Retirement; Differing Benefit Plans for Employees; Ord Tax Contract

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TO: W. G. Blodgett, Executive Director, Maine State Retirement System

FROM: Kay R. H. Evans, Assistant Attorney General

RE: Inquiries of Participating Local Districts Whether They May Institute a Retirement Plan which Would Provide Differing Benefits for Different Employees in the Same Employee-Class.

By memo of February 1, 1978, you requested, on behalf of a member of the Board of Trustees of the Maine State Retirement System, a written opinion on whether a participating local district may so structure its retirement plan for a particular group or classification of employees to retain present benefits for present employees in the classification while instituting different benefits for future employees in the same class. The question is answered in the negative.

OPINION:

This question has been dealt with several times in the Opinions of the Attorney General. I have attached copies of the three most recent[1/] responses. Rather than retracing the statutory provisions or reiterating the reasoning of these three earlier replies, this opinion will discuss the bases for their common conclusion that a participating local district may not, in structuring its retirement plan, make distinctions among employees other than those distinctions which are provided for in the statutory provisions of the retirement law.

1/ Opinion of May 7, 1974, from Charles Larouche to W. G. Blodgett; Opinion of December 10, 1975, to W. G. Blodgett from Donald Alexander; Opinion of December 15, 1975, to W. G. Blodgett from Donald Alexander.

There are three bases for that conclusion. The first is the rule of statutory interpretation that where a statute contains express designations, what was not expressly designated was intended to be excluded.[2] As applied to the question under discussion, this rule means that since the Legislature has in the retirement law designated certain classifications of employees for whom special benefit plans may be adopted,[3] it intended that other such designations not be made. The earlier Opinions from this Office uniformly decide that no classification of employees may be made other than those made in the statute; the Opinion of December 15, 1975, applies that conclusion to the question whether one occupational group within a statutory classification may be given benefits different from other occupational groups within the same classification. Logical consistency compels that that same conclusion applies when the question is whether a distinction may be made within an occupational group[4] or within a classification, where the classification contains only one occupational group.

The Legislature has expressly designated the available classifications. No other designations, whether of whole classes or subclasses may be made under the present law.[5]

2/ Sutherland, Statutory Construction, Volume 2A, § 47.23 (1973).

3/ See Opinion of May 7, 1974.

4/ The participating local districts who have raised the question seek to make a distinction within the occupational groups of police and/or firefighters on the basis of the date on which a particular employee entered into employment with the district.

5/ Another way of understanding the effect of this rule is to say that the Legislature, by designating particular things and by not providing criteria which others (e.g., administrative officials) might apply to make other similar designations, has indicated that it intends to retain for itself sole authority to make such designations. Until the Legislature changes the law to provide for the delegation of that authority, no body, agency or person may act in its stead.

The second basis for the conclusion that only legislatively-designated classifications may exist is that no general criteria or standards for the making of such distinctions are present in the statute. The Legislature might have indicated a set of criteria that it had itself applied, even without expressly providing others with the authority to make distinctions by applying the criteria. To have done so might have implied that reasonable extensions of the criteria could be made to make distinctions not provided for in the statute. Here, however, no criteria or standards whatsoever are provided[6/] on which participating local districts or any person or body might base the designation of new classifications.

Finally, no person, agency or body is given discretionary authority to make classifications other than are made in the statute. Clearly, participating local districts have no such discretion: they are free to structure retirement plans out of the statutory elements available, but the range of choice, procedure for choosing and terms of participation in the System are delimited by the retirement statute. Nor does the Board of Trustees of the Retirement System have such discretionary authority. The Trustees have general administrative responsibility for the "proper operation"of the System, 5 M.R.S.A. § 1031(1), and specific authority to make

> . . . the final and determining decision in all matters affecting the rights, credits and privileges of all members of the system, whether in the participating local districts or in the state service. 5 M.R.S.A. § 1032.

While the authority to make the kinds of determinations sought by the participating local districts might be thought to be implied in these general grants of authority, that implication is negated by the lack of criteria or standards for making such determinations and by the presence in the statute of legislatively-made classifications with no indication of intent that other classifications are to be made by anyone other than the Legislature.

6/ The only criterion discernable in the classifications made in the statute which are available to participating local districts is that some measure of hazardousness be involved in the work of those classes for whom special benefit plans can be elected. While, arguably, other classifications based on hazardousness might be made, that criterion is no basis for distinguishing among employees in the same occupational class, as is sought to be done by these participating local districts.

As is suggested in the Opinion of December 10, 1975, the proper route to the end the participating local districts seek is via the Legislature. As that Opinion states, legislative action could take several forms. If such a solution is sought, the Retirement System has some responsibility for ensuring that the Legislature understands the ramifications for the System itself of any particular solution, in terms of its administrative costs and complexities.

Kay R. H. Evans

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Enclosure