Retirement: Service credit for municipal employees
5 MRSA 1094-13

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

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

Re: Interpretation of 5 M.R.S.A. § 1094(13) and Related Questions.

Your memo of May 17, 1978, addressing issues raised at the April meeting of the Board of Trustees of the Retirement System by representatives of the Bath Police Department, asks certain questions regarding the interpretation and implementation of 5 M.R.S.A. § 1094(13), with respect to its application to participating local districts. This section permits employees who meet certain requirements to purchase for retirement credit up to four years of military service.* Your questions, summarized, are whether the subsection has mandatory, nonelective, or optional, elective, application to participating local districts and whether, if application is elective, the Board of Trustees may provide that participating local districts electing the subsection may not do so for fewer than all of their employees. From the discussion at the Trustees' meeting, a third question emerged: whether, if the Board may so regulate the availability of the subsection, it may waive the regulation in particular cases.

In my opinion, 5 M.R.S.A. § 1094(13) is optionally available to participating local districts. The Board may provide that participating local districts electing the subsection must do so for all of their employees and, in the specific circumstances of the particular situation, the Board has discretionary authority to waive its regulation.

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* By virtue of a 1975 amendment, the opportunity to purchase military time is available only to members who joined the system prior to January 1, 1976. P.L. 1975, c. 622, § 36.

OPINION:

1. Mandatory or optional application.

Neither the particular section in question nor the retirement law as a whole answers, on its face, the question whether sub-§ 13 has mandatory or optional application to participating local districts. However, the legislative history of the enactment of sub-§ 13, comparison of that sub-§ to other provisions of the retirement law, consideration of relevant principles underlying the operation of the retirement law and System, and the legislative history of the enactment which limited the availability of sub-§ 13 lead to the conclusion that the sub-§ is applicable to participating local districts only on their election.

Sub-§ 13 was introduced at the First Special Session of the 102nd Legislature as L.D. 1711. The L.D. provided:

> 13. Military service credit. Military service is defined as full time on active duty as a member of the Armed Forces. Anything to the contrary notwithstanding, military service shall be credited to teachers, state employees and participating district employees who are unable to otherwise qualify for military service credits, if the following requirements are met:
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> A. Within one year prior to the date of induction or acceptance of induction the member
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> (1) Had been pursuing a college course preparatory for state service or for teaching, or
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> (2) Had been employed by the State, teaching in the public schools of Maine, or employed by a participating district, and
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> B. Within one year of discharge from military service, had
>
> (1) Returned to college or graduate school from which he entered a position covered by the Maine State Retirement System within one year of the completion of such college or graduate school work, or
>
> (2) Returned to the state service or teaching in the public schools of Maine, or employment in a participating district, provided that the college or graduate study is followed by entry or re-entry into the state service or teaching in Maine within a period of one year.

No member who is otherwise entitled to military leave credits shall be deprived of this right if his return to covered employment is delayed beyond one year after his separation from military service under conditions other than dishonorable if the delay is caused by a military service incurred illness or disability.

Credit for military service under this subsection shall be limited to 4 years. Such credits shall be available to those persons who were separated under conditions other than dishonorable from the Armed Forces of the United States.

It is the intent that these provisions shall apply to all persons, active or retired, but that for those already retired the effective date of any adjustment shall be not earlier than that date on which such time or credit is certified to the Maine State Retirement System.

By House Amendment "A" H-492, the bill was altered to provide:

13. Military service credit. Anything to the contrary notwithstanding, military service shall be credited to all state employees who are unable to otherwise qualify for military service credits. A state employee shall be entitled to this credit only if at point of retirement he shall have at least 15 years of membership service in the State Retirement System. The member shall contribute to the retirement system for each year of military service claimed 5% of the earnable compensation paid such member during the first year of state employment subsequent to service in the Armed Forces. Credit for military service under this subsection shall be limited to 4 years. Such credit shall be available to those persons who were separated under conditions other than dishonorable from the Armed Forces of the United States.

It is the intent that these provisions shall apply to all persons, active or retired, but that for those already retired the effective date of any adjustment shall be not earlier than that date on which such time or credit is certified to the Maine State Retirement System.*

It is noteworthy that the amendment eliminates the references to participating local district employees.** The brief floor history of

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* The section was later amended in ways not here relevant by P.L. 1969, c. 415, § 3, and c. 449.

** The amendment also eliminates the reference to teachers. However, teachers are specifically included in the definition of employee, 5 M.R.S.A. § 1001(10).

the amendment consists of a speech in which the sponsor, explaining his amendment, states that it was designed to provide to

> . . . all career state employees, including teachers, school superintendents, highway employees, etcetera. . . *

the opportunity to add military service to their retirement credit. Again, participating local district employees are not mentioned. The bill was enacted in the amendment form.

