



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2013-9

Executive Director James R. Wilbanks, Ph.D.
Oklahoma Teachers Retirement System
2500 N. Lincoln Blvd., 5th floor
Oklahoma City, Oklahoma 73105

July 25, 2013

Dear Mr. Wilbanks:

This office has received your request for an official Attorney General Opinion, in which you ask, in effect, the following questions:

- 1. If a school district is annexed or consolidated, and a member of the Teachers' Retirement System of Oklahoma is not employed by the consolidated or annexed school district and the member receives employment assistance and elects to accumulate one year of creditable service for retirement purposes pursuant to 70 O.S.2011, § 7-203(B)(1)(c), then is the member responsible for paying statutory retirement contributions to the Teachers' Retirement System on the amount of employment assistance received?**
- 2. If the answer to the first question is "no," is the consolidated or annexed school district responsible for paying statutory retirement contributions to the Teachers' Retirement System on the amount of employment assistance received?**
- 3. If a Teachers' Retirement System member was employed by a school that closed due to annexation or consolidation, and the member was employed by the consolidating school district or another school district, with no break in service credits, and with continued participation and contribution to the Teachers' Retirement System, then does 70 O.S.2011, § 7-203(B)(1)(c) entitle the member to an additional year of service credit?**

The Teachers' Retirement System was established for the purpose of providing retirement allowances and other benefits for teachers of the State of Oklahoma. 70 O.S.2011, § 17-102. Membership in the retirement systems includes classified personnel such as teachers and principals and full-time nonclassified optional personnel such as cooks, janitors, noncertified nurses and

noncertified librarians. *See* 70 O.S.2011, §§ 17-103(1), (2); 17-101(3), (4). The rates have changed over time; however, each member is required to contribute an amount to the retirement system based on a percentage of the member's regular annual compensation. *See* 70 O.S.Supp.2012, § 17-116.2. In addition, the employer of every member of the Teachers' Retirement System shall make contributions to the Retirement System based on a percentage of the member's regular annual compensation. 70 O.S.2011, § 17-108.1(A). The contributions are invested to fund the retirement benefits paid to the member once the member becomes eligible for retirement.

Due to the various costs and issues associated with consolidating school districts the School Consolidation Assistance Fund ("Fund") was established, which may be expended by the State Board of Education for a variety of purposes including the purchase of uniform textbooks, employment of certified personnel, furnishing and equipping classrooms, and the purchase of additional transportation equipment. 70 O.S.2011, § 7-203. In addition, the Fund may be used to pay "employment assistance for personnel of the several districts who are not employed by the consolidated or annexing district." *Id.* § 7-203(B)(1)(c). "Employment assistance may include provision of a severance allowance for administrators, teachers and support personnel not to exceed eighty percent (80%) of the individual's salary or wages, exclusive of fringe benefits, for the school year preceding the consolidation or annexation." *Id.* Finally, "[p]ersonnel receiving such severance pay may accumulate one (1) year of creditable service for retirement purposes." *Id.* Application for the severance allowance must be made "to the Finance Division of the State Department of Education." *Id.*

I.

IF A MEMBER RECEIVES EMPLOYMENT ASSISTANCE AND ELECTS TO ACCUMULATE THE ONE YEAR OF CREDITABLE SERVICE FOR RETIREMENT PURPOSES, ARE CONTRIBUTIONS REQUIRED TO BE PAID ON THE AMOUNT OF EMPLOYMENT ASSISTANCE RECEIVED?

A. Employment Assistance

You first ask if a member receives employment assistance from the School Consolidation Assistance Fund and elects to accumulate the one year of creditable service, is the member and/or employer required to pay the statutory contributions on regular annual compensation for the service credit. To reconcile the statutes requiring contributions on regular annual compensation and employment assistance from the School Consolidation Assistance Fund we first look to the plain language of the statutes to "ascertain and give effect to the legislative intent." *YDF, Inc. v. Schlumar, Inc.*, 136 P.3d 656, 658 (Okla. 2006). First, the statute governing the School Consolidation Assistance Fund states, in part, the following:

- B. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the State Board of Education for the purposes established by this section, the Legislature and in accordance with rules

promulgated by the State Board of Education. The purposes shall be to provide:

....

