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75-293

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R75-337

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Arizona State Retirement System Board  
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Gentlemen:

We are writing in response to your requests for our opinion on the following questions:

1.A. Whether a person employed prior to June 30, 1974 and on leave of absence on July 1, 1975 qualifies for the liberalized benefits of Title 38, Chapter 5, Article 2.1 of the Arizona Revised Statutes as amended by Laws 1974, Chapter 167, and Laws 1975, Chapter 54 (H.B. 2206) without resuming active employment. [R75-335].

B. If the person must resume active employment, what minimum length of service enables him to be eligible for the liberalized benefit? [R75-335].

2. Whether a person who terminated his employment prior to June 30, 1974 and who retired July 1, 1974 is entitled to have his benefit recomputed at the two percent rate for future service as provided by Title 38, Chapter 5, Article 2.1 of the Arizona Revised Statutes, as amended by the Laws 1974, Chapter 167, and Laws 1975, Chapter 54 (H.B. 2206). [R75-337].

1. Section 1 of Chapter 54, Laws of 1975 (House Bill 2206), amending Laws 1974, Chapter 167, section 7, sets forth the "active participants" and the "retired participants" of the retirement plan who will be entitled to receive increased benefits under the act. It does not make special provision for persons on leaves of absence, and does not define "active." Nor is the rest of the act particularly helpful in determining the status of a person on leave. It is possible to argue from certain provisions that persons on leaves of absence are not active participants and therefore not entitled to increased benefits unless they resume employment. It is also possible to argue that other provisions reflect a general



policy that leaves of absence should not adversely affect rights under the act, and that therefore persons on leave should be included in the group of active participants qualifying for increased benefits.

In attempting to determine the status of a person on leave of absence, it is necessary to refer to the following definitions:

1. A.R.S. § 38-781.01.24(a):

"Participant" means:

Any employee of an employer member of the plan who is a member of the system as of the effective date and makes an appropriate election to join the plan.

2. A.R.S. § 38-741.6:

"Employee" means any employee of an employer member of the system.

3. A.R.S. § 38-781.01.19:

"Leave of absence" means:

(a) Any authorized vacation.

(b) Any leave of absence authorized by the board under uniform rules to be prescribed by it, including but not limited to, leaves authorized for sickness, disability or to pursue education or training. Time spent on leaves of absence in excess of ninety days shall not count as credited service, nor shall such time be considered as interruption of credited service.

On the one hand, the definition of a "participant" as an employee and the use of "active" to qualify "participant" support the view that a person on leave of absence is not an active participant within the terms of Chapter 54, Laws of 1975 (H.B. 2206), and must therefore resume active employment in order to take advantage of the increased benefits. The ordinary meanings of "employee" and "active" suggest that the person must be working and receiving compensation and thus "actively" contributing to the plan at the time

specified. This reasoning is buttressed by the definition of "employee" member in Attorney General Opinion No. 70-26 as one "actively engaged in his employment rather than a 'retired' member or a 'leave of absence' member." The reasoning is further supported by analogy to A.R.S. § 38-781.29 which provides:

A. All members of the system on leave of absence as of the effective date of the plan, shall be given an opportunity to become a participant in the plan. Leave of absence members electing to become participants in the plan shall, upon return to employment, be given credit for the number of credited past service standing to their benefit as indicated by the system's records as of the effective date of the plan. All leave of absence members, not returning to employment with an employer member, shall be deemed to have had their election to participate in the plan revoked and shall be granted a retirement benefit provided by the system.

B. Any active participant of the plan who is officially granted leave of absence from employment without pay may elect to be credited with future service for retirement purposes for not more than one year of such leave by paying to the plan the amounts as provided in subsection C of this section, provided such participant has not withdrawn contributions from the plan.

C. An active participant of the plan who elects to be credited with such leave period as provided in subsection B shall, within ninety days after terminating such leave and resuming such employment, unless employment could not be resumed because of disability or nonavailability of a position with the same employer, pay to the plan the amount equal to the employer and employee contributions for such period together with interest as provided by law, based on the salary received by such participant before such leave of absence commenced.

By analogy to this section, a person on leave of absence would qualify for increased benefits only upon his return to active employment.

In contrast, other definitions support the view that a person on leave is entitled to the increased benefits without resuming active employment. A.R.S. § 38-781.01.19, defining "leave of absence," states that time spent on leave of absence "shall (not) . . . be considered as interruption of credited service," and A.R.S. § 38-781.01.7 defines "continuous service" as "service, including periods of approved leave of absence, rendered as an employee of the system. . . ." These definitions indicate that leaves of absence do not adversely affect rights under the plan. Thus, leaves are to be treated as continuous service although not counting as credited service beyond ninety days and are to be ignored when determining such things as the five consecutive years for computing the average monthly compensation (see A.R.S. § 38-781.01.3). Following this reasoning, a person on leave of absence could be considered as continuing in service even though not actively engaged in his employment at the time and, therefore, qualified automatically for the increased benefits without resuming active employment.

From this analysis, it appears that the Legislature has not provided clear-cut dictates as to the status of a person on leave; either view can be supported by reference to different sections of the act. Thus, it is within the authority of the board to promulgate appropriate rules as directed in Section 1 of Chapter 54 of the Laws of 1975 which make an administrative interpretation of the law on this question.

2. It is clear from Section 1 of Chapter 54, Laws of 1975, that a person who had terminated his employment prior to June 30, 1974 would not qualify for the benefits provided under Chapter 167, Laws of 1974. However, a person who terminated his employment prior to June 30, 1974 but then began receiving retirement benefits on or after July 1, 1974 does qualify under the second sentence of Section 7.A of Chapter 167, Laws of 1974 as amended by Chapter 54, Laws of 1975, which provides:

Participants who began receiving normal retirement or early retirement benefits under the plan established by title 38, chapter 5, article 2.1, Arizona Revised Statutes, on or after July 1, 1974 shall, at the participant's discretion, on July 1, 1975 commence receiving such pension benefits calculated in accordance with the provisions of this act.

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Thus, regardless of when he terminated his employment, any person who began receiving retirement benefits under the plan established by Title 38, Chapter 5, Article 2.1 on or after July 1, 1974 qualifies under this section and is entitled to elect to receive benefits calculated at the rates provided in Chapter 167 of the Laws of 1974.

Very truly yours,



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The Attorney General

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