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Honorable Glen B. Gainer, Jr.
State Auditor
State Capitol, Room W-100
Charleston, West Virginia 25305

Dear Auditor Gainer:

This office is in receipt of your request for an opinion regarding Enrolled Committee Substitute for House Bill Number 4367 Acts of the Legislature, Regular Session, 1988. The bill was passed with an effective date of July 1, 1988. The bill amended Chapter 5, Article 5, Section 3, of the Code of West Virginia of 1931, as amended (hereinafter Code).

Specifically, your inquiry addresses the question:

"What is the maximum number of accrued annual leave days of an eligible employee under Code 5-5-3 for which, at his option, lump sum payment may be made at the termination of his employment, and in what manner are these days of accrued annual leave to be actually applied in respect of calendar months in determining the total and full amount of such lump sum salary payment to be made?"

You requested that I interpret the above question in its broadest sense to give you the guidance that this office deems necessary for the reason that the amount of an employee's lump sum payment may also be utilized at the option of the employee in enhancing the employee's retirement benefit computation.

Code 5-5-3, as amended by Enrolled Committee Substitute for House Bill No. 4367 provides in full as follows:

"Every eligible employee, as defined in section one of this article, at the time his or

her active employment ends due to resignation, death, retirement or otherwise, may be paid in a lump sum amount, at his or her option, for accrued and unused annual leave at the employee's usual rate of pay at such time. The lump sum payment shall be made by the time of what would have been the employee's next regular pay day had his employment continued. In determining the amount of annual leave entitlement, weekends, holidays or other periods of normal, noncountable time shall be excluded, and no deductions may be made for contributions toward retirement from lump sum payments for unused, accrued annual leave, since no period of service credit is granted in relation thereto; however, such lump sum payment is to be a part of final average salary computation; and where any such deduction of employee contribution may have been heretofore made, a refund of such shall be granted the former employee and made by the head of the respective former employer spending unit: Provided, That the superintendent of the department of public safety shall make deductions for retirement contributions of members of the department, since retirement benefits are based on cumulative earnings rather than period of service."

Code 5-5-3 refers to Code 5-5-1 for a definition of eligible employee. Code 5-5-2 provides that eligible employees with three or more years service shall receive an annual salary increase equal to thirty-six dollars times the employee's years of service not to exceed twenty years. Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intent can be gathered from the whole of the statute. Kimes v. Bechtold, ___ W. Va. ___, 342 S.E.2d 147 (1986); Manchin v. Dunfee, ___ W. Va. ___, 327 S.E.2d 710 (1984). Accordingly, Code 5-5-3 should be construed in pari materia with Code 5-5-1 and Code 5-5-2.

Code 5-5-3 first provided for an optional payment for accrued annual leave to an eligible employee in a lump sum in 1986. Prior to enactment of Code 5-5-3, the accumulation of, use of, and payment for accrued and unused annual leave days was governed by rules and regulations of the Civil Service Commission, custom and usages of constitutional officers, or rules and regulations of agencies of state government not subject to the rules and regulations of the Civil Service Commission. Constitutional offices and agencies not subject to the Civil Service

Commission frequently adopted, on a voluntary basis, the policies and procedures of the Civil Service Commission. Certain prior opinions of this office set forth the history and current practices of such rules and regulations constituting the law applicable to annual leave days. See, 51 Ops. Att'y Gen. 714 [1964-1966]; 60 Ops. Att'y Gen. 43 [1982-1984]; and 60 Ops. Att'y Gen. 118 [1982-1984].

Precedent established by long continued custom and usage is highly persuasive in construing a statute. Hechler v. McCuskey, W. Va. ___, 365 S.E.2d 793 (1987); State ex rel. Moore v. Blankenship, 158 W. Va. 939, 217 S.E.2d 232 (1975); Robertson v. Hatcher, 148 W. Va. 239, 135 S.E.2d 675 (1964). The custom and usage of long precedent established within state government with respect to the termination of employment by any means is that the employee remain on the payroll of the agency or office until the accrued and unused annual leave days are exhausted. Of course, the employee receives his or her salary for such period.

Statutes creating retirement or termination benefits for public employees should be liberally construed so as to effectuate their purpose. Spence v. Yerace, 155 W. Va. 54, 180 S.E.2d 868 (1971). The custom and usage described above has not been supplanted by Code 5-5-3. Rather the Legislature has provided public employees with an option in addition to the custom and usage described above.