- c. employment assistance for personnel of the several districts who are not employed by the consolidated or annexing district. *Employment assistance* may include provision of a severance allowance for administrators, teachers and support personnel not to exceed eighty percent (80%) of the individual's salary or wages, exclusive of fringe benefits, for the school year preceding the consolidation or annexation. *Personnel receiving such severance pay may accumulate one (1) year of creditable service for retirement purposes.*

70 O.S.2011, § 7-203 (emphasis added).

The word “‘may’ is ordinarily construed as permissive.” *Osprey L.L.C. v. Kelly-Moore Paint Co.*, 984 P.2d 194, 199 (Okla. 1999). Here, the word “may” indicates the individual receiving the severance pay has the option to accumulate one year of creditable service for retirement purposes. This statute places no extra burdens or requirements on the individual other than requesting the additional year of creditable service. Absent from this statute is any requirement for the individual to pay any contributions into the retirement system for the year of service.

This does not end the inquiry though. We must also look at the statutes governing the Teachers' Retirement System to see if there are any requirements for contributions on the year of creditable service granted in 70 O.S.2011, § 7-203. The statute governing contributions by employees into the Teachers' Retirement System requires that “the amount contributed by each member to the retirement system shall be ... [a percentage] of the *regular annual compensation*” of the member. 70 O.S.Supp.2012, § 17-116.2(B). The question must then be whether the employment assistance paid to an individual not employed by the consolidated or annexing district is considered “regular annual compensation” and must include a contribution into the retirement system to pay for the accumulated one year of creditable service.

B. Regular Annual Compensation

The term “regular annual compensation” is defined in the Teachers' Retirement System statutes, which state in pertinent part the following:

- D. For purposes of Section 17-101 et seq. of this title, *regular annual compensation* shall include:

1. Salary which accrues on a regular basis in proportion to the service performed, including payments for staff development;
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4. ***Excluded from regular annual compensation*** are expense reimbursement payments, office, vehicle, housing or other maintenance allowances, the flexible benefit allowance provided pursuant to Section 26-105 of this title, payment for unused vacation and sick leave, ***any payment made for reason of termination or retirement not specifically provided for in paragraphs 1 through 3 of this subsection***, maintenance or other nonmonetary compensation, payment received as an independent contractor or consultant, pursuant to a lawful contract which complies with the requirements of subsection B of Section 6-101.2 of this title, any benefit payments not made pursuant to a valid employment agreement, ***or any compensation not described in paragraphs 1 through 3 of this subsection.***

70 O.S.Supp.2012, § 17-116.2(D) (emphasis added).

“Employment assistance” and “severance allowance” provided in 70 O.S.2011, § 7-203 is analogous to a “payment made for reason of termination or retirement” that is specifically excluded from contributions on regular annual compensation. 70 O.S.Supp.2012, § 17-116.2(D)(4). Employment assistance and severance allowances are not characterized as “[s]alary which accrues on a regular basis in proportion to the service performed.” *Id.* § 17-116.2(D)(1). By its very nature, the severance allowance is a payment in lieu of the performance of service. Instead, the severance allowance is paid to compensate an individual for being terminated, without fault, from their position due to the consolidation of school districts. This type of payment is specifically excluded from “regular annual compensation” in Section 17-116.2(D)(4). Because the employment assistance is specifically excluded from regular annual compensation, no contributions are required by the employee on accumulating the one year of creditable service for retirement purposes pursuant to 70 O.S.2011, § 7-203(B)(1)(c). In addition, “any compensation not described in paragraph 1 through 3” of 70 O.S.Supp.2012, § 17-116.2 is excluded from “regular annual compensation.” Employment assistance is not described in paragraphs 1 through 3 adding further evidence that contributions are not required on any awarded employee assistance.

