MAINE STATE LEGISLATURE

The following document is provided by the

LAW AND LEGISLATIVE DIGITAL LIBRARY

at the Maine State Law and Legislative Reference Library

http://legislature.maine.gov/lawlib

Reproduced from scanned originals with text recognition applied

(searchable text may contain some errors and/or omissions)

STATE OF MAINE

Inter-Departmental Memorandum Date April 22, 1977

To P. R. Gingrow, Ass't. Exec. Director Dept. Maine State Retirement System

From Kay R. H. Evans, Assistant Dept. Attorney General

Subject Definition of "in service" as used in 5 M.R.S.A. § 1124, sub-§ 1

Your memo of January 31, 1977, presents the factual situation of a member of the Retirement System who died in the course of a leave of absence without pay granted pursuant to Personnel Rule 11.13 (Sick Leave without Pay). You requested our opinion on the question:

> "Is a member of the retirement system on a leave of absence without pay granted pursuant to Personnel Rule 11.13 a member 'in service' for the purposes of § 1124 sub-§ 1 of Title 5 M.R.S.A., so that, if he dies while on leave of absence, benefits due are to be determined under that section?"

The retirement statute does not in terms provide for the situation you describe. Our conclusion, that a member on leave of absence without pay is a member "in service" for the purposes of § 1124, sub-§ 1, is based on a broad reading of the retirement law in the light of relevant Personnel Rules and of the reasonable expectations of the employee-member and the employer. Our conclusion is further based on the fact that unless § 1124, sub-§ 1 is applicable in this situation, the retirement statute makes no provision for the disposition of the contributions made by and for the benefit of the member in question. Thus, our conclusion is limited to the facts of this case and would not necessarily apply in a different fact situation.

OPINION:

Section 1124, sub-§ 1 of 5 M.R.S.A. provides:

> "1. Death before eligibility for service retirement. Should a member who is in service. . . die at any time before completing the age and service conditions for service retirement, one of the following payments shall be made."1/

1/ At the outset, it should be noted that the terms "membership service" (§ 1001, sub-§ 13, 5 M.R.S.A.) and "service" are not synonymous. "Membership service" (or "creditable service" see our opinion of September 10, 1975, p. 2) is service on the basis of which certain contributions into retirement system funds and benefit payments out of those funds are made. "Service," as used in § 1124, refers to the status of the employee and does not necessarily mean service for which credit is allowable for the purposes of calculating contributions or benefits. Payment options themselves under § 1124, sub-§ 1 are not, except for the limitations in § 1124, sub-§ 1(B)(1)(a), related to membership service.

The issue presented is whether "in service" status can be held by a member of the Retirement System who is on leave of absence without pay due to illness and who dies while on such leave. The statutory definition of "service" is:

> "'Service' shall mean service as an employee, as defined in this section, for which compensation was paid." 5 M.R.S.A. § 1001, sub-§ 23.

The redundant definition is not helpful. As used elsewhere in the retirement statutes, "service" does not always mean active work. For example, time on leave may be credited as service for the purpose of computing benefits due, § 1094, sub-§ 4, and certain unused and uncompensated sick and vacation leave time may also count as service for the same purpose, § 1094, sub-§ 16. Thus, the term includes not only active work but also periods of work inactivity during which there is a continuing connection with the job and an understood availability for active work at some more or less definite future time. An employee on leave of absence is understood to be available for active service at the leave's termination and may be recalled to active service, under certain conditions, before termination. See Personnel Rules 11.7, 11.15, 12.7.

The statutory definition of "employee" is also redundant:

> "'Employee' shall mean any regular classified or unclassified officer or employee in a department. . . . " 5 M.R.S.A. § 1001, sub-§ 10.

The definition has meaning only if "employee" is also understood in its general or popular sense. So understood, the word connotes a relationship among worker, job and employer and implies a set of complimentary expectations as to the existence of a job and its performance. The Personnel Rules embody many of those expectations for State classified employees, agencies and departments. Personnel Rules 11.13 and 12.7 (Reinstatement from Leave of Absence) express the expectations relevant here. Personnel Rule 11.13 provides in part:

> "Upon application of a probationary or permanent employee, a leave of absence without pay may be granted by an appointing authority for the entire period of disability because of sickness or injury."

Rule 12.7 provides in part:

> "Except as otherwise provided by law, a permanent or probationary employee granted a leave of absence must be returned to his employment at the expiration of his leave unless the position he occupied has been abolished and no person with less seniority or status is employed in the same class in the same agency or organization unit at the date of expiration of the leave."

