2011-090

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

LUTHER STRANGE
ATTORNEY GENERAL

501 WASHINGTON AVENUE
P.O. BOX 300152
MONTGOMERY, AL 36130-0152
(334) 242-7300
WWW.AGO.STATE.AL.US

BEFORE CITING, SEE ACT 2012-302.

August 22, 2011

Honorable Thomas L. White, Jr.
State Comptroller
Department of Finance
100 North Union Street, Suite 220
Montgomery, Alabama 36130-2620

Honorable Jackie Graham
Director, State Personnel Department
300 Folsom Administrative Building
Montgomery, Alabama 36130-4100

State Comptroller – Personnel Department – Overtime Pay – Subsistence Allowance – Retirement Benefits – Compensation

Only the salary an individual is normally entitled to receive on a semi-monthly basis is "earnable compensation" as that term is used in section 36-27-1(14) of the Code of Alabama. Overtime payments are not salary as that term is used in section 36-27-24(b) of the Code, and may not be used for retirement calculation purposes.

"Earnable compensation" as used in section 36-27-1(14) of the Code does not include subsistence pay, but is limited to the normal salary an employee receives for a semi-monthly pay period.

Dear Mr. White and Ms. Graham:

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

QUESTION 1

Is overtime pay considered "earnable compensation" as that term is used in section 36-27-1(14) of the Code of Alabama concerning retirement benefits?

FACTS AND ANALYSIS

The Employees' Retirement System of Alabama, as set forth in section 36-27-1, *et seq.*, of the Code of Alabama, provides a defined benefit plan for certain employees of the State of Alabama whose salary is paid by a state warrant. ALA. CODE §§ 36-27-1 thru 36-27-31 (2001, Supp. 2010). Specifically, section 36-27-24(b) provides that "each employer shall cause to be deducted from the ***salary*** of each member on each and every payroll of such employer for each and every payroll period five percent of his ***earnable compensation***." ALA. CODE § 36-27-24(b) (Supp. 2010) (emphasis added).

"Earnable compensation" is defined as "[t]he full rate of compensation that would be payable to an employee if he or she worked the full ***normal*** work-time. In cases where compensation includes maintenance, the Board of Control shall fix the value of that part of the compensation not paid in money." ALA. CODE § 36-27-1(14) (2001).

The statutory provisions governing the Retirement Systems of Alabama do not allow for contributions on extraordinary payments. *See Mitchell v. Employees' Retirement Sys. of Ala.*, 642 So. 2d 480, 481 (Ala. 1994) (disallowing retirement calculations on sick and annual leave payments). State law clearly provides that deductions for retirement shall be made from an employee's ***salary***. By definition, "overtime" is not "salary."

The State Personnel Board, with the approval of the Governor, establishes a pay plan setting forth the salary of each class of positions within the Merit System. Each individual within the Merit System must be paid a rate or salary within the pay plan that is based upon a semi-monthly pay schedule. *See* ALA. CODE § 36-6-1(c) (Supp. 2010) (all classified and unclassified employees shall be paid semi-monthly one pay day in arrears).

Pursuant to state law, the salary of each employee is based upon a semi-monthly rate, regardless of the number of hours in the semi-monthly pay period. For example, during a calendar year, the semi-monthly pay period contains 72, 80, 88, and 96 work hours depending, on the work days contained within each semi-monthly time period. Regardless, however, of the number of hours within the semi-monthly time period, an employee's salary remains constant.

Additionally, Rule 670-X-11-.01 and .04 of the Rules of the State Personnel Board establish uniform regulations for all employees under the State Merit System and requires the number of hours to be uniform for all employees whose positions are allocated to the same class, unless specifically provided otherwise by action of the Board. A "Regular Work Week" is described as a 40-hour work week. (A 40-hour week shall be used for the purpose of calculating the pay of employees paid on a semi-monthly basis.). ALA. ADMIN. CODE r. 670-X-11-.01 and 670-X-11-.04 (eff. June 26, 2006). The State Personnel Board Rules, not in conflict with the laws of Alabama, have the force and effect of law. *See*, ALA. CODE § 36-26-9 (2001). With respect to state law enforcement officers, section 36-21-4 of the Code specifically provides that a normal work week is a 40-hour week. ALA. CODE § 36-21-4 (2001).

Therefore, based upon the foregoing, only the salary an individual is normally entitled to receive on a semi-monthly basis is "earnable compensation" as that term is used in section 36-27-1(14) of the Code. Overtime payments are not salary as that term is used in section 36-27-24(b) of the Code, and may not be used for retirement calculation purposes.

CONCLUSION

Only the salary an individual is normally entitled to receive on a semi-monthly basis is "earnable compensation" as that term is used in section 36-27-1(14) of the Code. Overtime payments are not salary as that term is used in section 36-27-24(b)of the Code, and may not be used for retirement calculation purposes.

QUESTION TWO

> Is subsistence pay, which is not compensation for state income tax purposes, considered earnable compensation for retirement purposes under section 36-27-1(14) of the Code?

FACTS AND ANALYSIS

Subsistence pay for law enforcement officers was established by state legislation in 1973. ALA. CODE § 36-21-2 (Supp. 2010). The recognized purpose of this subsistence allowance was to provide specific law enforcement employees a means to pay "for their meals as they ***regularly*** journey the highway and isolated areas away from their assigned duty station while discharging their duties." Opinion to Honorable R.G. Britton, Commissioner,

Alabama Board of Corrections, dated June 11, 1980, A.G. No. 80-00406 (emphasis in original).

Law enforcement officers receive $12.00 a day subsistence pay for every day they work. Subsistence pay is not subject to state income tax as it is "solely a subsistence allowance for the purpose of providing meals while said officers are on duty and is not to be considered compensation under the laws of the State." Opinion to Honorable Ryan deGraffenried, Jr., State Senator, dated January 18, 1984, A.G. No. 84-00121.

Further, in 1977, the Alabama Legislature enacted a joint resolution stating that the subsistence allowance ***was never intended to be compensation***. According to the resolution, the allowance was intended as a reimbursement for meal expenses incurred while the officers are on duty. *Cheatham v Eagerton,* 703 So. 2d 389, 390 (Ala. Civ. App. 1997) (emphasis added).

Therefore, based upon the analysis provided in response to Question 1, subsistence pay, which is not subject to state income tax and which is not considered compensation, may not be included as "earnable compensation" for retirement calculation purposes.

CONCLUSION

"Earnable compensation" as used in section 36-27-1(14) does not include subsistence pay, but is limited to the normal salary an employee receives for a semi-monthly pay period.

This opinion is to be applied prospectively.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact me.

Sincerely,

LUTHER STRANGE
Attorney General
By:
Brenda F. Smith
BRENDA F. SMITH
Chief, Opinions Division

LS/BFS
1161661/153045