The inclusion and subsequent omission of the mention of participating local district employees in the bill, while highly persuasive of the absence of legislative intent to make the law automatically applicable to participating local district employees, cannot be said to be conclusive on the question of mandatory or optional application. This is because terms such as "state employee," "employee," and "member" are used in the retirement law with no one consistent meaning, so that it cannot be said, for instance, that the term "state employee" on its face excludes participating local district employees.** A comparison of 5 M.R.S.A. § 1091(6) and sub-§ 13 provides an illustrative example. Section 1091(6), which provides for continuing retirement credit and contributions when specified military service interrupts employment in a position covered by the Retirement System, has always been treated administratively*** as applicable without election to participating local districts. While sub-§ 6 uses the terms "member" and "employee" rather than "state employee" and is thus more readily applicable on its face to participating local district employees, it also refers in terms only to "the State" as the employer, thus arguably narrowing its application to employees of the State only. Nonetheless, participating local district employers have always been treated administratively as subject to the requirements of § 1091(6) and their employees as entitled to its benefits.

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* Legislative Record, Special Session 1966, p. 277.

** Generally, however, the term "state employee" includes participating local district employees in those provisions which comprise the basic scheme of the Retirement System and are necessarily applicable to all employee-members, or those which, while referring to state employees, are electable by participating local districts.

*** No Attorney General's Opinions or court cases construing this subsection have been found.

Further comparison between § 1091(6) and § 1094(13) indicate that it is not unreasonable and arbitrary to conclude that despite similarities in subject matter and terminology, the two subsections operate differently with respect to their application to participating local districts. Section 1091(6) was enacted in 1941 as a part of c. 328.* Chapter 328 originated the Retirement System as it exists today, including those provisions permitting participation by local districts. Thus, every local district which has entered the System has assumed the applicability and thus accepted the potential costs of sub-§ 6. Sub-§ 13 was enacted in 1966, when 81 local districts were System participants. If sub-§ 13 were mandatory and retroactively applicable, it would have at its enactment imposed substantial unanticipated costs upon the local districts which were then members.** If the sub-§ were mandatory but not retroactive, its benefits would be available only to the employees of participating local districts joining after its enactment. Given this partial availability, outright optional application would appear more reasonable.

Additional light is shed by reference to other statutory sections, notably 5 M.R.S.A. §§ 1092(8) and (12). Section 1092(8) provides

> Employees who become members under this section and on behalf of whom contributions are paid as provided in this section, shall be entitled to benefits under the retirement system for which such contributions are made as though they were state employees and shall also be entitled to any additional benefits elected by the participating local districts

and has been in the retirement law in substantially the same form*** since the enactment of c. 328 in 1941. The provision guarantees equitable treatment by the Retirement System as between state employees and employees of participating local districts.**** Section 1092(12)

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* Public Law 1941, c. 328, § 227-B(6).

** While imposition of some unanticipated costs on local districts is unavoidable, a guiding principle of their participation is that they should be able to determine and control their costs. See p. 6, infra.

*** The concluding clause, from "and shall also be. . . " was added by P.L. 1975, c. 622, § 25.

**** The simultaneous enactment of § 1091(6) and of § 1092(8)'s guarantee of equitable treatment as between state and participating local district employees is worth noting.

provides

> Any amendments to this chapter enacted by the legislature, the benefits of which could apply to employees of participating local districts, shall be made effective only in the event any such district elects to adopt such benefits and agrees to pay into the system the required costs as developed by the actuary.

This section has been in the retirement law in its present form since 1959.* Sub-§ 12 reflects a fundamental term on which local districts participate in the Retirement System: they not only pay their own way, but within certain limits of administrative feasibility and fundamental standards of equitable and nondiscriminatory treatment,** determine their own costs. The administrative interpretation and implementation of sub-§ 12 is tied to this fundamental tenet. Thus, where a benefit enacted by an amendment involves no cost to the employer, no election is necessary for such an amendment to apply to the participating local districts. And, where an amendment involves or affects the equitable and nondiscriminatory treatment of members, it is treated as applicable without election to participating local districts, even if a cost is involved.

Thus, while § 1091(6) was not enacted as an amendment to the statute, it appears that if it had been, it would have been treated as mandatorily applicable to participating local districts, despite its cost to the employer, because it goes to the equitable, nondiscriminatory treatment of members. That is, § 1091(6) provides for even-handed treatment of all members who left covered employment for military service, and for even-handed treatment as between those who went to the military and those who remained in civilian service.

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* Prior to 1959 the statutory language contained the same basic idea, but amendments were specified as those enacted by a given legislature or legislative session.

** As part of its basic administrative function and role, the System is regarded as having some responsibility, and commensurate authority, to insure that equitable, nondiscriminatory treatment is accorded all members similarly situated. Thus, the System has this responsibility, not only as among state employees and as between state employees and participating local district employees, but also among the employees of a single participating local district. It may not permit a participating local district to treat its employees in a discriminatory manner.

