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David W. Bustin, Commissioner
Department of Personnel
State House Station #4
Augusta, Maine 04333

Dear Commissioner Bustin:

You have requested an opinion from this Office on the question of whether the rule of the Maine Department of Personnel (the Department) governing the eligibility of retired state employees[1] for state employment, Chapter 8, Section 4, is in conflict with that provision of the State Retirement Law, 5 M.R.S.A. § 1123, governing the computation of benefits for retired employees who return to active employment. For the reasons which follow, we conclude that, as far as it affects former state employees, the Department's rule conflicts with the Retirement Law and should be considered of no effect.[2]

1/ Whenever we refer to state employees in this Opinion, we also include public school teachers as defined by 5 M.R.S.A. § 1001(18),(25) since these teachers are treated as state employees under our retirement statute.

2/ You have also asked whether the Department's rule applies to employees of participating local districts (p.l.d.'s), such as municipalities or counties. The pertinent language of Section 4 is broad:

> Persons receiving retired pay benefits through or from the Maine State Retirement System shall be eligible for further state employment on a temporary, emergency or project basis only, and such employment shall not exceed 90 working days in any calendar years.

(Cont.)

Section 4 of Chapter 8 of the Maine Personnel Rules prohibits "[p]ersons receiving retired pay benefits through or from the Maine State Retirement System" from being employed by the State on more than a "temporary, emergency or project basis . . . not [to] exceed 90 working days in any calendar year." 5 M.R.S.A. § 1123, on the other hand, imposes limits on the amount of a state retiree's retirement benefit if he is restored to state service. Under this section, the retiree may earn up to a given amount upon re-employment by the State before his retirement allowance is reduced or cut off. Section 1123 does not by its specific terms, however, prohibit a state retiree from being rehired by the State. In fact, it implies that he may be rehired.

2/ (Cont.)

Two considerations suggest that Section 4 was not intended to apply to this class of retirees. First, Section 4 specifically speaks in terms of "further state employment," [emphasis added], suggesting strongly that it is limited in its effect to retired persons who had previously been employed by the State. The second reason for declining to accord Section 4 such broad effect arises from the financial rationale underlying the rule. Section 4 was intended at least partly to save the State from paying an employee both a salary and a retirement allowance, but this rationale does not apply to former p.l.d. employees because the State made no employer contributions to the System for these employees, and their retirement allowances are in no way derived from State funds. Liability for p.l.d. retirement allowances rests wholly with the local district. See 5 M.R.S.A. § 1092(9). Under these circumstances, it is unlikely that the drafters of Section 4 intended it to apply to retired employees of p.l.d.'s.

Even if Section 4 were applicable to p.l.d. retirees, however, the conclusion reached in this Opinion that it is invalid would not apply to them. The reason for this result is that the source of the rule's invalidity as to retired state employees and teachers, its conflict with § 1123, is not present as to former p.l.d. employees. The System has traditionally interpreted § 1123 as not applying to p.l.d. retirees who become employed by the State. Since § 1123 does not apply to limit a p.l.d. retiree's benefit when he is hired by the State, it cannot conflict with Section 4 and is not invalid for that reason as to these retirees.

The effect of Section 4 is to force the state retiree to give up his pension in order to qualify for re-employment, even though, based on his earnings in the new job, he might be entitled to continue to receive all or part of that allowance under Section 1123. Because a retiree may be put to this choice, it is evident that Section 1123 and Section 4 are in conflict.

It is a basic principle of administrative law that an administrative rule which conflicts with a statute is void. Marshall v. Gibson's Products, Inc. of Plano, 584 F.2d 688 (5th Cir. 1978). The rationale of this rule is that a statute states the Legislature's policy in a given area and that such policy would be undercut if an agency were permitted to promulgate conflicting rules. See Harris v. Alcoholic Beverage Control Appeals Bd., 39 Cal. Rptr. 192 (D.Ct. App. 1964); see also Mississippi State Tax Comm'r. v. Reynolds, 351 So.2d 326 (Miss. 1977).

In the instant case, it appears that Section 1123 was intended to state the Legislature's policy on the re-employment by the State of retired state employees. That policy is that such retirees may be re-employed, subject to the limitations on their retirement benefits imposed by Section 1123. Section 1123 is limited in its operation to the situation in which a state retiree returns to state service. It does not affect a state retiree's earnings if he becomes employed by a municipality or in the private sector. It operates only when a state retiree is restored to "service," and service is defined, in the state retiree context, as state employment. 5 M.R.S.A. § 1001(23), (10). The Legislature's policy is precise and limited in scope. If the Department is able to promulgate a regulation barring retirees from re-employment by the State completely, the Legislature's policy would be entirely frustrated.

Further support for this conclusion can be found in the legislative history of Section 1123. Absent from that long history[3/] is any suggestion that a rule barring re-employment of state retirees and the concept of limiting benefits effectuated by Section 1123 can stand together or that the Department of Personnel might have the authority, independent of Section 1123, to bar re-employment of state retirees by the State.

We therefore conclude that the Legislature intended that Section 1123 govern the question of whether state retirees could be rehired by the State and under what circumstances. Since Section 4 conflicts with Section 1123's resolution of this issue, it should be considered of no effect.

3/ The predecessor of Section 1123 was part of the first Maine State Retirement System statute. P.L. 1941, c. 328.

As a result of the conclusions reached in this Opinion, your fourth question regarding amendment of Section 4 need not be addressed.

We hope this information is useful. If you have any further questions or concerns, please do not hesitate to contact this Office.

Sincerely,

JAMES E. TIERNEY
Attorney General

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cc: Roberta Weil