2008-113

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July 30, 2008

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Honorable Robert L. Childree
State Comptroller
State Comptroller's Office
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Deferred Retirement Option Plan – Leave, Annual and Sick – Compensation

A participant in the Deferred Retirement Option Plan ("DROP") continues to earn and may take sick leave during DROP and after DROP if the participant continues to work.

DROP participants entitled to receive payment for sick leave at retirement, who retire at the end of the DROP period or after continuing to work after DROP, are entitled to receive payment based on their sick leave balance at the time of entry into DROP, or at the time of retirement, whichever is less.

Under section 36-27-170(j) of the Code of Alabama, state merit system employees are exempt from this requirement. State

merit system employees who participate in DROP, and retire at the end of the DROP period or after continuing to work after DROP, are entitled to receive payment for 50 percent of their accrued and unused sick leave up to 600 hours at the time of retirement pursuant to section 36-26-36(a) of the Code of Alabama.

This opinion is to be applied prospectively.

Dear Ms. Graham, Mr. Jones, and Mr. Childree:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

(1) Given that the law provides that DROP shall not affect any rights of any employees under the state personnel system, are these employees entitled to be paid for half of their accrued and unused sick leave at retirement, including any sick leave accrued, but not used, during the time of DROP?

(2) If employees are not allowed to count the sick leave accrued, but not used, during the time period of DROP for payment purposes, are employees who remain in service after their participation in DROP has ended, entitled to be paid for half of the sick leave balance prior to their entry into DROP or their sick leave balance at the end of DROP, whichever is less, and the amount earned, but not used, after they exit DROP, but not more than their balance upon retirement?

FACTS AND ANALYSIS

This Office has explained, as follow, who, in addition to state employees, may participate in the Employees' Retirement System:

> Participation in the Employees' Retirement System of Alabama is limited to regular employees of the State of Alabama, to those employees of counties, cities, towns, and public or quasi-public organizations of the state or of any political subdivision of the state that elect to participate by legally adopting a resolution pursuant to § 36-27-6, Code of Alabama 1975, and to those employees of agencies, the governing statute of which specifically authorizes such participation.

Opinion to Honorable Bobby E. Denton, Member, Alabama Senate, dated March 26, 1996, A.G. No. 96-00161, at 2.

The Deferred Retirement Option Plan for members of the Retirement Systems of Alabama is provided for in section 36-27-170, *et seq.*, of the Code of Alabama. ALA. CODE § 36-27-170 to § 36-27-175 (Supp. 2007). Section 36-27-170 governs participation in DROP. The legislative purpose of the act is stated in that section as follows:

> The purpose of DROP is to allow, contractually, in lieu of immediate withdrawal from service and receipt of a retirement allowance, continued employment for a specific period of time, coupled with the deferral of receipt of a retirement allowance until the end of such period of participation, at which time the member shall withdraw from service.

ALA. CODE § 36-27-170(a) (Supp. 2007).

A one-time election to participate in DROP from three to five years is available at age 55 with 25 years of service. ALA. CODE § 36-27-170(b)(1) & (2) (Supp. 2007); ALA. CODE § 36-27-170(c) (Supp. 2007). A

member can withdraw from service at the end of DROP or continue to work and withdraw later. ALA. CODE § 36-27-171(c)(2) & (d) (Supp. 2007).

Section 36-27-170(k) also states that "[p]articipation in DROP shall not affect the ***accrual*** of annual and sick leave by the participant." ALA. CODE § 36-27-170(k) (Supp. 2007) (emphasis added). Therefore, a DROP participant continues to earn and may take sick leave during DROP and after DROP if the participant continues to work.

Regarding the payment of sick leave, section 36-27-171 provides for the withdrawal from service. Both provisions in the section addressing withdrawal at the end of DROP and after continuing to work after DROP contain the following identical language:

> If applicable laws allow, the participant may elect to be paid for his or her sick leave as would any other member upon retirement. ***In no event can the number of sick leave days used for [the] calculation be greater than the number of days the participant had on entry into DROP.***

ALA. CODE § 36-27-171(c)(2) (Supp. 2007); ALA. CODE § 36-27-171(d)(2) (Supp. 2007) (emphasis added). Pursuant to these sections, DROP participants entitled to receive payment for sick leave at retirement, who retire at the end of the DROP period or after continuing to work after DROP, are entitled to receive payment based on their sick leave balance at the time of entry into DROP, or at the time of retirement, whichever is less.

One of the provisions in section 36-27-170 governing participation in DROP, however, specifically exempts state employees in certain circumstances. Section 36-27-170(j) states that "[p]articipation in DROP shall not affect the rights of any ***state employee under the state personnel system.***" ALA. CODE § 36-27-170(j) (Supp. 2007) (emphasis added). The right of state merit system employees to receive the payment of sick leave on retirement is provided for in section 36-26-36(a) of the Code of Alabama as follows:

> (a) Upon retirement, each employee who acquires sick leave pursuant to the state Merit System shall receive payment of 50 percent of his

> or her accrued and unused sick leave, not to include escrowed sick leave as provided herein, at the time of his or her retirement, and payments for the sick leave shall be made at the same rate as his or her regular pay, not to exceed 600 hours.

ALA. CODE § 36-26-36(a) (2001). This section states that state merit system employees are entitled to receive payment for 50 percent of their accrued and unused sick leave up to 600 hours at the time of retirement.

Accordingly, it is the opinion of this Office that section 36-27-170(j) operates to exempt state merit system employees who are participants in DROP from the requirement that DROP participants are limited to payment of sick leave based on the lesser of the balance at entry into DROP or retirement. State merit system employees who participate in DROP, and retire at the end of the DROP period or after continuing to work after DROP, are entitled to receive payment for 50 percent of their accrued and unused sick leave up to 600 hours at the time of retirement.

This Office understands that there have been different interpretations of the DROP sick leave provisions since the enactment of DROP. Because of the reliance on these interpretations by state administrators and employees alike, it would be unfair to implement this opinion in any manner other than prospectively. Opinion to Honorable Bernard H. Eichold, II, Health Officer, Mobile County Health Department, dated October 4, 1995, A.G. No. 96-00001.

CONCLUSION

A DROP participant continues to earn and may take sick leave during DROP and after DROP if the participant continues to work.

DROP participants entitled to receive payment for sick leave at retirement, who retire at the end of the DROP period or after continuing to work after DROP, are entitled to receive payment based on their sick leave balance at the time of entry into DROP, or at the time of retirement, whichever is less.

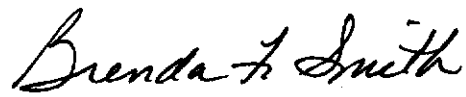
Under section 36-27-170(j) of the Code of Alabama, state merit system employees are exempt from this requirement. State merit system employees who participate in DROP, and retire at the end of the DROP period or after continuing to work after DROP, are entitled to receive payment for 50 percent of their accrued and unused sick leave up to 600 hours at the time of retirement pursuant to section 36-26-36(a) of the Code of Alabama.

This opinion is to be applied prospectively.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

TROY KING
Attorney General
By:



BRENDA F. SMITH
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