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Hon. William K. Simmons
Chancellor
W.Va. Board of Regents
950 Kanawha Boulevard East
Charleston, West Virginia 25301

Dr. Tom McNeel
State Superintendent of Schools
W.Va. Department of Education
State Capitol Complex
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Gentlemen:

This is in response to your related inquiries of July 7, 1988 and August 15, 1988, in which you request our opinion concerning the applicability of the June 27, 1988 amendments to W.Va. Code, 18-7A-35b, the early retirement law. Previously enacted on March 12, 1988, the statute was amended to give members of the teachers retirement system "employed under contract" for the 1988-89 school year the option of postponing actual retirement until the end of the school year, rather than leaving employment on December 31, 1988.

The executive secretary of the Teachers Retirement Board has by memorandum dated August 4, 1988 determined that the above statutory amendment does not apply to higher education employees. The Board of Regents therefore asks this question:

"In that higher education faculty receive a contract for the full school year and will be active, contributing members rendering services during 1988-89, why should they not be included as eligible members under paragraph (b) and be allowed to postpone actual retirement until immediately after the close of such contract period and said school year the same as public school teachers?"

The Department of Education's question is as follows:

"Therefore, I would like to know whether the letter sent to each State Department of Education employee annually on or about July 1 from the State Superintendent

of Schools is a written memorandum or note evidencing a contract between the employee and the West Virginia Board of Education."

We have also received inquiries from the W.Va. Schools for the Deaf and the Blind and the Division of Rehabilitation Services regarding the applicability of this exception to their employees. This opinion will attempt to address their concerns as well.

The statute in question is W.Va. Code, 18-7A-35b, which provides a temporary early retirement incentives program for certain members of the teachers retirement system. Subsection (a) defines "eligible members" who may elect to participate in this program as "those active, contributing members actually and currently employed" on April 1, 1988.

Generally speaking, the statute requires that all eligible members who are able to retire by December 31, 1988 and wish to take advantage of this program, make their election and take their retirement by that date. However, subsection (b) of 18-7A-35b contains the following exception:

"(b) Eligible, active, contributing members, aforesaid, employed under contract and rendering services during school year one thousand nine hundred eighty-eight -- one thousand nine hundred eighty-nine shall, if retiring pursuant to the provisions of this section and the early retirement incentive program set forth herein, make application for retirement, including choice of their respective option, and give notice to their respective county boards of education by the thirty-first day of December, one thousand nine hundred eighty-eight, but shall be permitted to postpone actual retirement until immediately after the close of such contract period and said school year; with proper credit to be granted for such extended period." [Emphasis supplied.]

We have been asked to determine to whom this exception applies. The reference to "county boards of education" has caused some confusion. However, in our opinion this language merely describes the manner of giving notice under the statute, and does not define the category of persons entitled to its benefits. This conclusion is supported by other notice provisions in the statute referring to "respective employers" or "other educational agencies."

The criteria for entitlement to the benefits of this exception must be found in the highlighted language above, viewed in the context of the entire statute. The preamble to W.Va. Code, 18-7A-35b states in part:

"The Legislature hereby finds and declares that a compelling state interest exists in providing a temporary, early retirement incentives program for encouraging the early, voluntary retirement of those public employees who were current, active contributing members of this retirement system on [April 1, 1988], in the reduction of the number of such employees and in the reduction of governmental costs therefor; that such program constitutes a public purpose." [Emphasis supplied.]

As the Legislature's express intent in enacting this statute was to temporarily reduce the number of contributing members under the teachers retirement system, in our opinion any exception to its application must be narrowly construed. The Legislature must have intended that an equally compelling state interest or public purpose be served by carving out this exception. Pursuant to Article XII of the West Virginia Constitution, education has been held to be a fundamental constitutional right in this State. See, e.g., Pauley v. Kelly, W.Va., 255 S.E.2d 859 (1979).

We therefore conclude that the Legislature could not have intended that the State of West Virginia be deprived of its right to rely on the continued presence of higher education faculty for the full school year as guaranteed by the terms of their teaching contracts, or that those eligible individuals directly responsible for the education of students be precluded from fulfilling their contractual obligations as a precondition to early retirement.

West Virginia Board of Regents Policy Bulletin No. 51 provides that full-time employment for higher education faculty "is on a full academic year (or at least a nine-month) contract basis for at least six semester credit hours teaching per semester or the equivalent . . ." The Board of Regents has also provided the following exception for faculty members subject to its mandatory retirement policy: "In the event such persons shall reach age 70 in the middle of a semester or fiscal year, such person shall not be compelled to retire prior to the end of the semester or fiscal year." Policy Bulletin No. 18, Section 2.2.

Although higher education faculty may be employed on either an academic year (nine-month) or fiscal year (twelve-month) contract basis, in each case special emphasis has been given to their teaching responsibilities. Therefore, in our opinion higher education faculty are entitled to postpone their actual retirement until the end of the academic or fiscal year pursuant to W.Va. Code, 18-7A-35b(b), if they are otherwise eligible within the meaning of the statute.

For the reasons set forth above, this exception would also apply to teachers under contract with the State Board of Education to teach at the W.Va. Schools for the Deaf and the Blind pursuant to W.Va. Code, 18-17-8.

By contrast, West Virginia Department of Education personnel are employed by the State Superintendent of Schools pursuant to W.Va. Code, 18-3-9, which provides:

"For carrying into effect the provisions of this chapter, the state superintendent of schools shall maintain a department of education at his office at the state capitol, and he shall have authority to employ assistants and such other employees as may be necessary."

On or about July 1 of each year, the Superintendent of Schools sends a letter to each Department of Education employee which states: "I'm pleased to advise you that the West Virginia Board of Education has approved your continued employment for 1987-88." These letters also set forth the salary to be earned for this period, together with any experience increment. However, they do not describe the employee's rights, privileges or responsibilities, referring instead to departmental policies, rules and regulations. These are referred to as "letters of appointment". W.Va. Department of Education Employee Handbook, p.7 (1987). In our opinion, these letters are not "contracts" within the meaning of W.Va. Code, 18-7A-35b(b).

Under W.Va. Code, 18-10A-3, employees of the Division of Rehabilitation Services are appointed by the director of the division, with the approval of the State Board of Education. They are not under contract, and although services rendered by DRS employees may include education, their primary focus is on vocational rehabilitation for disabled individuals. In our opinion, such employees would not be entitled to the benefits of this exception.

Because employment terms and conditions differ greatly within the State educational system, this opinion is advisory only, and is expressly limited to the questions set forth herein.

Very truly yours,

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