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STATE OF NEBRASKA
OFFICIAL
OCT 16 1995
DEPT. OF JUSTICE

DATE: October 12, 1995

SUBJECT: Retirement System for Nebraska Counties, Continuing Membership of County Employees

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

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

You have requested the "formal opinion" of the Attorney General regarding continuing membership of county employees in factual situations involving employment with more than one county.

The first question and facts presented are:

> Whether an individual who works for County A and County B, and contributes to the County Employees Retirement Plan in both Counties and then ceases employment in County A, but continues working for County B, if they shall be entitled to the benefits from County A, or if they shall have their account from County A, transferred to County B and should not be entitled to any benefits (Neb. Rev. Stat. section 23-2306).

For the most part, this question is expressly addressed by provisions of the County Employees Retirement Act, Neb. Rev. Stat. §§ 23-2301 to 23-2332 (1991 and Cum. Supp. 1994). The individual employee under the facts you describe is entitled to retirement benefits resulting from his or her employment with County A at the time the individual retires and is no longer an employee of a county participating in the Retirement System. For purposes of the

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Retirement Act, the employee is not retired due to continuing employment with County B. Neb. Rev. Stat. § 23-2301 (Cum. Supp. 1994) in material part provides:

> For purposes of the County Employees Retirement Act, unless the context otherwise requires:
>
> (1) Employees shall mean all persons or officers who are employed by a county of the State of Nebraska for twenty or more hours and who have completed at least twelve months of continuous service at any time, persons employed as provided in section 2-1608, all elected officers of a county, and such other persons or officers as are classified from time to time as permanent employees by the county board of the county by whom they are employed, except that employees shall not include judges, persons making contributions to the School Retirement System of the State of Nebraska, or nonelected employees and nonelected officials of any county having a population in excess of one hundred thousand inhabitants;
>
> (2) Retirement shall mean qualifying for and terminating employment after becoming qualified to receive the retirement allowance granted under the County Employees Retirement Act . . . .

(Emphasis added).

Based on these express provisions, an individual who continues employment with a county participating in the Retirement System is ineligible for retirement benefits until the individual's employment with a participating county ceases. The definitional sections of the statutes are direct and unambiguous. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning and courts will not resort to interpretation to ascertain meaning of statutory words which are plan, direct and unambiguous. ***In re Application of City of Grand Island***, 247 Neb. 446, 527 N.W.2d 864 (1995); ***State ex rel. Wieland v. Beerman***, 246 Neb. 808, 523 N.W.2d 518 (1994). Accordingly, it is our conclusion that an individual employed by more than one county is not eligible for retirement benefits during the time the individual continues employment with a county participating in the Retirement System.

Your question also incorporates the inquiry whether "they shall have their account from County A, transferred to County B. . . ." Whether the retirement account from County A should be

transferred to County B under the facts you describe is not addressed by provisions of the Retirement Act. Based on the generalized information you have provided, we are not aware of legal reasons for continuing to maintain separate retirement accounts for Counties A and B. However, there may be administrative reasons for continuing to maintain separate accounts to facilitate record-keeping, audit or any other administrative purpose. We believe the question whether the retirement accounts should be commingled is essentially a policy question based on administrative reasons for determination by the Retirement Board.

The second question and attendant facts you present is set forth below:

> Whether an individual who works for County A and is a participant in the County Employees Retirement Plan, either because of an elected position, (Neb. Rev. Stat. sections 23-2301 and 23-2306) or has met other eligibility requirements, when on becoming an employee of another County shall be immediately required to contribute to the County Employees Retirement Plan.

Whether an individual employed by another county is "required to contribute" to the Retirement System for Nebraska Counties under the general facts you have presented depends on whether the individual is a full-time or part-time employee of the county. Neb. Rev. Stat. § 23-2306 (1991) provides:

> The membership of the retirement system shall be composed of (1) all full-time employees who have been employees for a period of twelve continuous months, except that elected officials shall be eligible for membership on taking office, and (2) all part-time employees who have attained the age of twenty-five and have been employed for a total of twelve months and who exercise the option to join the retirement system. An employee who exercises the option to join the retirement system shall remain in the system until termination or retirement.

Thus, we believe the individual would be required to contribute to the Retirement System if the individual is a full-time employee with the second employing county. If the second employment is part-time, the individual would not be required to contribute unless the option to join the system was exercised by the individual. The provisions of the County Employees Retirement Act do not define the terms, "full-time employees" or "part-time

employees" nor has the Public Employees Retirement Board promulgated any rules or regulations to define the terms. Staff or the Retirement System has also informed us that there is no written formal policy for determining whether county employees are full-time or part-time for purposes of the Act. Accordingly, it is necessary to rely on the prior administrative practices of the Retirement Board for determining the status of a particular employee. Prior administrative practices of the Retirement Board pertaining to treatment of employees give rise to contractual rights. ***See Halpin v. Nebraska Patrolmen's Retirement System***, 211 Neb. 892, 320 N.W.2d 910 (1982); ***Omer v. Tagg***, 236 Neb. 527, 455 N.W.2d 815 (1990). Consequently, the Retirement Board appropriately should look to its prior administrative practices for determining whether a particular employee is employed full-time or part-time for purposes of the Retirement Act.

While we have generally concluded that whether an individual employee is required to contribute to the Retirement System turns on whether the individual is a full-time or part-time employee, we also point out that individuals employed less than twenty hours per week by a county are not employees for purposes of the Retirement Act. ***See*** section 23-2301(1) above.

The definition of the term "employees" set forth in § 23-2301(1) also includes persons or officers classified as "permanent employees" by the county board of the county by whom they are employed. Accordingly, an individual who is employed for less than twenty hours per week by a county would be an employee for purposes of the Retirement Act if the individual were so classified by the County Board. Other persons employed for less than twenty hours per week that are treated as employees for purposes of the Retirement Act include county extension employees employed by two or more county extension organizations. Neb. Rev. Stat. § 2-1608 (Cum. Supp. 1994) requires that county extension employees "jointly" employed by participating extension organizations be considered persons employed by a county for purposes of the Retirement Act.

The question you ask is highly factual in nature and sufficient information regarding the second employment is necessary to provide a definitive answer. Accordingly, the nature and terms of the second employment should be ascertained to determine whether the individual would be treated as an employee for purposes of the Retirement Act.

CONCLUSION

It is our opinion that an individual is not entitled to retirement benefits while the person is employed by a county participating in the Retirement System for Nebraska Counties. We further believe that an individual employed by a second county while continuing employment with the first county would be required to contribute to the Retirement System if the individual is a "full-time employee" as that term is defined and used in the County Employees Retirement Act.

Sincerely,

DON STENBERG
Attorney General

Fredrick F. Neid
Assistant Attorney General

Approved By:

Attorney General

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