



2012-072

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Honorable Greg Medders, Chairman
Tuscaloosa Police Officers and Firefighters
Retirement Plan Board of Trustees
14480 Opal Way
Duncanville, Alabama 35456

Pension Fund – Police Officers –
Firefighters – Contributions – Employees,
Employers, Employment – Tuscaloosa
County

Section 6.03(b) of Act 2012-450 increases member contributions to the Tuscaloosa Police Officers and Firefighters Retirement Plan. As long as a member's salary, pension base, or final average salary is not decreased, the deductions of section 6.03(b) of Act 2012-450 are applicable to current and new employees.

The city is not required to pay contributions on extra pay and benefits pursuant to section 6.05 of Act 2012-450 as a result of the definition of the term "salary" used in subsection 1.19 of section 2 of Act 99-568.

The Tuscaloosa Police Officers and Firefighters Retirement Plan Board of Trustees ("Board") should abide by the language in Act 2012-450 regarding section 7.14(a).

The language "any member who elects DROP" in section 7.14(c) of Act 2012-450 includes only any "new" member electing DROP after the effective date of Act 2012-450.

Members who enter the Deferred Retirement Option Plan ("DROP") once Act 2001-900 became effective, and who have less than five years left, may continue or may leave, as long as those members serve no more than five years as set out in Act 2001-900.

Dear Chairman Medders:

This opinion of the Attorney General is issued in response to your request on behalf of the Tuscaloosa Police Officers and Firefighters Retirement Plan Board of Trustees.

QUESTION 1

Does the increase in contributions mandated by section 6.03(b) of Act 2012-450 apply to all current contributing members or only newly hired members (those hired after the effective date of Act 2012-450)?

FACTS AND ANALYSIS

In your letter of request, you submit several questions concerning the Tuscaloosa Police Officers and Firefighters Retirement Plan, which has undergone recent changes as a result of the passage of Act 2012-450. Your questions seek clarification regarding the implementation of this act. Your initial question focuses on section 6.03(b) of Act 2012-450, which states, in pertinent part, as follows:

(b) Beginning with the effective date of the last act amending this subsection, or as soon thereafter as practical, from the salary of each firefighter and police officer the city shall agree to assume and pay "picked up" member contributions to the fund in lieu of direct contributions by the member in an amount equal to eleven and twenty-five hundredths percent of the amount of such salary (excluding bonuses and other extra pay and benefits) with such contributions being paid into the fund on behalf of the member.

Member contributions picked up by the city shall be payable from the same source of funds used to pay compensation to a member. A deduction shall be made from a member's salary equal to the amount of contributions picked up by the city. This deduction shall not reduce the member's salary, pension base, or final average salary. No member shall have the option of choosing to receive the contributed amounts directly instead of having them paid by the city directly to the fund. All such contributions by the city shall be deemed and considered as part of the member's accumulated contributions and subject to all provisions of this plan pertaining to accumulated contributions of members, but treated as city contributions in determining tax treatment under the Code. The intent of this language is to comply with Section 414(h)(2) of the Internal Revenue Code of 1986, as amended.

2012 Ala. Acts No. 2012-450.

When interpreting a statute, the plain language of a statute controls, except in those rare cases in which a literal application of the statute will produce results demonstrably at odds with the intention of the drafters. *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). Section 6.03(b) starts with the phrase “[b]eginning with the effective date of the last act amending this subsection, or as soon thereafter as practical[.]” 2012 Ala. Acts No. 2012-450. Based on this phrase and the fact that Act 2012-450 is the last act amending section 6.03(b), it stands to reason that once Act 2012-450 becomes effective, the provisions of 6.03(b) would become effective at that time or shortly thereafter.

The second portion of section 6.03(b), however, sets out more specifically the manner in which member contributions are “picked up” by the city. This portion of the act states that “[a] deduction shall be made from a member's salary equal to the amount of contributions picked up by the city. This deduction shall not reduce the member's salary, pension base, or final average salary.” 2012 Ala. Acts No. 2012-450. Originally, section 6.03(b) of Act 99-568 authorized a deduction in the amount of 11 percent. Hence, there is a change of twenty-five hundredths percent between the two acts. As long as the deductions do not reduce a member's salary, pension base, or final average salary, this provision is applicable to both current and new employees.

