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The Honorable G. W. Morris, II
Prosecuting Attorney
Barbour County Courthouse
8 North Main Street
Philippi, West Virginia 26416

Dear Mr. Morris:

You have asked whether school service personnel employed by a county board of education can receive retirement credit with the State Teachers' Retirement System for service with school districts from other states. After thorough review of the applicable statutory sections, we conclude that nonteaching employees may receive retirement credit for service with districts from other states.

West Virginia Code section 18-7A-17 establishes the computation of teacher service within the State Teachers' Retirement System. The Code provides in pertinent part as follows:

For service as a teacher in the employment of the federal government, or a state or territory of the United States, or a governmental subdivision of such state or territory, the retirement board shall grant credit to the member: Provided, that the member shall pay to the system double the amount he contributed during the first full year of current employment, times the number of years for which credit is granted, plus interest at a rate to be determined by the retirement board.

W. Va. Code § 18-7A-17 (1988 Repl. Vol. & 1993 Cum. Supp.).

This section also provides that any transfer of out-of-state service shall not be used to establish eligibility for a retirement allowance and that the credit is for additional service only. Further, the transfer of out-of-state service is prohibited if it is used to obtain a retirement benefit from another retirement system. Finally, the salaries paid to members for service prior to entrance into the retirement system cannot be used to compute the average final salary of the member. W. Va. Code § 18-7A-17 (1988 Repl. Vol. & 1993 Cum. Supp.).

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The statute does state that the transfer of out-of-state service is for service as a teacher. However, West Virginia Code section 18-7A-35 makes nonteaching employees entitled to such a transfer of out-of-state service also. West Virginia Code section 18-7A-35(a) states, "[n]onteaching employees shall mean all persons, except teachers, regularly employed for full-time service by the following educational agencies: (a) Any county board of education, (b) the state board of education, (c) the West Virginia board of regents; (d) and the teachers' retirement board." Subsection b provides that: "[s]uch nonteaching employees shall be entitled to all the rights, privileges and benefits provided for teachers by this article, upon the same terms and conditions as are herein prescribed for teachers." Therefore, any nonteaching members employed by county boards of education are entitled to the same rights and privileges as are teachers under the article establishing the State Teachers' Retirement System. By this we mean that school bus drivers, school cooks, school aides and other such nonteaching personnel are entitled to transfer out-of-state service as a school bus driver, school cook, school aide and the like. Consequently, nonteaching can receive transfer for out-of-state service on the same terms and conditions noted above.

We recognize that this Opinion is in conflict with an advice letter that was issued from the Office of the Attorney General on June 26, 1986 in response to the question whether a nonteaching member of the Teachers' Retirement System may buy credit for time spent as a nonteacher in the employment of the federal government. The response was that the member may not purchase such credit.

It is our opinion that while there is ambiguity in the statutes because of the phrase "as a teacher" that the intent of the Legislature was to provide nonteaching members of the retirement system the same rights, privileges and benefits provided for teacher members. That intent is frustrated if the statutes are interpreted to permit teachers the opportunity to transfer out-of-state employment time with the federal government, state or territory of the United States or their governmental subdivisions to the Teachers' Retirement System but prohibit nonteaching members from transferring their out-of-state service.

We are cautious in observing that the ambiguity of the statutes lends itself to differing interpretations. We note that should the Legislature disagree with our interpretation, it would be an easy matter to amend and reenact the statutory provisions so as to remove ambiguity.

Thank you for the opportunity to comment on this matter.

Sincerely,

William T. Douglass Jr.

WILLIAM T. DOUGLASS, JR.
ASSISTANT ATTORNEY GENERAL