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June 14, 1979

P. R. Gingrow
Assistant Executive Director
Maine State Retirement System
State Office Building
Augusta, Maine 04333

Re: Auburn-Lewiston Municipal Airport: Participation as a Local District and Prior Service Credit for Service Rendered Prior to Date of Incorporation of Airport.

Dear Mr. Gingrow:

Your memo of May 16, 1979, asks two questions regarding the Auburn-Lewiston Municipal Airport, Inc.:

1. Does the Airport qualify to participate in the Maine State Retirement System as a local district; and

2. Assuming the Airport qualifies, can it grant prior service to its employee-members for service rendered prior to the date of incorporation.

Documentation submitted with your memo establishes that the Airport comes within the definition of 5 M.R.S.A. § 1001(11-A) and is thus qualified to participate in the System as a local district. The Airport is clearly an instrumentality of the cities of Lewiston and Auburn, as shown by an Agreement which, pursuant to Chapter 203, Title 30 (Interlocal Cooperation) and resolutions of the municipal officers of each city, delegates

to the Airport duties and powers which the cities could themselves exercise.1/ The Airport was incorporated on April 12, 1979, under Title 13-B, M.R.S.A., as a non-profit corporation. The Airport is thus an "incorporated instrumentality of . . . one or more of (the State's) political subdivisions," as provided in sub-§ 11-A, and therefore is qualified to participate as a local district.

The Airport's Board of Directors has indicated that it wishes to grant full prior service credit to its full-time employees. By this, the Board intends that full-time employees receive prior service credit for the time they have worked for the Airport. You have raised the question whether Airport employees are "entitled to any prior service before the date of incorporation, since these employees were not employed by this corporation prior to that date but were employed by the Cities of Auburn and Lewiston."

The question arises because of the definition of prior service in 5 M.R.S.A. § 1001(17):

> "'Prior service' shall mean service rendered prior to the date of establishment of the retirement system for which credit is allowable under section 1094. In the case of participating local districts 'prior service' shall mean service to the district rendered prior to the district joining the retirement system."

No district exists as a district before it joins the Retirement System - that is, before it is found to be included in the definition of "local district" (sub-§ 11-A) and is found to have obtained proper approval of participation under 5 M.R.S.A. § 1092(1). That being the case, if sub-§ 17 is read literally, no employee could render "service to (a) district. . . prior to the district joining the retirement system."

What sub-§ 17 must be read to mean, if it is not to be rendered a nullity, is that prior service, in the case of participating local districts, means service performed for the entity which becomes the district, prior to the time it becomes a district. Where the entity is, for all practical purposes, identical before and after it acquires status as a district, this reading of sub-§ 17 permits service rendered to that entity

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1/ I am informed that the Airport was delegated and exercised such duties and powers prior to the execution of the Interlocal Agreement, which document gave a formal basis to the pre-existing arrangement. Conversation with Airport Manager, June 11, 1979.

to be included for prior service credit, if the district wishes to include it. On the other hand, where a district is dissimilar from the entity or entities creating or comprising it, sub-§ 17 would not permit the granting of prior service credit for service rendered to the entity or entities.[2/] For example, where several towns join in a school administrative district (SAD) and the SAD becomes a participating local district in the MSRS, sub-§ 17 would not appear to permit the SAD to grant prior service credit for service rendered to a town prior to the formation of the SAD. Of course, service rendered to the SAD prior to the time it became a district would be includible for prior service credit.

Under this interpretation and reasoning, prior service credit would be includible for service rendered to the Airport during such time as it existed in a form substantially identical[3/] to that in

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2/ This interpretation is supported by the use of the phrase "prior to the district joining the retirement system" in sub-§ 17. In the retirement statute, the term "date of establishment" is used to specify the date as of which a district's participation actually becomes effective - that is, was found to fit within the definition and to have obtained proper approval. See, e.g., §§ 1002, 1092(1). Had that phrase been used in sub-§ 17, it would then appear that prior service credit for employees of participating local districts would be available only for service rendered between the time the entity became a district and the district's date of establishment. Where the two coincided, no prior service credit could be given. The use of the phrase "prior to the district joining the retirement system" establishes a different relevant date and points to service rendered before a district becomes a district, as discussed above.

3/ While incorporation was necessary to obtaining status as a district, it does not, by itself, change the character or form of the entity so as to rule out the possibility of prior service credit under the sub-§ 17 definition.

which it exists after becoming a district. I understand that the Airport from its inception has functioned as the joint effort of the cities of Auburn and Lewiston, has maintained the same employment relationship with its workers and has otherwise operated no differently than it does now.4/ In my opinion, sub-§ 17 permits prior service credit to be granted for service rendered to the Airport while it existed in such form. On the other hand, if the Airport had previously been organized and operated very differently - as, for example, if it had been organized and operated as an agency of one of the two cities - sub-§ 17 would not permit the granting of prior service credit for service rendered during the time the Airport was so organized and operated.

Clearly, the situations in which such questions of creditable prior service arise will have to be resolved on the basis of the particular facts presented. While I hope that this opinion provides useful guidelines for an administrative decision in the ordinary case, you may wish to seek an opinion of this office in a close question.

Very truly yours,

Kay R. H. Evans

KAY R. H. EVANS
Assistant Attorney General

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4/ Airport employees are carried on the payroll of one of the two cities; the cities alternate annually. The carrying city is reimbursed for these costs by the Airport. Employees are hired and fired by and are under the supervision and control of the Airport Board. Information obtained from Airport Manager, in conversation June 11, 1979. The fact that the employees are carried on the cities' payrolls is by itself, in these circumstances, insufficient to constitute them employees of the cities, at least insofar as the period of time during which the above-described arrangements have existed.