80-156

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Robert Bourgault, Chairman
Board of Trustees
Maine State Retirement System
Augusta, Maine 04333

Dear Mr. Bourgault:

The Board of Trustees of the Maine State Retirement System has requested that this office issue an opinion regarding the concept of "restoration to service" as defined in 5 M.R.S.A. § 1123.1/ More specifically, the Board has requested that we resolve the question of whether a particular retiree was "restored to service" under § 1123 when he assumed a position, nominally as an independent contractor, very similar to the position from which he had retired.

For a number of reasons, we think it inappropriate to resolve the specific factual problem you have raised. As a

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1/ Section 1123 reads, in pertinent part, as follows:

> Should any recipient of benefits other than disability benefits be restored to service, and should the total earnable compensation for that year exceed his average final compensation at retirement, subject to such percentage adjustments, if any, that may apply to the amount of retirement allowance of the beneficiary under section 1128, the excess shall be deducted from the service retirement allowance payments during the next calendar year, those deductions to be prorated on a monthly basis in an equitable manner prescribed by the board of trustees over the year or part thereof for which benefits are received. The beneficiary shall be responsible for reimbursing the Maine State Retirement System for any excess payments not so deducted. If the beneficiary's retirement allowance payments are thereby eliminated, he shall again become a member of the retirement system and he shall contribute thereafter at the current rate and when that member subsequently again retires, he shall receive such combined benefits as may be computed on his entire creditable service and in accordance with the then existing law.

general proposition, the opinion process is not designed to make findings of fact. When such findings are necessary to resolve a specific dispute, we believe our role must be limited to a discussion of the relevant legal principles. See 5 M.R.S.A. § 195. The application of those principles to a specific problem is generally the responsibility of the agency charged with administering the statutes in question.

In this instance, there are additional reasons why we question whether further action is appropriate. We understand that the person who is the subject of your request is no longer in the position which gave rise to the request. More important, we understand that this individual sought and received advice from the Retirement System on the course of action which he ultimately pursued: leaving employment and retiring and then undertaking on a contractual basis a job similar to that from which he retired. The advice which he received indicated that his new position would not be viewed as a restoration to service pursuant to § 1123. Presumably, the person acted at least in part on the basis of this advice. Thus, there is an element of reliance present in this case which may render a resolution adverse to the person in question unfair.

Finally, we understand that the case in issue may represent only a single example of a more widespread problem: retirement and return to what could be viewed as a covered position but on an independent contractual basis. To penalize the retiree here involved when there is in fact no systematic way of reaching others in the same situation may result in less than even-handed treatment. We therefore leave it to the Board to determine whether further action should be taken regarding the person whose actions led to your question or whether the principles articulated in this opinion should be applied solely on a prospective basis.

While we are unable to resolve this specific dispute, we do believe that the concept of "restoration to serive" merits attention. More specifically, there are serious questions as to whether, and subject to what limitations under § 1123, a member of the Retirement System may retire and then return to work as an independent contractor. The purpose of this opinion is to give the Board some guidance in dealing with such questions.

The concept of "restoration to service" is not specifically defined in § 1123, and there is no significant legislative history which would help to give substance to it. Therefore, it would seem appropriate for the Board of Trustees, the body charged with its implementation, to interpret § 1123 in order to apply it on a systematic basis. To a certain extent, the Board has done this by recognizing in certain situations that independent contractors are not restored to service for purposes of § 1123.

The language of § 1123 supports a distinction between independent contractors and employees because it keys limitation of benefits to return to "service," and "service" is specifically defined in 5 M.R.S.A. § 1001(23) as "service as an employee, as defined in this section, for which compensation was paid."

It would seem clear that under such an interpretation, the interpreting authority, here the Board, must determine on a case-by-case basis whether a person characterizing himself as an independent contractor is truly in that status or is attempting to circumvent the earnings limitation imposed by § 1123. In order to make such determinations, criteria must be established and applied.

The law has developed specific criteria defining an independent contract. The chief issue in making such a determination is the extent to which the work of the person in question is controlled by the employer. E.g., Poulette v. Herbert C. Haynes, Inc., 347 A.2d (Me. 1975); Jenkins v. Hardware Mutual Casualty Co., 156 Me. 288 (1957). The independent contractor will have control of the execution of the details of his work, whereas the employee will be subject to the employer's control as to such details. See Kirk v. Yarmouth Lime Co., 137 Me. 73 (1940). A set of factors, most of which relate to the issue of control, is set out in Murray's Case, 130 Me. 181, 186 (1931). They are as follows:

1) existence of a specific contract;

2) independent nature of business or calling;

3) employment of assistants with power to supervise their activities;

4) furnishing of tools, supplies, or materials;

5) right to control progress of work, except as to final results;

6) time of employment;

7) method of payment, whether by job or by time;

8) whether the work is part of the regular business of the purported employer.

Additionally, Murray's Case, supra, notes the importance of the factor of power to terminate the relationship. Id. at 187.

While these factors are useful in determining whether, as a strictly legal matter, an independent contract exists, there are other factors related to the specific policy of § 1123 to preclude excess earnings in covered employment after retirement. Thus, in our view, it would be appropriate for the Board to utilize additional criteria in carrying out the policies underlying the Retirement System statute as a whole. For example, the Board may wish to exercise greater scrutiny where a retiree has returned, ostensibly as an independent contractor, to a position identical or nearly identical to that from which he retired. Similar scrutiny should perhaps be applied where the person seeking independent contractor status holds a position which has traditionally been an employment position requiring membership in the System. On the other hand, the Trustees may also wish to take into account whether the reason for returning to a given position is to provide emergency, transitional or temporary aid. In such circumstances, if the position is for a limited duration, it might be in keeping with the purpose of the law to treat the relationship, in the same manner as an independent contract.2/

The additional criteria set forth in the preceding paragraph are not intended to be exhaustive. It is obviously impossible to anticipate in an opinion every situation which may arise. These criteria also indicate, however, the type of factors the Board may consider in deciding whether a particular "employment" relationship constitutes restoration to service.

In conclusion, we believe that the nature of this type of problem and the frequency with which it may arise deominstrates a need for clarification of the concept of "restoration of service." We think the Board should either seek legislative clarification of § 1123 or should promulgate regulations which would amplify the meaning of restoration to service. The suggestions put forth

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2/ It should be noted that this opinion does not purport to address the issue of the extent to which state and local governments may actually contract for services, as opposed to hiring employees, but only speaks to the narrow issue of the extent to which retired persons may offer contract services without invoking the earnings limitations of § 1123.

herein are not meant to limit the Board or dictate its actions but merely to provide some preliminary guidance. If we can be of further assistance on this or other matters, I hope that you will feel free to contact us.

Very truly yours,

RICHARD S. COHEN
Attorney General

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cc: Members of the Board
W. G. Blodgett