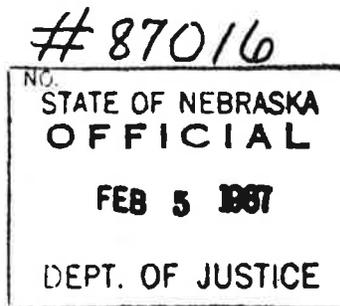


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: February 2, 1987

SUBJECT: Legality of Implementation of Retirement
Transition Benefits Provided by Neb.Rev.Stat.
§84-1319 (Supp. 1986).

REQUESTED BY: Jack E. Nellson, Director
Nebraska Public Employees Retirement Systems.

WRITTEN BY: Robert M. Spire, Attorney General; Fredrick F.
Neid, Assistant Attorney General

This is in response to your request for an opinion of the Attorney General concerning whether certain provisions of the Nebraska State Employees Retirement Act, Neb.Rev.Stat. §§84-1301 to 84-1331 (Supp. 1986) are unconstitutional or violative of certain state and federal statutes.

It is the opinion of this office that implementation of the provisions of Neb.Rev.Stat. §84-1319 (Supp. 1986) is violative of the United States and State Constitutions and violative of federal and state statutes prohibiting discrimination in employment on the basis of age.

The questions raised concerning the provisions of the Nebraska State Employees Act are partially due to an action filed with the Nebraska Equal Opportunity Commission by a retiring state employee. In summary, the complaining party alleges that implementation of the provisions of the State Employees Retirement Act constitutes illegal age discrimination because an employee eligible for retirement who elects to receive the full lump sum payment of the employee account must forfeit amounts in the employer account. By contrast, an employee not eligible for retirement (not age fifty-five) who terminates his employment may make this election and not forfeit amounts in the employer account. It is in light of this factual context that the questions raised have been considered.

The retirement plan for state employees is a mandatory deferred compensation plan under the terms and conditions of the

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State Employees Retirement Act. It is mandatory in that employee participation in and contribution to the plan are required.

Generally, the plan provides that the retirement account consists of two parts. One portion is the employee account which consists of employee contributions arising from salary deductions. The second part is the employer account which consists of contributions to the account by the state. The plan also provides for certain options to employees who are eligible for retirement (fifty-five years of age and five years of service) and for those employees who terminate their employment prior to eligibility for retirement. For employees eligible for retirement, Neb.Rev.Stat. §84-1319(1) (Supp. 1986) in part provides:

. . . a retiring employee may elect to receive the entire amount in his or her employee account, except that if he or she selects such alternative, he or she shall forfeit the accumulated sums in his or her employer account. . . . (emphasis added).

By contrast, the Act also provides under Neb.Rev.Stat. §84-1321 (Supp. 1986) that if an employee terminates his employment with the state prior to eligibility for retirement (attainment of age fifty-five or over with five years of service) the employee may elect to receive a "termination benefit" equal to the full amount of the employee account and a paid-up annuity provided by the vested portion of the employer account. Thus, a terminating employee under age fifty-five may receive a lump sum payment of amounts in the employee account without forfeiting amounts in the employer account.

1. Age Discrimination in Employment Act

The first issue is whether implementation of the provisions of Neb.Rev.Stat. §84-1319 (Supp. 1986) conflicts with the Age Discrimination in Employment Act of 1967, §4(a)(1), 29 U.S.C.A. §623(a)(1). Section 4(a)(1) provides in part that it shall be unlawful for an employer to ". . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals age, . . ."

Employees age fifty-five and older with five years of service must forfeit amounts in the employer account to receive a lump sum payment of amounts in the employee account. The specific question raised is whether this disparate treatment based on age is discriminatory within the meaning of the Age Discrimination in Employment Act (ADEA). The implementation of Neb.Rev.Stat. §84-1319 is prima facie discriminatory in that retiring employees are entitled to a lesser benefit than these employees who have not attained age fifty-five. Accordingly, implementation of the provisions of Neb.Rev.Stat. §84-1319 is in

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violation of the ADEA unless the retirement plan qualifies for exemption from the Act under §4(f)(2), 29 U.S.C.A. §623(f)(2).

To qualify for exemption, the plan providing the benefits must meet four criteria: (1) It must be "bona fide" in that the plan is in effect and pays substantial benefits; (2) It must be a plan described by the Act; (3) The acts (payments, forfeiture) must be in observance of the plan; and (4) The plan must not be a subterfuge to evade the purposes of the Act. E.E.O.C. v. Borden's Inc., 724 F.2d 1390 (9th Cir. 1984).

Various fringe benefit plans including disability retirement plans, severance pay plans, and lay-off insurance policies and benefits have been found by the courts not to be exempt from the ADEA. It was held that a severance pay plan, which denied benefits to employees over age fifty who were eligible for retirement was not exempt from the ADEA because the policy was only loosely integrated with the pension plan. E.E.O.C. v. Great Atlantic and Pacific Tea Co., 618 F.Supp. 115 (D.C. Ohio 1985).

