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NO.
STATE OF NEBRASKA
OFFICIAL
APR 3 1996
DEPT. OF JUSTICE

DATE: March 29, 1996

SUBJECT: Public Employees Retirement Systems; Disclosure of Medical Examination Reports and Information to Members

REQUESTED BY: James S. Cashin, Director
Public Employees Retirement Systems

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

The retirement systems administered by the Public Employees Retirement Board provide for disability benefits as well as retirement benefits for members of the systems. Briefly described, the disability benefits consist of retirement benefit amounts which the disabled member is entitled to computed at the time of disability. The statutory provisions regarding "disability retirement" are set forth in Neb. Rev. Stat. §§ 79-1523 to 79-1526 (1994) for the School Retirement System; Neb. Rev. Stat. § 23-2315.01 (1991) for the Retirement System for Nebraska Counties; Neb. Rev. Stat. §§ 81-2028 to 81-2030 (1994) for the Nebraska State Patrol Retirement System; Neb. Rev. Stat. §§ 24-709 to 24-709.02 (1989) for the Nebraska Retirement Fund for Judges; and Neb. Rev. Stat. § 84-1323.01 (1994) for the State Employees Retirement System.

The procedures for establishing disability generally require that a medical examination of the member be conducted by a physician at the retirement system's expense. The retirement systems statutes do not indicate whether the medical records and information are to be available to members. You specifically ask, "[c]an the agency withhold the information submitted by the

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physician from the member?" We believe that the Public Employees Retirement Board is required to disclose the medical examination information to the member or his or her representative to comply with established principles of due process.

APPLICATION PROCEDURE

The procedure outlined in the retirement systems statutes generally provides that a member, a member's employer, or a person acting for the member, apply for the disability retirement benefits. A medical examination of the member conducted by a physician is or may be required and the determination of disability is made by the Retirement Board except for judges. The determination regarding retirement on account of disability for judges is made by the Commission on Judicial Qualifications.

A copy of an examination form titled, "NEBRASKA SCHOOL EMPLOYEES RETIREMENT SYSTEM PHYSICIAN'S CONFIDENTIAL REPORT," was submitted with your request for an opinion of this Office. The report is organized to include specific information such as symptoms, diagnosis, cause of disability, and prognosis. The report also calls for a recommendation of the examining physician whether the application for retirement should be approved. The information in the report is used by the Retirement Board to approve or deny an application for disability retirement benefits.

Following decision, post determination procedures are available to a member for review of the Board's determination. For example, a member of the School Retirement System may have the decision reviewed by the Retirement Board. Neb. Rev. Stat. § 79-1544 (1994) states:

> All acts and decisions of the retirement board shall be subject to review, reversal, modification, or approval by the retirement board, on its own motion or on the complaint of a member, under such rules as it may prescribe. Any teacher or other person, who deems himself or herself aggrieved by any action of the retirement board, may appeal to and have the same reviewed by the retirement board under such rules as it shall prescribe. Any final order made by the retirement board after review may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act.

Any final order of the Retirement Board is subject to judicial review in accordance with the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (1994 and Supp. 1995). Section 79-1525 of the School Employees Retirement Act authorizes further

medical examination of any disability beneficiary on an annual basis.

PUBLIC RECORDS STATUTES

The medical examination reports and information constitute public records as that term is defined in Neb. Rev. Stat. § 84-712.01 (1994). As public records, the medical examination reports and information would be subject to disclosure to the public unless otherwise exempted under the provisions of Neb. Rev. Stat. § 84-712.05 (1994). The reports include confidential information that falls within several classes of records and information described in section 84-712.05. Thus, the lawful custodian of records, the Retirement Board, may withhold the medical examination information from the public.

Of course, each agency must determine whether, as a matter of policy, it will elect to refuse disclosure of records which may fall within any of the statutory exceptions under section 84-71205. Op. Att'y Gen. No. 94095 (Dec. 5, 1994) citing Op. Att'y Gen. No. 94-004 (Jan. 11, 1994). While the Retirement Board may determine as a matter of policy whether the medical records shall be withheld from the public, this determination does not resolve the issue whether the information may be withheld from a member of the retirement system. A member who has applied for disability retirement is differently-situated than members of the public. A member of the retirement system is the subject of the medical examination and an interested party who has a stake in the outcome of the disability determination. Consequently, a member who has applied for disability retirement has rights and interests different from the general public and the public records statutes are not dispositive of the issues you have raised for this reason.

