641026.1

RETIREMENT SYSTEMS: State Employees—Payments in addition to regular salary.

State Retirement Board may not accept retroactive contributions covering payments in addition to ordinary salary to certain employees of State Accident Fund nor recompute the final average compensation of retirants. Payments of this nature are properly included in compensation and contributions including the required percentage of such payments reported should hereafter be accepted.

No. 4381 October 26, 1964.

Mr. Lawrence L. Farrell
Executive Secretary
Employees' Retirement System
Lewis Cass Building
Lansing 13, Michigan

Act 240, P.A. 1943, as amended, being C.L.S. 1961 § 38.1 et seq.; M.S.A. 1961 Rev. Vol. and 1963 Cum. Supp. § 3.981(1) et seq., provides for a retirement system for state employees. Section 13 of the Act was amended by Act 25, P.A. 1944 (Ex. Sess.) to permit employees of the State Accident Fund[1] to become members by filing written notice with the retirement board within 1 year from employment. Section 13 has subsequently been amended but not in pertinent part.

It has been the policy of the State Accident Fund to require its employees to become members. Employees have contributed to the fund on the basis of their ordinary salaries and the employer contribution is made by the State Accident Fund.

I am informed of the facts set out below in regard to participation of such members in the system. Payments in addition to ordinary salary have been made to certain executive employees of the Accident Fund. The first provision for these payments was made at a meeting on January 10, 1945, at which time it was decided that an amount equalling 5 per cent of the 1944 salary would be paid to such executives. A like sum was paid in quarterly installments during the year 1945. By action of the advisory board of the Accident Fund, similar payments have been authorized in advance for every year since then and payments have been made on a quarterly basis. Payments currently equal an amount constituting 20 per cent of ordinary salary.

Employee contributions to the State Retirement Fund have never been made covering these extra payments nor have employer contributions been based on amounts including them. Certain retirants now submit that the extra payments should properly have been considered as part of their total compensation.

Based on these facts, you ask if the State Empolyees' Retirement Board can (1) accept retroactive contributions covering the payments in addition to ordinary salary made since 1944 and recompute final average compen-

[1] C.L. 1948 § 415.1 *et seq.*; M.S.A. 1960 Rev. Vol. § 17.199, *et seq.*

sation for those already on retirement; and (2) accept contributions based on such payments in the future.

Section 35 of the Act, (C.L.S. 1961 § 38.35; M.S.A. 1961 Rev. Vol. § 3.981(35)) requires that each member contribute a specified percentage of his annual compensation to the employees' savings fund.

Compensation is defined by Section 1(q) of the Act, as last amended by Act 233, P.A. 1962 (M.S.A. 1963 Cum. Supp. § 3.981(1)(q)) as follows:

> " 'Compensation' means the remuneration paid a member on account of his services rendered to the state, except remuneration paid in lieu of accumulated sick leave. * * *"

Compensation is a broader term than salary. In *Kane v. City of Flint,* 342 Mich. 74, compensation was held to include retirement pension benefits, group insurance and furnishing of uniforms. Thus, compensation of the recipients was increased by the value of these items and, being equivalent to compensation received by others, the plaintiffs involved were unable to maintain that their compensation was not equal to other employees as required, merely because their wages or salary was less.

Opinions of the Attorney General have previously considered the term compensation in relation to retirement contributions. In Opinion No. 3541 dated October 21, 1961, O.A.G. 1961-62, p. 194, the Attorney General held that employer-paid insurance premiums were includable in "compensation" for the purpose of computing state and employee contributions to the Public School Employees' Retirement Fund. In Opinion No. O-3115 dated April 5, 1945, O.A.G. 1945-46, p. 298, it was held that payment for vacation leave not used was compensation earnable and therefore subject to retirement contribution deduction even when paid after separation from state service. Such payments were held to be includable in compensation used in determining "average final compensation" in Opinion No. 1150 dated June 12, 1950, O.A.G. 1949-50, p. 585.

If the payments in question were made to the executive employees for services rendered, it follows that they must also be considered a part of compensation. In essence, the effect of the payments is to increase ordinary salary even if superficially not considered as part of it.

