STATE OF MAINE

Inter-Departmental Memorandum Date April 26, 1977

To P. R. Gingrow, Asst. Exec. Dir. Dept. Maine State Retirement System

From Joseph E. Brennan, Attorney General Dept. Attorney General

Subject Discontinuance of Retirement Allowance to Beneficiary When He or She Becomes the Dependent of Another Person

Your memo of March 2, 1977, requests our opinion on a question of termination of a retirement allowance granted under 5 M.R.S.A. § 1121, sub-§ 1-C. Specifically, you ask whether a surviving spouse who remarries "becomes the dependent of another," necessitating termination of the retirement allowance, although said surviving spouse will continue after remarriage in the employment by which she or he has been self-supporting since the death of the previous spouse. We conclude that in the circumstances you describe in your memo, a surviving spouse who after the previous spouse's death became self-supporting and who continues to be so after remarriage has not become the dependent of another and is entitled to continue to receive the retirement allowance due under § 1121, sub-§ 1-C.

OPINION:

Section 1121, sub-§ 1-C, provides that the surviving spouse of certain retired or disabled members of the Maine State Police are entitled to a retirement allowance,

> "which. . . shall continue for the remainder of his or her lifetime or until he or she becomes the dependent of another person."1/

Your memo and the attached letter presented the facts of a recipient of such an allowance, who, after the death of her spouse, entered into employment by which she provided her own financial support. She has now remarried but states that she will continue in her employment.

The issue presented is whether the retirement allowance due a surviving spouse under § 1121, sub-§ 1-C, is to be terminated upon remarriage despite the fact that the surviving spouse will continue after remarriage in the employment by which she has supported herself since the previous spouse's death. It should

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1/ Prior to the changes made by Chapter 622 of the Public Laws of 1975, this section dealt only with female surviving spouses and required termination of the allowance upon the widow's remarriage. The Statement of Fact accompanying L.D. 1939, which became Chapter 622, makes explicit the intent of the changes. The Statement of Fact notes:

> "The inequities of sexually discriminatory eligibility standards are also removed from these statutes, and the remarriage provisions changed to dependency limitations."

be noted that all relevant factors in the situation, saving only remarriage, remain constant. Thus, the issue becomes whether marriage or, here, remarriage, constitutes one party to the marriage a dependent of the other party notwithstanding individual financial resources. Because benefit eligibility of this kind cannot be conditioned on sexually discriminatory criteria, Califano v. Goldfarb, U.S. , 97 S. Ct. 1021 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), see discussion infra, if remarriage constitutes dependency, both male and female surviving spouses would have to be deemed the dependent of another on remarriage.

As you are aware, the Legislature has provided no definition of the word "dependent" in the statute. In such cases, non-technical statutory words are to be read "according to the common meaning of the language." 1 M.R.S.A. § 72, sub-§ 3. The term "dependent" in this context commonly describes one who relies on another for the financial means to meet life needs. See Webster's New Int'l. Dictionary, 3rd Ed., (1963). Under Maine case law, "dependent" implies a need for financial support by one party, and a recognition of that need by another party coupled with some duty or obligation, legal or moral, to provide such support. Supreme Lodge, New England Order of Protection v. Sylvester, 99 A. 655, 116 Me. 1 (1917); O'Leary v. Renard, 105 A. 399, 118 Me. 25 (1919).

In view of the Maine case law, the question arises whether the traditional legal duty of a husband to support his wife constitutes her a dependent regardless of her own financial means. While it is true that it is still the majority rule that a husband has a legal duty to support his wife, that duty is increasingly imposed only and to the extent that the wife has need of support. For example, modern divorce law increasingly looks to the potential or proven ability of the wife to provide her own support in determining whether and to what extent the husband should be compelled to provide support. See Strater v. Strater, 196 A.2d 94 (1963) citing Davis v. Davis, 255 Ala. 488, 51 So.2d 876 (1951). Where the wife explicitly or implicitly disavows the need to be supported, as by earning her own support, her husband would seem to be under no duty to support her at least for so long as she continues not to need support. In any event, to decide the issue in this case on the basis of the husband's legal duty to support his wife would be to return in another guise to the marriage limitations on eligibility expressly eliminated by the Legislature in amending the retirement statute. See Statement of Fact, L.D. 1939, 107th Legislature, Regular Session, 1975, Footnote 1, supra. Further,

to do so would run perilously close to, if not overstep, the proscription against sexually discriminatory eligibility criteria recently laid down by the Supreme Court. Califano v. Goldfarb, Weinberger v. Weisenfeld, supra.