PRINCIPLES OF DUE PROCESS

As we have pointed out, postdetermination procedures are available to a member who is aggrieved by any decision of the Retirement Board which include an appeal of the decision to the district court under the provisions of the Administrative Procedure Act. In the event of a legal challenge to a disapproval decision, the medical examination information would be available to the member. The information would be available in the form of factual information or evidence considered in the record for determination of the case under Neb. Rev. Stat. § 84-914 (1994). The only remaining question is whether the Retirement Board would be required to disclose the reports and information to the member regardless of the Board's determination.

We believe a strong legal argument can be made that the medical reports and information are required to be made available to the applicant. Members have important and substantial rights and interests in retirement benefits and amounts. It is well established that members of public pension systems have contractual rights in retirement benefits, ***Caruso v. City of Omaha***, 222 Neb. 257, 383 N.W.2d 41 (1986), and that these rights are constitutionally protected, ***Halpin v. Nebraska State Patrolmen's Retirement System***, 211 Neb. 892, 320 N.W.2d 910 (1982). Further, the members have property interests in retirement accounts and benefits that are vested, at least to the extent of member contributions under retirement system statutes. ***See*** Neb. Rev. Stat. §§ 23-2319, 24-706, 79-1527, 81-2031 and 84-1321 (1994 and Supp. 1994). Accordingly, participating members have contractual rights and property interests that are constitutionally protected.

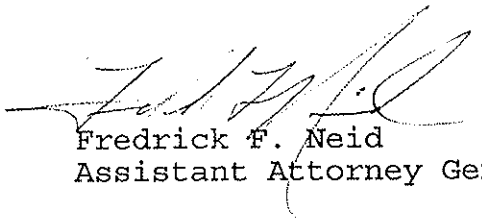
If the members of the retirement systems have a property interest in retirement amounts and benefits, those benefits cannot be denied or withheld without due process. It is fundamental to established principles of due process that, as a prerequisite to an intentional deprivation of a protected property interest, the government must provide some notice and an opportunity for hearing appropriate to the nature of the case. ***Mullane v. Central Hanover Tr. Co.***, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). In ***Cleveland Board of Education v. Loudermill***, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), the U.S. Supreme Court held that a public employee with a property interest in continued employment who is given posttermination administrative procedures must nevertheless, before termination, be given (1) oral or written notice of the charges against him, (2) an explanation of the employer's evidence, and (3) an opportunity to present his side of the story. These established principles of due process have been applied by the Nebraska Supreme Court in ***Unland v. City of Lincoln***, 247 Neb. 837, 530 N.W.2d 624 (1995).

Similarly, a member of retirement systems is entitled to predetermination due process which includes information regarding the evidence against him or her and an opportunity for the member to present his or her side of the story in disability determination

cases. For these reasons, it is our opinion that established principles of due process require that the Retirement Board disclose the medical examination report and information to a member who has applied for disability retirement.

Sincerely yours,

DON STENBERG
Attorney General



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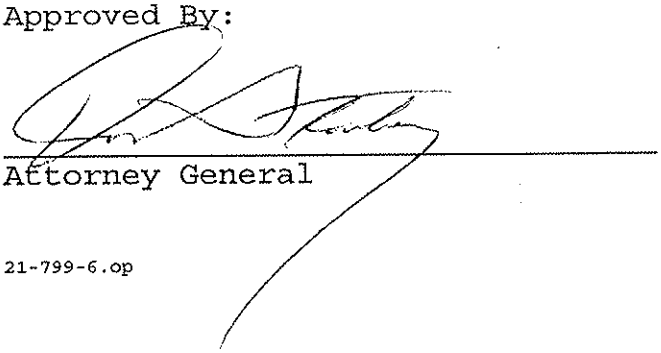

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