The possibility that the extra payments involved could be classified as salary is not excluded. The Attorney General has found longevity pay to be within the term salary (Opinion No. 2616 dated June 7, 1956, O.A.G. 1955-56, Vol. II, p. 317, and Memorandum Opinion No. M-617 dated May 2, 1960). There is no doubt, of course, that salary is within the term compensation.

In any case, it seems clear that the payments in addition to ordinary salary are encompassed within the broader term "compensation." They are definitely remuneration for services. To hold otherwise would be to constitute the payments a mere gratuity (*Kane v. City of Flint,* supra). Nowhere is the State Accident Fund authorized to pay gratuities (See C.L. 1948 § 415.1 et seq.; M.S.A. 1960 Rev. Vol. § 17.199 et seq.).

The Accident Fund is, in fact, authorized to pay "compensation" to its employees. The empowering section is C.L. 1948 § 415.9; M.S.A. 1960 Rev. Vol. § 17.207, which reads in pertinent part as follows:

> "He (commissioner of insurance) may employ such deputies and assistants and clerical help as may be necessary, and as the advisory board, hereinafter created, may authorize, for the proper administration of said funds, and the performance of the duties imposed upon him by the provisions of this act, at such compensation as may be fixed by the advisory board, and may also remove them."

There is no indication that the payments were not intended to be within the authority of this section.

This not to say, however, that retroactive contributions covering such payments in the past can be accepted and final average compensation recomputed. The Retirement Act (Act 240, P.A. 1943, as amended) does not empower the system or board to take such action.

Sections 13, 17 and 18 of the Act authorize the payment of retroactive contributions in certain cases. Section 13 allows such payments when certain state employees become members for the first time; Section 17 allows such payments to cover creditable service by a member under certain positions not covered by the Act; and Section 18 allows such payments by those members returning from war or federal service. No provision permits retroactive contributions where none were made for a period of years on a portion of compensation of a covered position. It must therefore be concluded that such contributions cannot be made. (*Sebewaing Industries, Inc. v. Village of Sebewaing,* 337 Mich. 530.)

It is true that in one instance, the Attorney General has ruled that similar retroactive contributions could be made. In Opinion No. O-2829 dated January 11, 1945, O.A.G. 1945-46, p. 169, where no deductions for contributions to the retirement system were made for a state employee for two years, the employee was said to have a duty to make the payments. The deductions had not been made as his appointing authority did not think he was covered by the Act.

That opinion is distinguished, however, by the fact that only one employee was involved, only a two year period had to be considered and contributions were withheld because of a mutual mistake of law in deciding that the employee was not eligible to join the retirement system. In addition, no threat to the actuarial soundness of the system was there presented.

Until Section 35 of the Act was amended by Act 196, P.A. 1953, the deduction and contribution of an employee was a percentage of his annual compensation not in excess of $3,600. From the effective date of that act, the employee contribution was a percentage of annual compensation not in excess of $4,800 until Section 35 was again amended by Act 237, P.A. 1955. This latter amendment removed the limitation when members became covered under the old age and survivors insurance program and a percentage of total compensation was thereafter required to be taken.

Records of the executive employees of the State Accident Fund involved reveal that their ordinary salary always exceeded the limitation when it was in effect. Thus, retroactive employee contributions would be a consideration only after the effective date of elimination of the limitation as set forth in the 1955 amendment.

Employer contributions, however, have always been calculated on total compensation. (Sections 38 and 39 of Act 240, P.A. 1943, and as amended

by Act 196, P.A. 1953 and Act 237, P.A. 1955.) Obviously retroactive contributions for retirants would not correct the deficiency resulting from the fact that employer contributions in this case were never made on the payments in addition to ordinary salary. There is no provision in the Act to provide such a sum retroactively plus interest, but its absence, if final average compensation were recomputed, could threaten the actuarial soundness of the system.