The same analysis applies to employer contributions into the retirement system. The statutory contribution requirement for employers states, “[T]he employer of any member of the Teachers’ Retirement System of Oklahoma shall make the following contributions to the System: . . . [a

percentage] of the *regular annual compensation* of the member.” 70 O.S.2011, § 17-108.1(A), (emphasis added). The employer contribution requirement rests on the same defined term of “regular annual compensation” as the employee contribution rate. “Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.” 25 O.S.2011, § 2. Because the employment assistance is specifically excluded from regular annual compensation for the purposes of both employee and employer contributions, no contributions are required by the employer on accumulating the one year of creditable service for retirement purposes.

II.

WHO BEARS THE FINANCIAL BURDEN OF THE ACCUMULATION OF ONE YEAR OF CREDITABLE SERVICE FOR RETIREMENT PURPOSES?

We recognize the concern that if the member receives an extra unfunded year of creditable service, this would necessarily adversely impact the retirement system’s unfunded liability. Although this concern is actuarially valid, it does not require that the member is only entitled to the year of service credit in instances where the member has fully funded the cost of that service credit if the law does not clearly intend such a requirement.

There are numerous instances where the Legislature granted additional benefits to members of state-sponsored retirement programs and in doing so, explicitly stated the additional benefits were contingent upon the member making up funding for them. *See, e.g.*, 74 O.S.2011, § 910.1(B); 70 O.S.2011, § 17-116.9; 11 O.S.2011, § 50-111.2A. In fact, specific procedures and requirements are set forth for any member of the Teachers’ Retirement System who is terminated as a result of a reduction-in-force and wishes to purchase additional benefits. This section specifically states, “To purchase the termination credit, the member shall be required to make payment to the System of an amount equal to both the employer and employee contributions which would have been paid to the System.” 70 O.S.2011, § 17-116.12(C). In this case, the member is not subject to a reduction-in-force but instead is not employed by a consolidated or annexed school district, and there is no requirement imposed by the Legislature to purchase the year of creditable service. Where the Legislature has delineated a requirement in numerous statutes in an area and yet has failed to provide in a similar statute the same requirement, such silence is indicative of legislative intent that the requirement is not intended to exist. *See City of Duncan v. Bingham*, 394 P.2d 456, 460 (Okla. 1964).

The Legislature imposed a requirement in certain instances that additional retirement credits must be purchased and paid for by the member. Here, the Legislature did not impose a requirement to purchase and pay for the retirement credit granted through the employment assistance in 70 O.S.2011, § 7-203(B)(1)(c). Such silence indicates the legislative intent that the requirement to pay for the service credit is not intended to exist. *See Bingham*, 394 P.2d at 460. Such a scenario, where the Legislature has increased the benefits to members of a retirement program without requiring

funding by the member or the employer is not unique. *See, e.g.*, 74 O.S.2011, § 930.3; 70 O.S.2011, § 17-116.1; 70 O.S.2011, § 17-116.13; 11 O.S.2011, § 49-143. In such cases, the financial burden of benefit increases must be borne by the unfunded liability of the retirement system if the Legislature has not dedicated funding to the benefit increase.

III.

IF A MEMBER IS EMPLOYED BY THE CONSOLIDATING SCHOOL DISTRICT OR ANOTHER SCHOOL DISTRICT, IS THE MEMBER ENTITLED TO AN ADDITIONAL YEAR OF SERVICE CREDIT PURSUANT TO 70 O.S.2011, § 7-203(B)(1)(C)?

A. Employed by the Consolidating District

This question requires analysis of two separate issues. First you ask if a member of the Teachers' Retirement System is employed by the consolidating or annexing school district, is the member allowed to accumulate an additional year of service under 70 O.S.2011, § 7-203(B)(1)(c). The plain language of the statute states, in part, that the purpose is to provide "employment assistance for personnel of the several districts *who are not employed by the consolidated or annexing district.*" *Id.* (emphasis added). "If a statute is plain and unambiguous, it will not be subject to judicial construction, but will receive the effect its language dictates." *State ex rel. Okla. Firefighters Pension & Ret. Sys. v. City of Spencer*, 237 P.3d 125, 132 (Okla. 2009) (footnotes omitted). Here, the statute's plain and unambiguous language dictates that it only applies to members "who are not employed by the consolidated or annexing district." 70 O.S.2011, § 7-203(B)(1)(c). Therefore, any member who is employed by the consolidated or annexing district is not eligible to accumulate an additional year of service credit under 70 O.S.2011, § 7-203(B)(1)(c).

