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95065
NO.

STATE OF NEBRASKA
OFFICIAL
AUG 21 1995
DEPT. OF JUSTICE

DATE: August 21, 1995

SUBJECT: School Retirement System; Legally Protected Rights of Certain Non-Certificated School Employees

REQUESTED BY: William J. Lindsay, Jr., Chairman
Public Employees Retirement Board

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

You have requested a "formal opinion" of the Attorney General to address issues related to prior administrative practices of the Public Employees Retirement Board that permitted certain non-certificated school employees to become members in the School Retirement System. Briefly stated, the issues are whether certain employees and former employees or their beneficiaries affected by the administrative practices have legally protected rights which cannot be impaired by the Retirement Board; and whether contributions should continue to be made to the Retirement System by the State of Nebraska, school districts and agencies thereof, on behalf of the affected employees.

It is generally the opinion of this Office that the affected non-certificated employees or former employees who participate or have participated as members in the Retirement System have rights that are legally protected and should not be impaired by the Public Employees Retirement Board. It is further our opinion that the State of Nebraska, the school districts, and agencies thereof, as employers, may continue to make contributions to the Retirement System on behalf of the affected school employees in light of the facts known to us.

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BACKGROUND

Prior to January 1, 1978, certain non-certificated school employees were not required to be members of the School Retirement System established under the provisions of the School Employees Retirement Act (Neb. Rev. Stat. §§ 79-1501 to 79-1567 (1994)). The non-certificated employees were authorized under the provisions of section 79-1509, prior to amendment, to file an election not to be included in the membership of the retirement system. The provisions of section 79-1509 were amended by LB 349, passed in 1977 with an operative date of January 1, 1978.

LB 349 added a new section to permit those non-certificated employees who previously elected not to be included in the membership of the retirement system to again become members by filing their election to participate as members prior to January 1, 1978. The additional provision is codified at Neb. Rev. Stat. § 79-1509.02 (1994) which states:

> All school employees not required to hold a certificate, diploma, or credentials to practice in a professional capacity who had previously elected not to be included in the retirement system pursuant to section 79-1509 may, after January 1, 1978, and prior to July 1, 1978, file with the retirement board an election to be included in the membership of the retirement system, but such employees shall be treated as new employees and no service credit shall be granted for the years the employees elected out of the system.

Another section was added by LB 347 to permit non-certified employees who were employed during the period January 1, 1978 to June 30, 1978 to become members if they did not file an election to not participate by or before June 30, 1978. This provision is codified at Neb. Rev. Stat. § 79-1509.03 (1994) and states:

> All school employees not required to hold a certificate, diploma, or credentials to practice in a professional capacity who are employed after January 1, 1978, and prior to July 1, 1978, shall have until June 30, 1978, <u>to file with the retirement board an election not to be included in the membership of the retirement system</u> established pursuant to Chapter 79, article 15, and such election shall be in writing on forms prescribed by the retirement board and any person so electing waives all rights within the system except to a refund of his accumulated contributions. All such employees employed on or after July 1, 1978, shall become members of such retirement system as soon as they are employed and shall not have a right to elect out of such retirement system.

(Emphasis added).

During March of 1995, the Public Employees Retirement Board and its staff learned that certain non-certificated school employees employed prior to July 1, 1978 who did not elect membership in the Retirement System by or before June 30, 1978, were subsequently permitted to become members. The administrative practices of the Retirement Board and its staff allowed these employees to enroll and participate in the Retirement System after July 1, 1978. In some instances, employees have retired or become disabled and are receiving retirement annuity or disability benefits.

While no specific information or materials have been furnished to us, we understand that the Retirement Board and employer school districts distributed materials that included information or representations that the affected employees were eligible for membership in the Retirement System.

ANALYSIS

There are four specific issues you request be addressed by the Attorney General. The first issue is:

> Whether the non-certificated school employees who had previously elected against membership in the School Employees Retirement System, but who were permitted to enroll as members after June 30, 1978, have acquired rights to continue as members of the Retirement System which are contractual or other legally protected rights which cannot be impaired by the PERB at this time, notwithstanding the recent discovery that the enrollment of these persons was in contravention of Neb. Rev. Stat. sections 79-1509.02 and 79-1509.03

At the outset, we point out that any analysis of this and related issues is factually dependent and the Retirement Board has provided few material facts or information to assist in analysis of the complex issues you have presented to us. However, to accommodate your request, facts have been assumed to reach definitive conclusions regarding the issues you have inquired about. It seems that the Retirement Board or its staff communicated to the affected employees that they were eligible for membership in the Retirement System, at least to the extent of accepting applications for membership and contributions of the employees as members. The facts related to the issues are highly significant because any conclusions regarding rights of the affected employees are dependent on the prior administrative practices of the Retirement Board and employer school districts with respect to permitting the affected employees to become members of the Retirement System.