The State Accident Fund makes the employer contributions in the present situation. While not required to make such contributions, it may do so. (Opinion No. O-3246 dated March 14, 1945, O.A.G. 1945-46, p. 271). If the State Accident Fund fails to make the employer contribution in any year, participation of its employees in the retirement system would have to cease. Correspondingly, a partial failure to make employer contributions as occurred here makes it impossible to recompute final average compensation as though contributions had been made in full.

It is observed that Section 41 of the Act (C.L. 1948 § 38.41; M.S.A. 1961 Rev. Vol. § 3.981(41)) authorizes the correction of errors. It provides that:

> "Should any change or error in the records result in any member, retirant or beneficiary receiving from the retirement system more or less than he would have been entitled to receive had the records been correct, the retirement board shall correct such error and, as far as practicable, shall adjust the payment in such a manner that the actuarial equivalent of the benefit to which such member, retirant or beneficiary was correctly entitled shall be paid."

This section allows the "retirement board" to correct errors in *its* records and adjust payments in accordance with, and to compensate for the mistake.

The matter under consideration, however, is not a mistake in the retirement board's records. Contributions collected from those involved and made by the State Accident Fund on their behalf are there accurately reflected.

Nor is there a mistake in the records of the State Accident Fund. The decision to omit the payments in addition to ordinary salary was deliberately made as a matter of policy, and these amounts were not reported to the retirement board. A mistake of law is not involved here. The desire to now include such amounts for retirement purposes and recompute final average compensation stems from a change in attitude on the part of the State Accident Fund caused by the persuasion of certain retired employees. Section 41 was not designed to remedy this type of situation.

Unlike the case of regular state employees, where the board can readily ascertain the correct compensation paid and the contributions based on its total that must be made, the board must depend on information from the State Accident Fund to know how much compensation the Fund's employees received. Contributions and the benefits of some already retired have been based on such information and the board may continue to rely thereon.

It is accordingly my opinion that the retirement board is without authority to accept retroactive contributions covering payments in addition to ordinary salary and recompute final average compensation for those already on

retirement. It should, however, accept employee and employer contributions to the system based on such reported payments plus other compensation in the future, if made currently, and calculate future benefits thereon.

FRANK J. KELLEY,
Attorney General.

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GOVERNOR: Powers as Commander-in-Chief

NATIONAL GUARD STAFF OFFICERS: Court Martial

The governor's powers as Commander-in-Chief of the National Guard do not include the power to summarily relieve officers of the National Guard from their positions.

Under Act 84 P.A. 1909 as amended the Adjutant General and the Quartermaster General are staff officers. In the absence of resignation or disability, such staff officers can be relieved of their duties by the governor acting as Commander-in-Chief by the finding of cause by a court martial legally convened for that purpose.

No. 4387 November 2, 1964.

Honorable George Romney
The Governor
Capitol
Lansing, Michigan

You have been extensively quoted in the press, on radio and on television to the effect that you are seeking my advice concerning the legality of your action of October 8, 1964 in relieving from state actual duty Major General Ronald D. McDonald, the Adjutant General of Michigan; Brigadier General Carson R. Neifert, the Quartermaster General of Michigan; and Lieutenant Colonel Versel Case, Junior, the Executive Officer of the Office of Quartermaster General. Herewith I am responding to your publicly stated request, and also take note of the fact that you did not see fit to provide me with a formal request for an opinion.

Your action was ostensibly taken under your general powers as Commander-in-Chief.

I find no justification for your action solely on the ground that you are Commander-in-Chief of the armed forces pursuant to Article V, Section 12, Constitution of 1963. Your powers as Commander-in-Chief are statutorily enumerated in Section 19 of the Military Establishment Act being Act 84 P.A. 1909 as amended (C.L. 1948 § 32.1 et seq., M.S.A. 1961 Rev. Vol. § 4.591 et seq.). Nothing appearing in Section 19 authorizes you to relieve officers of the National Guard from their positions nor do I consider you to have any such implied power. A case in point is *People ex rel. Boatright, Atty. Gen., v. Newlon* (1925), 238 P. 44, wherein the Supreme Court of Colorado dealt with a situation somewhat similar to the matter here under consideration. The governor had attempted to remove the acting adjutant