The lump sum payment option of amounts in the employee account for employees aged fifty-five and older (with five years of service) is termed a "retirement transition benefit." The same option for employees under age fifty-five is referred to as a "termination benefit." Regardless of the name, the payout of the lump sum amount in the employee account to the employee constitutes a severance benefit payment either due to retirement or because of termination of employment by an employee not eligible for retirement. In this situation, there can be no doubt that the age of the employee is a factor in determining whether or not the amounts in the employer account are forfeited if a "retirement transition benefit" (lump sum payment of amounts in the employee account) is selected by the retiring employee. Accordingly, it is our opinion that the severance pay policy provided by statute discriminates arbitrarily against older employees within the protected age group of the Act.

The courts have also held that the ADEA applies to plans for state and local employees. In 1974, the ADEA was amended to extend coverage to state and local employees. In E.E.O.C. v. Wyoming, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), the Supreme Court held that the extension of the ADEA to cover state and local governments is a valid exercise of Congress' powers and the Commerce Clause.

For these reasons, we conclude that the ADEA is applicable to the State of Nebraska and that implementation of the provisions of Neb.Rev.Stat. §84-1319 is violative of the ADEA.

2. Nebraska Act Prohibiting Unjust Discrimination in Employment Because of Age

You have also inquired whether provisions of the Nebraska State Employees Act is in violation of the Nebraska Act Prohibiting Unjust Discrimination in Employment Because of Age, Neb.Rev.Stat. §§48-1001 et seq. (Reissue 1984).

Neb.Rev.Stat. §48-1004(1)(a) (Reissue 1984) provides, in part, that it shall be an unlawful employment practice for an employer:

. . . To refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to his terms, conditions, or privileges of employment, otherwise lawful, because of such individual's age, when the reasonable demands of the position do not require such an age distinction; . . . (emphasis added).

As stated previously in this opinion, the implementation of the provisions of Neb.Rev.Stat. §84-1319 results in disparate treatment paying termination or transition benefits which arbitrarily discriminates against employees within the protected age group. Further, there are no exemptions set forth in the Nebraska Act and it is clear that the Nebraska Act applies to the state and its political subdivisions under Neb.Rev.Stat. §48-1010 (Reissue 1984).

Accordingly, it is our opinion that the provisions of Neb.Rev.Stat. §84-1319 violate the Nebraska Act in that implementation of the provisions discriminate against individuals on the basis of age.

3. The Constitutions of the United States and the State of Nebraska.

Our review of your questions concerning constitutionality have been limited to Neb.Rev.Stat. §84-1319 (Supp. 1986) which provides for the payment of the retirement transition benefit to employees age fifty-five and older.

The legal question raised is whether implementation of the provisions of Neb.Rev.Stat. §84-1319 is violative of rights guaranteed by the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. The courts have generally upheld the constitutionality of statutes which create a classification based on age which bear a reasonable relationship with the ability to work. Legislative enactments and statutes which provide for mandatory retirement or denial of employment at certain ages have been held to be constitutional because the acts have a reasonable relationship with the ability

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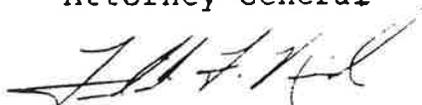
to work. Maresca v. Cuomo, 64 N.Y.2d 242, 475 N.E.2d 95 (1984); Armstrong v. Howell, 371 F.Supp. 48 (D.C. Neb. 1974); Gossman v. State Employees Ret. System, 177 Neb. 326, 129 N.W.2d 97 (1964).

However, in this factual context, the classification based on age has no relationship with the ability to work but rather with the right to elect similar retirement or termination benefits afforded individuals under the age of fifty-five. If these distinctions cannot be justified on any rational basis, a strong argument may be made that the statute violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and Article I, Section 1 of the Constitution of the State of Nebraska.

In summary, it is our conclusion that disparate treatment concerning forfeitures of amounts in employer accounts renders Neb.Rev.Stat. §84-1319 constitutionally suspect and further violates the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, as well as the provisions of Neb.Rev.Stat. §§48-1001 to 48-1010 (Reissue 1984). This opinion is consistent with earlier opinions of this office which in effect concluded that retiring employees should be accorded the same treatment as those employees terminating employment prior to eligibility for retirement. Report of Attorney General 1969-70 at p. 152 and Advisory Opinion of the Attorney General, June 14, 1986.

Sincerely,

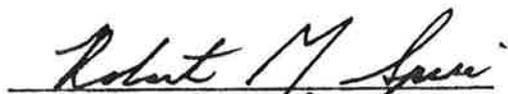
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