In contrast, § 1094(13) was enacted as a statutory amendment and involves substantial potential cost to the employer. While it may tend to equalize the treatment accorded military service of whatever nature, it also discriminates in favor of those members who have been in the military as against those who have not.* The legislative history of the termination of the availability of § 1094(13) benefit reveals that the section was, then at least, seen as a special benefit for a particular group, and thus was undesirable.**

Finally, the interpretation and implementation accorded a statute by the persons responsible for its administration, while not conclusive, is entitled to great weight where not plainly erroneous or inconsistent

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* Section 1091(6) did not have a discriminatory effect in favor of those serving in the military, but rather maintained some degree of equivalence between those leaving for military service and those staying. While the employer paid the employee contributions for the member in military service, those contributions were frozen at the rate applicable to the position held at the time of departure for service. Considerations of relative hazardousness and patriotism undoubtedly were also involved; the section was enacted in time of war and applies to war-time service.

** Statement of Fact, L.D. 1818 (original) and L.D. 1939 (new draft), 107th Legisalture, 1975. The Bill contained an extensive revision of the retirement law and was the result of an independent study of the Retirement System. The portion of the Statement of Fact here relevant reads:

> The provisions that allow members to purchase additional "service credits" for specified types of past employment or military service are also removed, and replaced by a provision allowing all members to make contributions to increase their retirement allowance.

The replacement provision, 5 M.R.S.A. § 1062(2)(C) is treated administratively as applicable without election to participating local districts, because it involves no cost to the employer and because it goes to the equitable treatment of all members.

with the statute. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933); United States v. Groupp, 459 F.2d 178 (1st Cir., 1972); Dupler v. City of Portland, 421 F. Supp. 1314 (D.C. Me., 1976). In this case, § 1094(13) has been treated administratively since its enactment as optionally available to participating local districts and the above discussion indicates that this interpretation is neither erroneous nor inconsistent with the statute.

II. The Board's authority to require that § 1094(13), if elected, must apply to all employees of the electing district.

The Board of Trustees has extensive authority to make rules and regulations for the administration and operation of the Retirement System, 5 M.R.S.A. §§ 1031(1),(5); 1032. So long as such regulations are not arbitrary, oppressive, unreasonable, unfair, discriminatory or otherwise abusive of the Trustees' discretion, they are not vulnerable to challenge. The regulation in question, adopted at a Board meeting on January 8, 1976, and noticed to participating local districts by memo of January 12, 1976, does not transgress the above standards.

Further, earlier opinions of the Attorney General indicate that the Board does not have discretionary authority to permit participating local districts to make the benefit of sub-§ 13 available to a selected group or groups of employees. These opinions on questions of the interpretation and implementation of the retirement law have consistently held that the only distinction as to benefits which may be made among the employees of a participating local district are those which are specifically provided in the statute. While no opinions have been found on sub-§ 13 itself and/or the related regulation in particular, the principle enunciated in Opinions on other portions of the retirement law apply to govern resolution of this closely analagous question.

Finally, the regulation is in accord with the fundamental requirement that the Retirement System provide and ensure equitable, non-discriminatory treatment for all similarly situated members.

III. The Board's authority to waive its regulation.

In general, the discretionary authority to waive application of a particular administrative rule or regulation can be said to be commensurate with the authority to promulgate such rules and regulations in the first instance. There may be more question as to the authority to waive where there is doubt that the result permitted by the waiver is even permissible under the statute. For example, in this instance, waiver would permit the participating local district in question to make the benefits of § 1094(13) available to a selected group of its employees, in contradiction to the consistent interpretation of the Attorney General that the retirement law permits no distinction as to benefits among participating local district employees except those specifically permitted by the statute. However, the circumstances

of this particular situation make it possible to view the question of waiver in a different light. First, the Board, if it decided to waive the regulation in the instant case, would not thus be permitting the participating local district to make a distinction among its employees on a continuing basis, but only in the single instance. Secondly, circumstances surrounding the instance itself indicate that an error on the part of the System contributed to the original problem and that considerations of equity, namely, reliance on the part of participating local district employees, may be involved. Thirdly, there is some precedent for a present waiver in the previous waiver granted in 1976 in the cases of two other employees of this participating local district. These considerations lead me to conclude that it would be within the discretionary authority of the Board to waive the regulation in question in this specific situation. In so concluding, I do not intend to imply that it would be an abuse of discretion not to grant the waiver.

In determining whether to waive the regulation in the instant case, the Board may want to consider (1) whether the previous waiver was granted because erroneous advice given by the System contributed to the problem; if so, whether that error was corrected by the memo sent in January, 1976; if corrected, whether the same error can now serve as a basis for waiver; and (2) whether the previous waiver was granted out of considerations of equity and, if so, whether the same or other equities obtain now.

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