Under these Rules it is clear that employer and classified employee share the expectation that, temporary absence notwithstanding, the employee holds a job to which he will return[2/] unless terminated by legislative act or operation of other provisions of the Rules. Further, a general reading of Personnel Rules 11 and 12 indicates that the purpose of making a leave of absence, with or without pay, available is to insure the continuation of the employment relationship through temporary situations which prevent active work.

"Compensation" is not defined in the statute. Cases in related areas have defined the term to include not only wages or salary but also all money or economic benefits flowing from the employment relationship. Frank v. Anderson Bros., 51 N.W.2d 805, 236 Minn. 81 (1952) (Workmen's Compensation Act); W. W. Cross and Co. v. NLRB, 174 F.2d 875 (1st Cir., 1949) (National Labor Relations Act). Leave of absence without pay is, of course, not a direct money benefit. It may, however, be an economic benefit. Not only can the employee count on an income at a reasonably certain future point, but on the strength of the guarantee of income which leave of absence carries with it, he may be able to borrow money and obtain credit. The Maine Statutes, in at least two instances, take a broad view of what constitutes compensation. The arbitration provisions of the State Employees Labor Relations Act, 26 M.R.S.A. §§ 979 - 979-O, direct the arbitrator, in resolving a controversy after the parties have reached impasse, to consider

---

2/ Since it could not be known until the expiration of a leave of absence whether the proviso would apply, the existence of the proviso does not alter our view of the relevant expectations of employee and employer. Even if an employee is laid off or denied reinstatement prior to the expiration of his leave, it appears from Personnel Rule 12.7 that he retains the right to be reinstated and final determination as to the applicability of the proviso is not made until the leave expires. See Rule 12.7, paragraphs 2 and 3. Thus the expectation of return to active employment remains until expiration of leave. In the fact situation you describe, leave had not expired.

> "(T)he over-all compensation presently received by the employees including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received." 26 M.R.S.A. § 979-D, sub-§ 4(c)(3). (emphasis added)

The retirement statute itself suggests this wider view in its definition of "earnable compensation." In determining earnable compensation in cases where maintenance is provided, the trustees are directed to

> ". . . fix the value of that part of the compensation not paid in money." 5 M.R.S.A. § 1001, sub-§ 9.

Given these readings of the essential terms - service, employee and compensation - in the definition of "service," it would seem that the individual in question comes within the definition and is therefore a member "in service" for the purposes of § 1124, sub-§ 1.

There is no statutory method for the distribution of benefits in this situation other than via those alternatives provided in § 1124, sub-§ 1-(A), (B) and (C). Sections 1121 (service retirement), 1122 (disability retirement), 1124, sub-§ 2 (death after eligibility for retirement) and 1125 (accidental death benefits) are clearly inapplicable. The inapplicability of § 1096 becomes apparent on close examination. Section 1096 provides

> "Return of accumulated contributions. If the service of any member has terminated, except by death or by retirement under this chapter, he shall be paid, upon proper application therefor, the amount of his accumulated contributions . . . . "

In the light of this section, the question presented is whether commencement of a leave of absence without pay constitutes termination of service. As discussed above, when a leave of absence is applied for and granted, employee and employer contemplate not termination but continuation of the employment

relationship, albeit with certain temporary modifications.[3/] Moreover, if we were to conclude that the member on leave of absence without pay as described was not "in service" and therefore was a member whose "service. . . has terminated" by a means other than death or retirement, § 1096 would still not provide a mechanism for the distribution of benefits in the case where the member has died during leave. The section clearly contemplates dealing with an employee who after termination can make "proper application" for and receive payment of his accumulated contributions; that is, a living (former) employee. It makes no provision for application by or payment to a named beneficiary or other survivor, nor does it provide for payment to a member's estate.[4/] Thus, only via § 1124, sub-§ 1 can the retirement system distribute benefits to which the employee in question, by virtue of his membership, became entitled.

Kay R. H. Evans

KAY R. H. EVANS
Assistant Attorney General

KRHE:ec

3/ In this regard, it should be noted that an employee on leave of absence may be allowed up to one month's "creditable service," (see Footnote 1, supra), while on such leave. 5 M.R.S.A. § 1094, sub-§ 4. Further, if administrative leave were equated with termination, employees might be encouraged to use this device to win return of accumulated contributions.

4/ Nor should it, since, as presently written, the section applies only in cases of termination "except by death or retirement. . . ." Compare § 1124, sub-§ 2, especially sub-§ (b).