It was not intended by the Nebraska Legislature that the affected employees have any rights to membership or entitlement to benefits provided by the Retirement System. Prior to amendment by LB 349 in 1977, section 79-1509 provided that non-certificated employees could elect not to be included in the membership of the Retirement System and that, ". . . any person so electing waives all rights within the system except to a refund of his accumulated contributions." Further, section 79-1509.03 currently provides that those employees employed after January 1, 1978 and prior to July 1, 1978, who filed an election not to be included in the membership waived ". . . all rights within the system except to a refund of his accumulated contributions." While it was not intended that non-certificated employees who elected not to be members have rights within the system, the administrative practices of the Board and employer school districts give rise to rights that are legally protected.

It is well established that public pensions are deferred compensation payable to the employee under the terms and conditions of the legislative act which an employee voluntarily agrees to by accepting the terms of employment. ***Gossman v. State Employees Retirement System***, 177 Neb. 326, 129 N.W.2d 97 (1964); ***Wilson v. Marsh***, 162 Neb. 237, 75 N.W.2d 723 (1956); ***State v. Love***, 89 Neb. 149, 131 N.W. 196 (1911). The Nebraska Supreme Court has also addressed the rights of employees to certain retirement and pension benefits due to <u>prior administrative practices</u> of the Retirement Board and public employers.

In ***Halpin v. Nebraska Patrolmen's Retirement System***, 211 Neb. 892, 320 N.W.2d 910 (1982), the Court held that the Retirement Board's change in administrative practice to exclude leave payments in calculating pension annuity benefits constituted an impairment of constitutionally protected contractual rights of retiring members. Under the facts of the case, the Retirement Board had changed its method of calculating pension benefits by excluding certain lump sum payments for unused leave in determining the final average monthly salary. For the prior ten years, the retirement Board's practice was to include these amounts for calculating pension amounts. The Court observed that Nebraska public employees who rely upon an offer of deferred benefits to their detriment and to the benefit of the employer who gains the employee's valuable services and loyalty, have expectations which are protected by the law of contracts. In finding that the employees' rights were unconstitutionally impaired, the ***Halpin*** Court stated:

> We find that the board's practice of including lump sum leave payments in the annuity calculation gave rise to legitimate expectations on the part of the plaintiffs and the plaintiffs have a vested right to have this practice continued as to them. <u>The board's failure to include</u>

> such payments after January 4, 1979, in calculating retirement annuities for patrolmen who were members of the system on or before January 4, 1979, was an impairment of vested contractual rights.

Id. at 901, 320 N.W.2d at 915 (emphasis added).

Similarly, in *Omer v. Tagg*, 235 Neb. 527, 455 N.W.2d 815 (1990), the Nebraska Supreme Court found that retired former members' contracted rights were impaired based on previous administrative practice of the employer, the Nebraska State Patrol. At the time of employment, the former employees were"told" that upon retirement, they would be allowed to continue to participate in the group health insurance coverage offered by the State. The Court held that the representations made at the time of employment constituted a contract enforceable against the State.

In applying the holdings and rationale of these cases, we believe that the prior administrative practices of the Board and school district employers give rise to constitutionally protected contractual rights of the employees who participate as members of the Retirement System. Consequently, these rights should not be impaired by the Retirement Board.

The second issue you have presented is:

> Whether, in the case of noncertificated school employees who had previously elected against membership in the School Employees Retirement System, but who were permitted to enroll as members after June 30, 1978, such employees who have retired or have become disabled or beneficiaries of such deceased employees, have acquired rights to continue to receive pension or death benefits from the Retirement System which are contractual or other legally protected rights which cannot be impaired by the PERB at this time, notwithstanding the recent discovery that the enrollment of such employees was in contravention of Neb. Rev. Stat. §§ 79-1509.02 and 79-1509.03.

Based on known facts, we believe this particular class of non-certificated employees who have retired or become disabled or beneficiaries of such employees, also have expectations that rise to the level of constitutionally protected contract rights that should not be impaired. The prior administrative practice of the Retirement Board and the employers created expectations relied on by the employees who were permitted to become members in the Retirement System after July 1, 1978. We necessarily assume that the employees were permitted to become members and participated as members prior to their retirement or disability as the case may be.

It would seem the affected employees, having participated as members of the Retirement System, applied for the retirement or disability benefits they are receiving and the Retirement Board or its staff approved their eligibility for and entitlement to the benefits.

This particular class of affected employees have relied to their detriment more than any other group of affected employees since they not only participated as members but the Retirement Board also approved their applications for retirement or disability. Obviously, these persons are receiving retirement or disability benefits as a direct consequence of the Board's administrative actions. Further, these persons are least able to secure employment or make other arrangements for retirement. Thus, it is our conclusion that these former employees, or beneficiaries thereof, have vested rights in the benefits they are receiving and these rights should not be impaired by the Retirement Board.

