

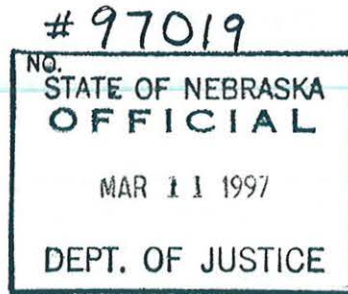


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DATE: March 11, 1997

SUBJECT: State Employees Retirement System; Eligibility for Membership and Vesting Requirements

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

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

This is in response to the question (issues) you have raised regarding eligibility for membership and vesting requirements of participants in the State Employees Retirement System. You have related general facts describing membership in the Retirement System and further set out certain issues arising from the facts. Apparently, the questions you present are the "issues" you have set forth in your request.

The FIRST issue set out is:

[W]hether this individual has a legal right to the employer account despite the fact he has erroneously enrolled in the system while a temporary employee and excluding his time in the system while a temporary would result in this person having less than five years of participation in the system as required for vesting?

For the most part, this issue is addressed by the provisions of the State Employees Retirement Act, Neb. Rev. Stat. §§ 84-1301 to 84-1333 (1994, Supp. 1995 and Cum. Supp. 1996). Members of the Retirement System who terminate their employment prior to

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retirement are entitled to certain termination benefits. Neb. Rev. Stat. § 84-1321 (Cum. Supp. 1996) provides:

(1) Except as provided in section 42-1107, any member of the retirement system who ceases to be an employee before becoming eligible for retirement under section 84-1317 may, upon application to the board, receive:

(a) If not vested, a termination benefit not to exceed the amount in his or her employee account payable in a lump sum or an annuity with the lump-sum or first annuity payment made at any time after termination but no later than the sixtieth day after the end of the year in which the member attains the age of seventy and one-half years; or

(b) If vested, a termination benefit not to exceed (i) the amount in his or her employee account payable in a lump sum or an annuity with the lump-sum or first annuity payment made at any time after termination but no later than the sixtieth day after the end of the year in which the member attains the age of seventy and one-half years plus (ii) the amount of his or her employer account payable in a lump sum or an annuity with the lump-sum or first annuity payment made at any time after the member's fifty-fifth birthday but no later than the sixtieth day after the end of the year in which the member attains the age of seventy and one-half years.

Benefits of a terminating member shall be deferred until the application is received.

(2) At the option of the terminating member, any lump sum of the vested portion of the employer account or any annuity provided under subsection (1) of this section shall commence as of the first of the month at any time after such member attains the age of fifty-five or may be deferred, except that no benefit shall be deferred later than the sixtieth day after the end of the year in which the employee has both attained at least seventy and one-half years of age and has terminated his or her employment with the state. Such election by the terminating member shall be made at any time prior to the commencement of the lump-sum or annuity payments.

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(3) The vesting percentage shall be one hundred after a total of five years of (a) participation in the retirement system plus (b) eligibility and vesting credit. The vesting percentage shall equal one hundred for any disability retirement under section 84-1317.

(4) In the event that the terminating member is not credited with one hundred percent of his or her employer account, the remainder shall be credited to the State Employees Retirement Fund and shall be applied to reduction of the liability for prior service benefits until such time as such liability is completely funded, and thereafter the remainder shall first be used to meet the expense charges incurred by the Public Employees Retirement Board in connection with administering the system and the remainder shall then be used to reduce the state contribution which would otherwise be required to fund future service retirement benefits.

(5) If a member ceases to be an employee due to the termination of his or her employment by the state and a grievance or other appeal of the termination is filed, transactions involving forfeiture of his or her employer account shall be suspended pending the final outcome of the grievance or other appeal.

(Emphasis added).

Whether or not the former employee has a "legal right to the employer account" is a determination necessarily made by the Public Employees Retirement Board. Initially, it is necessary that the Retirement Board make a determination based on described facts whether contributions should be adjusted. You appear to indicate that the terminating member is not vested in the employer account since it is stated that, "he was erroneously enrolled in the system. . . ." We previously pointed out in Op. Att'y Gen. No. I97-003 (January 31, 1997) that the Retirement Board is expressly empowered to take corrective action in situations where the Retirement System received contributions contrary to statutory provisions. See Neb. Rev. Stat. § 84-1305.02 (Cum. Supp. 1996).

It is doubtful that a singular administrative error in and of itself gives rise to vested contract rights particularly in the absence of any showing that the employee relied on the erroneous information furnished to him. However, it is important that the Retirement Board review its past practice and policy relating to enrollment of employees previously employed as temporary employees. We have previously pointed out that it is important that the Board

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consider its past administrative practices in determining the legal rights of employees to participation in a public retirement system. The subject of contractual rights and expectations which may arise as a consequence of prior administrative practices was addressed in Op. Att'y Gen. No. 95065 (August 21, 1995). We refer you to the discussion and Nebraska case authority set out in that opinion. We believe the Retirement Board must necessarily consider its past administrative practices relating to enrollment of employees who were previously employed as temporary employees to determine whether expectations protected by the law of contracts may have been created.

The SECOND question (issues) raised is:

[Whether the members who were enrolled in the retirement system by counting their temporary employment towards the minimum service required to join were enrolled prematurely? If so, should the Public Employees Retirement Board adjust their retirement accounts and return the contributions that were made before the members would have been eligible to join by counting only their permanent employment towards the minimum service required for membership?

The issues or questions you pose necessarily require a determination by the Retirement Board based on all facts and circumstances of employment whether the members are participating contrary to statutory provisions. See Neb. Rev. Stat. §§ 84-1307 and 84-1305.02 (Cum. Supp. 1996) and our response to the FIRST question above. The second part of this issue, whether retirement accounts should be adjusted, is an administrative determination necessarily made by the Retirement Board. The corrective action may be considered only upon the Board determining that contribution amounts were received "not in accordance with statutory provisions."

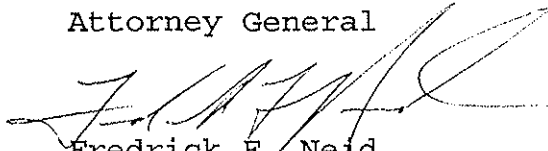
It seems to us that corrective action including adjustment of retirement accounts is appropriately taken only after the Retirement Board has made an administrative determination that the retirement system previously received contribution amounts "which for any reason are not in accordance with the statutory provisions of the State Employees Retirement Act." In this respect, we point out that section 84-1305.02(2) requires that the Board adopt rules and regulations implementing the procedures for adjusting contributions or benefit amounts. The procedures are to include

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notice provided to all affected persons and the notices are required to describe the process for disputing an adjustment of contributions or benefits.

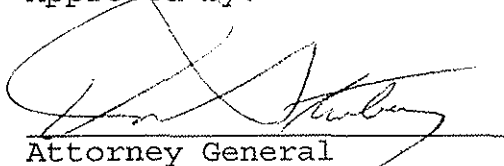
Sincerely yours,

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