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William G. Blodgett
Executive Director
Maine State Retirement System
State House #46
Augusta, Maine 04333

Dear Bill:

You have requested an opinion from this office on the question of whether the Assistant to the Commissioner of Educational and Cultural Services has the option of joining the Maine State Retirement System. This request requires us to formulate a general rule to determine which state employees are not required to join the Maine State Retirement System as a condition of their employment. The relevant language appears in 5 M.R.S.A. § 1091(1), which describes membership in the System and which reads as follows:

> Any person who shall become an employee shall become a member of the retirement system as a condition of employment and shall not be entitled to receive any retirement allowance under any other retirement provisions supported wholly or in part by the State, anything to the contrary notwithstanding. Membership shall be optional in the case of any class of elected officials or any class of officials appointed for fixed terms.
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> [Emphasis added.]

In order to formulate a rule, we must determine the meaning of the words "fixed term." As a starting point, we think that the

Legislature intended to encompass at least those officials for whom a specific term is established by constitution or statute.1/ We do not think, however, that these are the only state employees who are to be viewed as serving fixed terms.

We also think that the words "fixed term" were meant to include employees who are appointed by and serve at the pleasure of officials with fixed terms. It is well established that, in the absence of statute, an appointing authority cannot confer on his appointees tenure beyond his own term. See Longley v. State Employees Appeals Board, 392 A.2d 530, 531 (Me. 1978); Ross v. Hanson, 227 A.2d 606 (Me. 1967). It follows that "at pleasure" appointees of officials appointed or elected to offices with established tenures serve a "fixed term" because their tenure is, at most, coterminous with their appointer. In our view, the Legislature intended to include within the "class of officials appointed for fixed terms" not only those officials whose terms are specifically limited by statute or constitution, but also appointees who serve at the pleasure of such officials.

In the context of the Personnel Law, the interpretation suggested in this opinion draws a distinction between state employees who are appointed either to a set term or serve at the pleasure of appointing officials and those state employees who may only be dismissed "for cause." 5 M.R.S.A. § 678. When viewed in this way, our conclusion is supported by the history of the enactment of the original Retirement System statute. The language of § 1091(1) which is interpreted

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1/ This conclusion runs contrary to Lothrop v. Rockland & Rockport Lime Co., 110 Me. 296 (1913), in which the Law Court held that a state official was not appointed for a fixed term if a procedure for his removal prior to the expiration of that term existed. For a number of reasons, however, we do not think the Legislature intended to incorporate that holding into its definition of "fixed term" in the Retirement System statute. First, the Court was interpreting a different statute whose purpose is in no way related to the Retirement System. Second, since statutory or constitutional removal procedures exist for every civil official, see, e.g., Me. Const., art. IX, § 5, the ultimate extension of Lothrop's reasoning is that there are no officers whose terms are "fixed." Finally, and most significantly, the reasoning in Lothrop is flawed and therefore unpersuasive, and we do not think that the Legislature would have incorporated its conclusion in a statute.

herein is identical to the language found in the original retirement statute. P.L. 1941, c. 328, § 227-C. Since the Personnel Law in effect at the time of that enactment set up the same distinction between "for cause" and "at pleasure" employees, see R.S. 1944, c. 59, § 16, it is reasonable to infer that the Legislature had this distinction in mind when it employed the words "fixed term" in the 1941 retirement statute.2/

The distinction suggested in this opinion is also supported by a policy inherent in the operation of the Retirement System. The critical difference between "at pleasure" and "for cause" employees is that the latter have some protection against dismissal, and can therefore reasonably expect to serve a long period or an entire career in state government, while the tenure of the former is likely to be more limited. Under both the current and original retirement statutes, it is necessary to serve a substantial period as a state employee in order to qualify for meaningful retirement benefits. In both cases, the amount of benefit is based on the number of years of service. 5 M.R.S.A. § 1121(2)(A)(1); R.S. 1944, c. 60, § 5(II). Additionally, under the original statute, it was necessary to be

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2/ There is one category of state employees which does not appear to fall within the "for cause"/"at pleasure" distinction developed in this opinion. State officers who are subject to the provisions of 5 M.R.S.A. § 2 appear to have the characteristics of both categories. That section reads as follows:

> All civil officers, appointed in accordance with law, whose tenure of office is not fixed by law or limited by the Constitution, otherwise than during the pleasure of the Governor, shall hold their respective offices for 4 years and no longer, unless reappointed, and shall be subject to removal at any time within said term by the Governor for cause.

The effect of this provision is to limit the term of an officer whose tenure is "not fixed by law or limited by the Constitution, otherwise than during the pleasure of the Governor" to four years, subject to removal for cause during that four-year period. Officers subject to this section thus have "for cause" protection, but only for the limited period of their terms. We conclude that these officers serve a "fixed term" for purposes of § 1091 because their tenure is set by statute and they therefore fall within the original class intended to be excepted from mandatory membership in the Retirement System. Their "for cause" protection does not change this result because it applies only within the period of their set term.

"in service" at the age of 65 in order to qualify for benefits, R.S. 1944, c. 60, § 5(I), and currently, a member must have at least 10 years of service to qualify for a minimum benefit. 5 M.R.S.A. § 1121 (2)(A)(4). It is probable that the Legislature had these provisions in mind when it determined whether membership in the System was to be optional or mandatory. It is therefore reasonable to conclude that the Legislature decided to distinguish between the class of employees whose tenure with the State was likely to be so limited that they might never qualify for benefits and those who could expect to qualify. Membership of the former in the System could be optional; for the latter, it was to be mandatory.

We must now apply the rule formulated herein to your specific inquiry as to whether the Assistant to the Commissioner of Educational and Cultural Services is an official appointed for a "fixed term" under § 1091(1). The Assistant to the Commissioner is described in 20 M.R.S.A. § 1-B(5), as serving at the pleasure of the Commissioner and as not being subject to the Personnel Law. We therefore conclude that the Assistant to the Commissioner of Educational and Cultural Services serves for a "fixed term" under § 1091(1) and therefore may join or not join the System at her option.

We hope this information is useful. If you have any further questions, please feel free to contact this office.

Very truly yours,

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JET/jwp

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