The third issue you request we address is stated as follows:

> Whether non-certificated school employees who had previously elected against membership in the School Employees Retirement System but who have not yet applied for enrollment as members have acquired a contractual or other legally protected right to elect membership at a later date on the basis of previous representations by the PERB and/or the employers to the effect that such election to join the Retirement System would be permitted.

The question whether this group of employees who elected against membership and who have not yet applied for enrollment have contractual or other legally protected rights is the most difficult to assess. It has previously been pointed out that the determination of rights to participation in the Retirement System is fact based. This is particularly so with respect to this group of employees. We have no facts before us to determine whether these employees relied on representations of the Retirement Board or school district employers that induced these employees to continue their employment. In certain respects, it would appear that these employees did not rely on the prior administrative practices of the Retirement Board since they have not previously elected membership and are not participating as members in the Retirement System. These employees are not contributing to the retirement System and based on this lack of participation, the employees have no present entitlement to any benefits provided by the Retirement System.

Under the facts of the ***Halpin*** and ***Omer v.Tagg*** cases, the Court found that the evidence demonstrated that the employees participated as members and relied on representatives made to them at the time of employment that they were entitled to certain benefits. Accordingly, we cannot conclude whether or not these employees have any legally protected rights to become members in the Retirement System. However, certain limited contractual rights to become members may exist if representations were made to these employees that they could elect to participate at a time of their choosing and that these representations were a factor in their continued employment.

The fourth issue is set forth below:

> Whether the State of Nebraska, school districts, and agencies thereof, which are employers under the School Employees Retirement System may continue to make contributions to the Retirement System with respect to the affected individuals if such individuals' rights to continued membership or pension benefits cannot be impaired by the PERB.

Under known facts and circumstances, we believe the State of Nebraska, the school districts, and agencies thereof, should continue to make contributions on behalf of the affected employees who are participating as members in the Retirement System. As we have pointed out, the affected employees participating as members or who previously participated as members have constitutionally protected contractual rights that should not be impaired.

The rights of the employees arise in the context of the employment contract existing between the employee and the employer. The legal theory applied by the Nebraska Supreme Court in recognizing the contract rights is in part based on the fact that employers also benefit from continued valuable services of the employees. In ***Hoiengs v. County of Adams***, 245 Neb. 877, 516 N.W.2d 223 (1994), the Court affirmed that public employees have certain rights to pension benefits because of the employment relationship. The Court observed, "Hoiengs claim arises from his right to retirement benefits by virtue of his employment by a county participating in the system." *Id.* at 889, 516 N.W.2d at 234 (emphasis added).

In a recently decided case, the Nebraska Supreme court found that a supplemental benefit plan previously available to city employees could not be eliminated since the employees have constitutionally protected rights that vested when they accepted employment with the city and became members of the plan. The Court considered the employment relationship and commented:

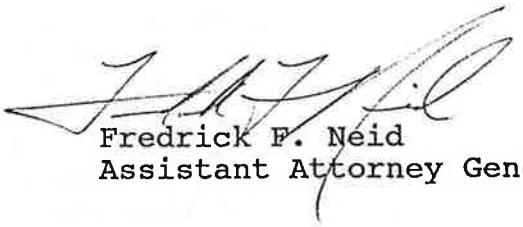
> Employees contemplating employment with the city or current employees considering leaving public employment may well have been induced to commence or begin working for the city because they knew they were guaranteed a cost-of-living benefit package in addition to their straight pension benefits.

Calabro v. City of Omaha, 247 Neb. 955, 963, ___ N.W.2d ___, ___ (1995). Based on these authorities, we believe that it is appropriate that employers participating in the Retirement System continue to make contributions.

The Retirement Board previously has indicated that certain steps were being taken by the Board to address the issues that have risen after learning of the administrative practice permitting these employees to become members. The steps include seeking legislative resolution, notification of affected parties, and continuation of benefits and contributions until the possibility of a legislative resolution is determined. It is our conclusion that the State of Nebraska, school districts, and agencies thereof, which are employers appropriately may continue to make contributions to the Retirement System in recognition of the legally protected rights of the employees and in light of the steps being taken by the Retirement Board to address these matters.

Sincerely yours,

DON STENBERG
Attorney General



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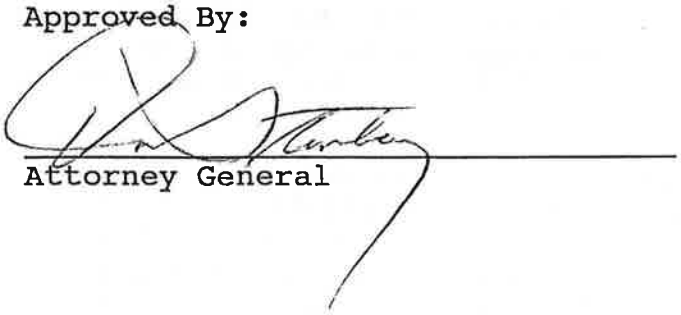

Attorney General

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