CONCLUSION

Section 6.03(b) of Act 2012-450 increases member contributions to the retirement fund. As long as a member's salary, pension base, or final average salary is not decreased, the deductions of section 6.03(b) of Act 2012-450 are applicable to current and new employees.

QUESTION 2

Is the city required to pay contributions on extra pay and benefits pursuant to section 6.05 of Act 2012-450?

FACTS AND ANALYSIS

Section 6.05 of Act 2012-450 states as follows:

The governing body of the city shall cause to be paid into the fund out of the treasury of the city an amount equal to thirteen and twenty-five hundredths percent (13.25%) of the salary (excluding bonuses) of each member of the fire and police department who is eligible for membership in this fund, such payment to be made to the fund as and when such salary becomes payable, and deduction therefrom is made as provided in this section.

2012 Ala. Acts No. 2012-450.

Although section 6.05 of Act 2012-450 does not define the term "salary," this term was defined in subsection 1.19 of section 2 of Act 99-568 as follows:

SALARY. *A member's base salary* (up to the contribution and benefit base under Section 230 of the Social Security Act in effect at the beginning of the plan year) for his or her classification *plus overtime pay, official job assignment pay, and holiday pay, including picked-up contributions but excluding bonuses and other extra pay and benefits.* Notwithstanding the foregoing, the salary of any member hired after December 31, 1995, for any purpose

under the plan, including the determination of final average salary, shall not exceed one hundred fifty thousand dollars (\$150,000), as adjusted in accordance with the provisions of section 401(a)(17)(B) of the Code.

1999 Ala. Acts No. 99-568, 1220, 1222 (emphasis added). Based on the definition of the term “salary,” as used in subsection 1.19 of Act 99-568, it is the opinion of this Office that the city is not required to pay contributions on extra pay and benefits.

CONCLUSION

The city is not required to pay contributions on extra pay and benefits under section 6.05 of Act 2012-450, as a result of the definition of the term “salary” used in subsection 1.19 of section 2 of Act 99-568.

QUESTION 3

Section 7.14(a) concerns the Board’s Deferred Retirement Option Plan (“DROP”). It appears that Legislative Reference Service, when drafting this section of Act 2012-450, did not use the latest version of the act found in Act 2001-900. Instead, the language used in section 7.14(a) from Act 99-568 was used. Should the Board abide by the language in Act 2012-450 or use the correct language found in Act 2001-900 regarding section 7.14(a)?

FACTS AND ANALYSIS

The enactments of section 7.14(a) from Act 99-568, Act 2001-900, and Act 2012-450, respectively state as follows:

(a) A member shall become eligible for the “DROP” upon completing 25 years of service. A member eligible for the DROP can prospectively elect a “DROP period” of 1 year, 2 years, or 3 years in accordance with the rules established by the board under section 7.05. The member must also make any

election of options under 5.03 at the same time as electing the DROP. A member electing the DROP cannot elect the "Back DROP" under 7.15. Any death benefit payable under the plan other than the distribution of the "DROP account" shall be determined as if the member had retired on the date that the DROP was elected.

1999 Ala. Acts No. 99-568, 1220, 1247.

(a) A member shall become eligible for the "DROP" upon completing 25 years of service. A member eligible for the DROP can prospectively elect a "DROP period" of no more than five years in accordance with the rules established by the Board under 7.05. The member must also make any election of options under 5.03 at the same time as electing the DROP. A member electing the DROP cannot elect the "Back DROP" under 7.15. Any death benefit payable under the plan other than the distribution of the "DROP account" shall be determined as if the member had retired on the date that the DROP was elected. Any active member who is in the DROP on the effective date of this amendment can choose to increase his/her DROP period to no more than 5 years from his/her effective DROP date.

2001 Ala. Acts No. 2001-900, 737, 737-38.

(a) A member shall become eligible for the "DROP" upon completing 25 years of service. A member eligible for the DROP can prospectively elect a "DROP period" of 1 year, 2 years, or 3 years in accordance with the rules established by the board under 7.05. The member must also make any election of options under 5.03 at the same time as electing the DROP. A member electing the DROP cannot elect the "Back DROP" under 7.15. Any death benefit payable under the plan other than the distribution of the "DROP account" shall be determined as if the member had retired on the date that the DROP was elected.