In response to the first part of the question raised by your request for an opinion, the maximum number of accrued annual leave days for which an eligible employee is entitled to a lump sum settlement under Code 5-5-3 is the maximum accrued annual leave days an employee could lawfully carry into a new calendar year under the rules and regulations or customs and usages of his employer plus the number of annual leave days actually accumulated by the employee within the calendar year of the employee's election to receive the lump sum settlement. For instance, assume an employee elects to retire on December 31, 1988. That employee carried over 40 days of leave on December 31, 1987, under the rules and regulations of his employer. The employee would be eligible to receive a lump sum settlement for 40 days plus any annual leave days accumulated between January 1, 1988, and through December 31, 1988. In the instance of an employee governed by the Civil Service Commission, an employee with fifteen or more years service could accrue 24 additional days for a maximum of 64 days through December 31, 1988. Of course, other agencies and offices have different rules and regulations with respect to accrual of annual leave. Each case must be judged on its own merits.

In answer to the second part of the question posed by your request for an opinion, Code 5-5-3 specifies that the lump sum settlement is to be based upon the employee's usual rate of pay at the time of his or her termination from employment for any reason. Words used in a statute are to be given their plain meaning. Thompson v. Chesapeake & Ohio Railroad Co., 76 F. Supp. 304 (S.D. W. Va. 1948). Accordingly, an employee's usual rate of pay is that employee's salary inclusive of that employee's entitlement to annual increment at the time of the employee's termination from employment, with such annual increment to be prorated on the basis on which the employee is paid, whether hourly, bimonthly, monthly, or otherwise. The lump sum payment to which an employee is entitled is to be made by such employee's "next regular payday had his employment continued." The statute looks forward in specifying the time for payment. It is the opinion of this office that the statute also looks forward in specifying that the annual leave entitlement (the amount of lump sum payment for accrued annual leave) is to be determined by excluding, as specified in the statute, noncountable time of the weekends of a calendar month, the holidays of such month, and the other periods of normal, noncountable time (such as compensatory days which are lost) and with the corollary, countable days, clearly being those workdays remaining in such calendar month and against which the employee's accrued and unused annual leave days are to be applied and credited.

During an employee's periods of normal active employment, his accrued annual leave days are only used and credited against such countable workdays (not used against weekend days, holidays or days properly taken as compensatory days earlier earned); therefore, it is the opinion of this office that the Legislature in Code 5-5-3 generally continues such application for determining the amount of the lump sum payment at the time of termination of employment, usually through resignation or retirement. Thus, although an eligible employee will not be remaining on the payroll, but instead will be electing and exercising his option to lump sum payment; nevertheless, the calendar month of the date of his last day on the payroll and/or subsequent calendar months must be used to determine the countable days against which his accrued annual leave days are to be applied and credited and the full month's and/or portion of a month's salary for which he is entitled to be paid in lump sum amount. In respect of any portion of a month and part of month's salary to which an employee may be entitled, such is to be computed by first striking from consideration, as excludable, the aforesaid weekend days, holidays, or other noncountable time, and thereafter determining the fractional part of the monthly salary which is to constitute such lump sum payment, with the numerator thereof being the accrued leave days of an employee remaining and applicable in such month

and the denominator thereof being the countable days of such month remaining after the aforesaid exclusions.

Finally, we turn to consideration of your request that this opinion be expanded, as deemed necessary to give the clearest guidance. The statutory provision, Code 5-5-3, as we earlier noted, is cross-referenced to Code 5-5-1 wherein the increment for certain "eligible employees" is provided, and since Code 5-5-2 also addresses such increment, it must be read in pari materia with Code 5-5-1, both of which latter sections specify that such annual increment constitutes an "annual salary increase." is thus an integral part of an employee's gross annual salary, and such increment is not to be deleted or subtracted in the course of determining the value of payment for accrued and unused annual leave days, either under the "remaining on the payroll" method or under the "lump sum payment" optional method, since such deletion or subtraction unlawfully reduces the value payable for accrued annual leave days.

Very truly yours,

CHARLES G. BROWN
ATTORNEY GENERAL

By



Solicitor General

STEPHEN D. HERNDON

CGB/SDH/k