B. Employed by a Different District

The second part to your question asks if a member was employed by a school that closes due to annexation or consolidation, and that member is subsequently employed by a district different from the annexing or consolidated district, is that member eligible to accumulate an additional year of service credit even though the member experiences no break in participation or contribution to the Teachers' Retirement System. Again, the plain language of the statute states, in part, that the purpose is to provide "employment assistance for personnel of the several districts *who are not employed by the consolidated or annexing district.*" 70 O.S.2011, § 7-203(B)(1)(c) (emphasis added). Any member who is not employed by the consolidated or annexing district may request employment assistance in the form of a severance allowance from the State Department of Education. *Id.* If the member receives such severance pay, then the member may accumulate one year of creditable service for retirement purposes. *Id.*

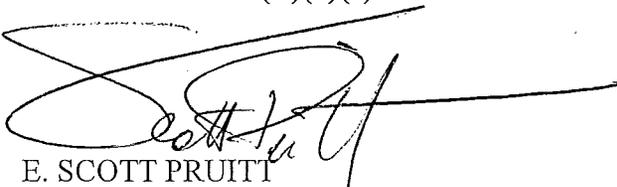
The statute does not provide an exception or exclusion for a member who is employed by a different school district. *Id.* The only requirement to receive employment assistance, including the one year of service credit, is that the member is not employed by the consolidated or annexing district. *Id.*, *see also* OAC 210:1-3-2(e). "If a statute is plain and unambiguous, it will not be subject to judicial

construction, but will receive the effect its language dictates.” *Okla. Firefighters Pension*, 237 P.3d at 132 (footnotes omitted). The plain and unambiguous language of the statute dictates that if a member is not employed by the annexing or consolidated district, then that member is eligible to receive employment assistance. *Id.* If the member does receive employment assistance, then the member is eligible to accumulate one year of service credit for retirement purposes. *Id.* There are no additional exceptions or exclusions for a member employed by a different school district. *Id.* Therefore, if a member who is not employed by a school district that is annexed or consolidated is subsequently employed by a school district different from the annexing or consolidating school district, that member is eligible to accumulate one year of service credit if the member receives employment assistance under 70 O.S.2011, § 7-203(B)(1)(c).

It is, therefore, the official Opinion of the Attorney General that:

- 1. If a school district is annexed or consolidated, and a member of the Teachers’ Retirement System is not employed by the consolidated or annexing school district, and the member receives employment assistance and elects to accumulate one year of creditable service for retirement purposes pursuant to 70 O.S.2011, § 7-203, then the member is not responsible for paying statutory retirement contributions to the Teachers’ Retirement System on the amount of employment assistance received.**
- 2. If a member of the Teachers’ Retirement System is not employed by a consolidated or annexing school district, and the member receives employment assistance and elects to accumulate one year of creditable service for retirement purposes pursuant to 70 O.S.2011, § 7-203, then the consolidated or annexing district is not responsible for paying statutory retirement contributions to the Teachers’ Retirement System on the amount of employment assistance received.**
- 3. If a member of the Teachers’ Retirement System is not employed by a consolidated or annexing school district, and the member receives employment assistance and elects to accumulate one year of creditable service for retirement purposes pursuant to 70 O.S.2011, § 7-203, then the financial burden of the additional year of creditable service is borne by the Teachers’ Retirement System as unfunded liability.**
- 4. If a Teachers’ Retirement System member was employed by a school that closed due to annexation or consolidation, and the member is then employed by the consolidating school district, then the member is not entitled to employment assistance and an additional year of service credit pursuant to 70 O.S.2011, § 7-203(B)(1)(c).**

5. If a Teachers' Retirement System member was employed by a school that closed due to annexation or consolidation, and the member is then employed by a school district different from the consolidated or annexing district, with no break in service credits, and with continued participation and contribution to the Teachers' Retirement System, then the member is entitled to an additional year of service credit if the member receives employment assistance pursuant to 70 O.S.2011, § 7-203(B)(1)(c).



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