2012 Ala. Acts No. 2012-450.

The provisions of section 7.14(a) of Act 2012-450 is the latest expression of the law. Taking action in accordance with any provision other than the latest pronouncement of the law would be in violation of the law. *Swift v. Gregory*, 786 So. 2d 1097,1099-1100 (Ala. 2000), *citing State v. Towery*, 143 Ala. 48, 49, 39 So. 309, 309 (1905) (generally stating that previously enacted laws cease to be the law once omitted). As such, it is the opinion of this Office that the Board should abide by the language used in section 7.14(a) of Act 2012-450.

CONCLUSION

The Board should abide by the language in Act 2012-450 regarding section 7.14(a).

QUESTION 4

Does the language “any member who elects DROP” in section 7.14(c) of Act 2012-450 include only any “new” member electing DROP after the effective date of Act 2012-450?

FACTS AND ANALYSIS

Section 7.14(c) of Act 2012-450 states as follows:

(c) Any member who elects the DROP shall have the lesser of (i) his or her benefit as determined under 7.14(b), and (ii) the amount in effect under 4.05 at his or her retirement without the adjustment of 4.01(a)(II), but subject to an optional form of payment elected under 5.02, deposited monthly into a “DROP account” (instead of paid directly) in the member’s name under the plan’s fund during the DROP period. The DROP account shall be credited with interest at an annual percentage rate (APR) equal to one-third of the actuarial return of investment in effect during each plan year as provided by the actuarial study, not to exceed four percent, compounded on a monthly basis.

The Alabama Supreme Court has consistently held that statutes are to be applied prospectively unless the Legislature has clearly indicated in the act that the act is to be applied retroactively. *Riley v. Kennedy*, 928 So. 2d 1013, 1016 (Ala. 2005); *Gotcher v. Teague*, 583 So 2d 267, 268 (Ala. 1991); *Dennis v. Pendley*, 518 So. 2d 688, 690 (Ala. 1987). *See also*, opinion to Honorable V. Gordon Moulton, President, University of South Alabama, dated June 1, 2011, A.G. No. 2011-067; opinion to Honorable Steve Windom, Member, State Senate, dated February 24, 1992, A.G. No. 92-00186. Accordingly, the provisions of section 7.14(c) are applicable to any new member electing DROP.

CONCLUSION

The language “any member who elects DROP” in section 7.14(c) of Act 2012-450 includes only any “new” member electing DROP after the effective date of Act 2012-450.

QUESTION 5

Can members who enter the DROP after Act 2001-900, and have less than five years left, continue, or will they be qualified to leave at the end of 3 years, the maximum years as set out in Act 2012-450?

FACTS AND ANALYSIS

The provisions of section 7.14(a) of Act 2001-900 are applicable to all members who elected the DROP program after Act 2001-900 became effective and until such time that Act 2012-450 becomes effective. As such, section 7.14(a) of Act 2001-900 applies to any member who enters the DROP program between September 18, 2001, and September 30, 2012.

Section 7.14(a) of Act 2001-900 authorizes a member to “elect a ‘DROP period’ of no more than five years.” 2001 Ala. Acts No. 2001-900, 737. Based on the plain language used, a member may select a DROP period of 1 year, 2 years, 3 years, 4 years, or up to the maximum allowable of 5 years. Alternatively, had this provision stated that a member may work no less than 5 years, such language would mean that any member entering DROP would be required to work a total of 5 years to complete the DROP process.

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Going forward, section 7.14(a) of Act 2012-450 authorizes a member to “elect a ‘DROP period’ of 1 year, 2 years, or 3 years.” 2012 Ala. Acts No. 2012-450. As such, pursuant to Act 2012-450, the “DROP period” is more limited, and under no circumstance may a member work more than three years. Yet, a member may choose to work as few as one or two years.

CONCLUSION

Members who enter DROP once Act 2001-900 became effective, and who have less than five years left, may continue or may leave, as long as those members serve no more than five years as set out in Act 2001-900.

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

Sincerely,

LUTHER STRANGE
Attorney General

By:



BRENDA F. SMITH
Chief, Opinions Division

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