Thus, a surviving spouse who has become the spouse of another has not necessarily become the dependent of another. If he or she, having independent financial resources, is not reliant on another for financial support, he or she is not the dependent of another. The individual in question states that she has supported herself since the death of her first spouse, and that she will continue after remarriage in the employment by which she has done so. In those circumstances, she has not "become the dependent of another person" and so is entitled to continue to receive the retirement allowance provided by § 1121, sub-§ 1-C.

This is an area in which it would be very useful for the Retirement System to issue clarifying regulations. The Legislature has provided an undefined concept, leaving the Board free to develop by regulation, 5 M.R.S.A. § 1031, sub-§ 5, its own criteria and procedure by which determination that a beneficiary has become "the dependent of another person" is to be made.

Recent Supreme Court cases have laid out some of the standards which eligibility criteria must meet in order to be valid. Califano v. Goldfarb, Weinberger v. Wiesenfeld, supra. Under these cases, dependency itself is an acceptable test for eligibility of a beneficiary for benefits,[2/] if applied equally in similar situations. Though these cases dealt specifically with questions of sexual discrimination in eligibility criteria, there can be distilled from them a general rule by which the Board should be guided: No criteria should have the effect of enabling any one employee or class of employees to purchase with the same

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2/ Goldfarb and Wiesenfeld dealt with dependency as a criterion for initial eligibility for benefits under Social Security. Under the retirement statute, the criterion of dependency is applied to determine continuing eligibility. There is in the statute no requirement that the surviving spouse has been the dependent of the deceased in order to qualify for the allowance initially. There is no reason to treat the dependency requirements differently simply because they become relevant at different points of time.

contribution any better protection for beneficiaries than any other employee similarly situated.3/

With respect to sexually discriminatory criteria in particular, the Legislature has provided by amendment a statute nondiscriminatory on its face. The Board should be careful not to compromise the statute in this respect. Any criteria adopted must apply equally to male and female employees situated similarly in all respects other than gender. That is, similarly situated male and female employees must be able to purchase identical benefits for their surviving spouses. Any presumptions made by regulation must also apply regardless of sex. For example, the Board may want to provide that a surviving spouse who remarries is presumed dependent on the new spouse unless the surviving spouse proves otherwise.4/ Such a presumption and requirement of proof would be valid only if applied equally to remarried male and female surviving spouses.

The Board should also, in developing regulations in this area as in others, be alert to those instances where notice to members of the substance of the regulation is especially important. For instance, if a regulation provided for termination of surviving spouses' retirement allowance in a particular set of circumstances, it might be important for an employee to know this so that he or she could purchase other insurance, the benefits of which would continue to be paid.

3/ Goldfarb makes it clear that in an equal protection analysis of the effect of such criteria, the impact on the rights of the wage-earning employee must be considered. 97 S.Ct. 1021,1027.
Of course, benefits may vary between classes of employees. For instance, § 1121, sub-§ 1-C itself gives to surviving spouses of certain members of the Maine State Police benefits not available to surviving spoues of all other Retirement System members. The legislative determination that surviving spouses of members of the Maine State Police are to have special benefits is not invalid. What is essential is that the same benefits are available to the surviving spouses of all members of the Maine State Police who meet the other statutory criteria.

4/ The example is not given to suggest a regulation we think desirable, but merely to illustrate our point. The Board would probably want to consider cost factors in developing regulations regarding presumptions and requirements of proof. That is, in which instances would it cost less to simply continue to pay the retirement allowance than to make case-by-case assessments of dependency?

The facts of this particular case have led us to consider various situations in which this section of the retirement statute would come into play. Though in this case a finding of no dependency is indicated, to enlarge that result to a general rule that earning one's own living equals non-dependency could lead to unfortunate results in other cases, cutting off a surviving spouse's retirement allowance in a situation where its continuation would be fair and reasonable. For example, consider the case of a surviving spouse who remarried in a situation where it would be preferable or desirable for him or her not to continue working at outside employment, but the family unit could not absorb the loss of both salary and retirement allowance. If not earning were the equivalent of dependency, such a person would be forced to continue outside work in order to continue receiving the retirement allowance. By regulation the Board may want to provide for the retention of benefits in situations where the surviving spouse does not continue to earn but where the benefit itself comprises a certain portion of family income.

It seems clear that mechanical application of the dependency test can lead to unfair and probably unwanted results. By regulation, however, the Board can do considerable shaping of both meaning and application, ultimately providing itself with a useful tool.

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