through any of its executive or administrative officers when acting exclusively in their respective official, executive, or administrative capacities.

(emphasis added). That subsection then goes on to exclude various specific state officials and employees from inclusion in the employee definition. However, the Governor and the other state constitutional officers are not listed among those exclusions. Therefore, it appears to us that the Governor is covered by the provisions of the Retirement System under the explicit language of the applicable statute.

Our conclusion with respect to membership in the Retirement System by the Governor is again supported in two respects. First of all, ***Neb. Rev. Stat. §*** 84-1330 (1994) provides:

> The provisions of sections 84-1301 to 84-1331 [the State Employees Retirement Act] ***pertaining to elected officials or other employees having a regular term of office*** shall be interpreted as to effectuate its general purpose and to take effect as soon as the same may become operative under the Constitution of the State of Nebraska.

(emphasis added). This specific reference to elected officials indicates that the Legislature did intend that elected state officers including the Governor should be included in the Retirement System. Indeed, in ***Gossman v. State Employees Retirement System***, 177 Neb. 326, 129 N.W.2d 97 (1964), the Nebraska Supreme Court discussed the provisions of § 84-1330 in the context of a challenge to the constitutionality of the Retirement System Act, and stated:

> Plaintiff argues that the exceptions from the [Retirement System] Act as to elected officials with definite terms is unreasonable. ***The Act provides that they will come under its provisions as soon as their term expires and it takes effect as to them as soon as it may become operative under the Constitution.*** Under the authority of Wilson v. Marsh, supra, the Act could not apply as to those employees having terms since their salary would be diminished during their term of office. The Legislature simply recognized this distinction, and it is obviously a reasonable one. The provision in the Act that it applies as soon as it could become operative under the Constitution accomplished the same result reached by this court in Wilson v. Marsh . . .

Id. at 340, 129 N.W. at 106 (emphasis added).

The legislative history of LB 512, the 1963 legislative bill which became the Retirement System Act, also supports our conclusion that the Governor is included under the provisions of the Retirement System. During floor debate on that bill, Senator McGinley, its primary sponsor, offered the following explanation:

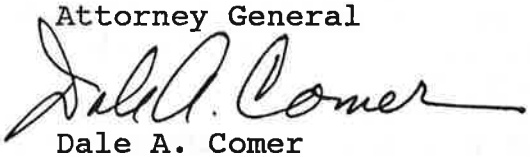
> I have a few more comments to make just to complete the record without delaying unduly. I forgot to mention that one of the committee amendments [to LB 512] was to include members of the Legislature which had originally been excluded. ***In other words, elected officials, including all of the elected state officials, and including of course members of the Legislature.***

Floor Debate on LB 512, 73rd Neb. Leg. 2181-2182 (1963) (statement of Sen. McGinley) (emphasis added). Those comments support the notion that the Governor and other elected state officials must participate in the Retirement System when they attain the initial requirements for membership.[1]

For the various reasons stated above, it is, therefore, our view that the Governor is included in the definition of employee as it is set out in the Retirement System Act. As a result, the Governor must participate in the Retirement System when he or she reaches 30 years of age and has been in state service for two years.

Sincerely yours,

DON STENBERG
Attorney General



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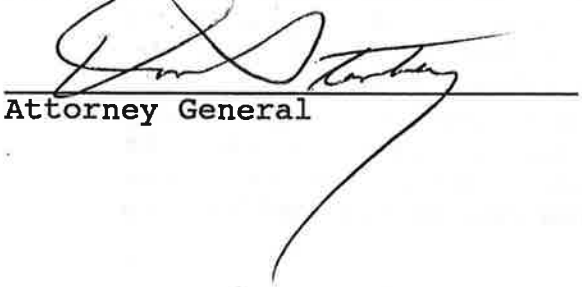

Attorney General

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[1] Under *Neb. Rev. Stat.* § 84-1307 (Supp. 1995), full-time state employees must join the Retirement System when they reach age 30 and have been with the state for two years.