

MAINE STATE LEGISLATURE

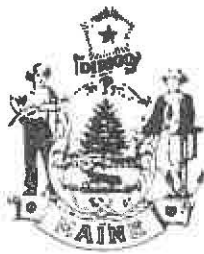
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RICHARD S. COHEN
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

October 16, 1980

William G. Blodgett
Executive Director
Maine State Retirement System
State Office Building
Augusta, Maine 04333

Re: Earnable Compensation - 5 M.R.S.A. § 1001, sub-§ 9.

Dear Mr. Blodgett:

Your opinion request poses the question of whether a member of the Maine State Retirement System may ever have more than 30 days of accrued vacation time included as "earnable compensation," under 5 M.R.S.A. § 1001(9). We answer this question in the negative.

Your request gives the following facts: a state employee took a leave of absence^{1/} from the classified service to take an unclassified position.^{2/} At the time he left the classified service, he was paid for 30 days unused vacation leave accumulated while in the classified service, in accordance with State Personnel Rules.^{3/} He retired on March 19, 1979, and has been paid for another 30 days unused vacation leave accumulated while in his unclassified position.

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- ^{1/} The request states that he resigned from the classified service, but it has been determined that he in fact took a leave of absence. Our conclusion would not be changed had he in fact resigned.
 - ^{2/} According to then Personnel Rule 11.12, now 94-3489, c. 11(3)(C).
 - ^{3/} Then Rule 11.7, now 94-389, c. 11(2)(B)(b)(1) and (2).

The problem is created by the ambiguity of the statutes involved. Retirement benefits are calculated by determining a person's "average final compensation" and applying to that figure a factor reflecting the relevant type of benefit entitlement (e.g., 1/50 multiplied by the number of years of service, for an ordinary service retirement). See 5 M.R.S.A. § 1121(2)(A) and (2).

"Average final compensation" is defined in 5 M.R.S.A. § 1001(3) as

the average annual rate of earnable compensation of a member during the 3 years of creditable service... in which such average annual rate of earnable compensation is highest. . . .

(emphasis added)

It is evident that the concept of "earnable compensation" is critical in finding "average final compensation" and therefore in determining the amount of a retirement benefit. "Earnable compensation" is also specifically defined in the statutes as follows:

"Earnable compensation" shall mean actual compensation, including maintenance if any, but shall not include payment for more than 30 days of accumulated or accrued sick leave or unused vacation leave or a combination of both, nor include any other payment which is not compensation for actual services rendered or which is not paid at the time such services are rendered

. . . .^{4/}

5 M.R.S.A. § 1001(9)

^{4/} The language establishing the 30-day limit was enacted by an amendment to the statute, P.L. 1975, c. 622, § 1. By c. 622, § 66, ¶ 1, the amendment was made applicable to "all retirement allowances first payable on or after July 1, 1978." Thus, if the limitation is effective at all in this kind of situation, it would apply to this individual, as his retirement allowance was first payable in March, 1979.

The match-up of the two definition is imperfect and therefore ambiguous. "Average final compensation" plainly is a figure based on an average of "annual" earnings in 3 different years. While "earnable compensation" might be read to imply an "annual" concept of earnings, the specific use of the words "annual rate" preceding "earnable compensation" in subsection 3 of § 1001 belies such an interpretation. A careful reading of the definition of "earnable compensation" together with the other parts of the benefit formula suggests that the purpose of the concept is to determine what kinds of income ought to be included in or excluded from "average final compensation." Thus, "earnable compensation" has no element of time but rather defines the types of income which are properly cognizable in calculating a retirement benefit.

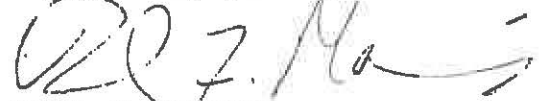
Given this view of "earnable compensation," the question for resolution is whether a retiree is entitled to use more than 30 days of accrued vacation leave (for which he has properly been paid) as "earnable compensation" in determining his retirement benefit. The answer must be in the negative because the clear policy behind § 1001(9) is to preclude a person from claiming such extra income as "compensation" under any circumstances. When "earnable compensation" is viewed not in an "annual" sense but as a principle of including or excluding income from "average final compensation," there is an absolute limit of 30 days unused vacation leave which may be used to augment such compensation in determining a retirement benefit.

The extensive legislative history of the bill which enacted this 30-day limit focuses chiefly on the problem of the "ballooning" of actual compensation in the last year of work in order to raise the retirement benefit. See, e.g., II Me. Leg. Rec. at B2128, B2129-31 (remarks of Representatives Farnham, Morton and Theriault) (1975). Hence, it might be interpreted as suggesting that the 30 days was intended as an allowable yearly limitation. But the specific abuse at which the 30-day limit was directed was that the ballooning of income in the final year made it impossible to establish an accurate basis upon which a retirement benefit could be calculated. Id. at B2128, B2129 (remarks of Representative Theriault). Such a rationale should also logically bar the use of more than one period of 30 days in establishing "average final compensation." Moreover, the legislative history clearly does not consider a situation such as this where more than one reimbursement for unused vacation leave takes place. Since such a situation was not specifically considered therein, we have looked to the general intent suggested by the statutory language and the legislative history.

We conclude that 5 M.R.S.A. § 1001(9), when read with subsection 3 and placed in the context of its part in calculating specific retirement benefits, limits the use of unused sick or vacation leave in determining "earnable compensation" to a single 30-day period. We therefore think that, in the factual situation you have presented, only one of the 30-day periods for which the retiree was compensated should be included in his "earnable compensation."

If you have any further questions, please contact this office.

Very truly yours,

A handwritten signature in dark ink, appearing to read "P. F. Macri", with a long horizontal flourish extending to the right.

PAUL F. MACRI
Assistant Attorney General

PFM/ec