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#96072

DATE: October 29, 1996

SUBJECT: Constitutionality of the Application of Neb. Rev. Stat. §§ 79-1509.02 and 79-1509.03 (1994) so as to Deny Certain State Employees Retirement Benefits

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

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

This opinion amplifies and provides further discussion of matters treated at length in our Op. Att'y Gen. No. 95065 (August 21, 1995) regarding the application of Neb. Rev. Stat. §§ 79-1509.02 and 79-1509.03 (1994) to retirement benefits afforded certain school employees by the Nebraska Public Employees Retirement Systems ("Retirement Systems"). The facts surrounding the situation are set out in detail in Opinion No. 95065. Essentially, administrative practices adopted over time by Retirement Systems and various school district employers allowed certain school employees to become members of the school retirement system in a manner contrary to the provisions of Neb. Rev. Stat. §§ 79-1509.02 and 79-1509.03. In Opinion No. 95065, we concluded:

> . . . prior administrative practices of the [Public Employees Retirement] Board and school district employers give rise to constitutionally protected contractual rights of the employees [in question] who participate as members of the Retirement Systems.

Id. at 5. You have now asked us "whether application of sections 79-1509.02 and 79-1509.03 to deny retirement benefits to the noncertificated employees . . . would be unconstitutional under the applicable provisions of the United States and Nebraska Constitutions?"

Our conclusion in Opinion No. 95065 with respect to the prior administrative practices of Retirement Systems and the school district employers was based, in part, upon three cases from the Nebraska Supreme Court. 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 the constitutionally protected contractual rights of retiring members. Similarly, in ***Omer v. Tagg*** 235 Neb. 526, 455 N.W.2d 815 (1990), the Nebraska Supreme Court found that retired former members' contractual rights were impaired based upon previous administrative practices of the employer, the Nebraska State Patrol. Finally, in ***Calabro v. City of Omaha***, 247 Neb. 955, 531 N.W.2d 541 (1995), the Court found that a supplemental benefit plan previously available to city employees could not be eliminated since the employees had constitutionally protected rights that vested when they accepted employment with the city and became members of the plan.

The determinations in all the cases cited above were based upon the constitutional provisions in the Nebraska Constitution and the United States Constitution prohibiting the state from impairing the obligation of contracts. U.S. Const. art I, § 10, cl. 1; Neb. Const. art. I, § 16. In like fashion, our conclusion in Opinion No. 95065 that the contractual rights for noncertificated employees at issue in that instance were constitutionally protected was based upon those same constitutional provisions. Therefore, for the reasons stated in our Op. Att'y Gen. No. 95065 (August 21, 1995), we believe that application of Neb. Rev. Stat. §§ 79-1509.02 and 79-1509.03 in such a way as to deny retirement benefits to the noncertificated employees involved in this situation would be unconstitutional under art. I, § 10, cl. 1 of the United States Constitution and art. I, § 16 of the Nebraska Constitution.

Sincerely yours,

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05-55-14.op
Approved by:

Attorney General