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ATTORNEY GENERAL OPINION NO. 84- 67

Honorable Norman E. Gaar
State Senator, Seventh District
8717 West 110th Street
Suite 640
Overland Park, Kansas 66210

Re: State Boards, Commissions and Authorities--
Public Employees Retirement System--Compulsory
Retirement Age for School Employees

Schools--Teachers' Contracts--Mandatorily-Negotiable
Items; Unilateral Changes by Board Not Authorized

Synopsis: No state statute prescribes a mandatory retirement age for current employees of unified school districts or community colleges. Thus, it is improper for a board of education or board of trustees to rely upon the mandatory retirement age provisions of K.S.A. 72-5512 or 74-4937 (Weeks, 1980, now repealed,) as the basis for not renewing the employment contract of a faculty member.

Additionally, during the term of a negotiated agreement reached under the Teachers' Professional Negotiations Law, a board of education or board of trustees, acting unilaterally, may not make changes in any item which is mandatorily-negotiable, such as the matter of retirement. Moreover, this is true even though the item was not noticed for negotiation and was neither discussed during negotiations nor included in the resulting agreement. Cited herein: K.S.A. 72-5413(7)(1), 72-5501(d), 72-5512, 74-4931, 74-4937 (Weeks, 1980, now repealed), K.S.A. 1983 Supp. 74-4937; L. 1983, ch. 254, §15; L. 1971, ch. 232, §1(d)(7); L. 1970, ch. 326; L. 1941, ch. 341.

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Honorable Norman E. Gaar
Page Two

Dear Senator Gaar:

You seek an opinion on whether Kansas law currently provides a mandatory retirement age for instructors at community colleges and whether the board of trustees of a community college possesses the authority to adopt a resolution prescribing a mandatory retirement age. You explain that one of your constituents is a 70 year-old instructor at Johnson County Community College. This instructor was sent a notice of nonrenewal of his teaching contract by the Board of Trustees, pursuant to the Continuing Contract Law (K.S.A. 72-5410 et seq.) and the Teachers' Due Process Law (K.S.A. 72-5436 et seq.)

You have provided the notice of nonrenewal of the instructor's contract, which notice indicates that K.S.A. 72-5512 specifies a mandatory retirement age of 70 years. You also have provided that portion of the personnel policies of the community college which provide for retirement of community college employees. You indicate this policy was adopted by the Board of Trustees during the just-concluded 1984 spring semester. Among other things, the policy prescribes:

"Every employee of the College shall retire or be subject to mandatory retirement by the College at the time that the employee attains the age of seventy (70) years. . . . For contractual employees and faculty members, the effective date of mandatory retirement shall be the expiration date of the employee's then current contract year."

You have reviewed K.S.A. 72-5512 and K.S.A. 72-5501(d)(7) and have concluded the mandatory retirement age prescribed in the former is not applicable to any school employee after September 1, 1971. In addition, you question whether the College's retirement policy was properly adopted.

Regarding your first inquiry, we too note that K.S.A. 72-5512, in part, provides.

"No person shall be employed for any school service to which this act applies after August 31 of the calendar year in which he attains age seventy (70)." (Emphasis added.)

Honorable Norman E. Gaar
Page Three

However, we further note the final provision of subsection (d) of K.S.A. 72-5501 states:

"After September 1, 1971, no person shall be deemed a school employee for the purposes of this act." (Emphasis added.)

The two above-quoted statutes are part of an act which established the State School Retirement System, which was enacted in 1941. (See L. 1941, ch. 341.) It provided a retirement system for "school employees," as defined in subsection (d) of K.S.A. 72-5501.

In 1970, however, the Legislature enacted a law "merging the State School Retirement System with the Kansas Public Employees' Retirement System (KPERS). See L. 1970, ch. 326. While the new act did not entirely abolish the State School Retirement System, it did prescribe that, on and after January 1, 1971, all unified school districts and community colleges would provide retirement for their employees under KPERS, rather than under the State School Retirement System. See K.S.A. 74-4931. Moreover, in 1971, the legislature enacted Senate Bill No. 139, which included the statement now found in 72-5501(d)(7) that no person shall be deemed a school employee for purposes of the State School Retirement System, after September 1, 1971. See L. 1971, ch. 232, §1(d)(7).

Given the 1971 amendment referred to above, it is clear the mandatory retirement age prescribed in the old State School Retirement System Act (at K.S.A. 72-5512) is inapplicable to persons who were in the employ of school districts and community colleges as recently as the 1983-1984 school year.

We note, however, that until July 1, 1983, state law providing retirement for school employees continued to provide a mandatory retirement age. [See K.S.A. 74-4937(2) (Weeks, 1980), now repealed.] However, this mandatory retirement age provision was stricken from the law in 1983. (See L. 1983, ch. 254, §15.) Since the effective date of the 1983 act (June 18, 1983), Kansas law has not prescribed a mandatory retirement age for persons in school employment. Thus, it is improper for a board of education or board of trustees to rely upon the mandatory retirement age provisions of K.S.A. 72-5512 or 74-4937 as the basis for not renewing the employment contract of a faculty member. Currently, no statute effectively prescribes a mandatory retirement age for school employees.

The above analysis and conclusion dispose of your first inquiry and lead us to a discussion of your second question, namely,

Honorable Norman E. Gaar
Page Four

whether the Board of Trustees properly adopted its personnel policy regarding mandatory retirement age for employees of the community college. We again emphasize it is our understanding the retirement policy was adopted during the spring semester of 1984. It also is our understanding the Board of Trustees and the professional employees of the community college were operating at that time under a negotiated agreement entered into under the provisions of the Teachers' Professional Negotiations Law, K.S.A. 72 5413 et seq.

Under K.S.A. 72-5413(2)(1), the subject of retirement is a term and condition of employment for purposes of the Teachers' Professional Negotiations Law. Consequently, it is a mandatorily-negotiable item. See NEA-Wichita v. U.S.D. No. 259, 234 Kan. 512 (1983) and the cases cited therein at Syllabus Paragraph 5.

In NEA-Wichita, supra, the Supreme Court specifically held:

"After a negotiated agreement has been reached between the exclusive representative of professional employees and a board of education pursuant to K.S.A. 72-5413 et seq., then during the time that agreement is in force, the board, acting unilaterally, may not make changes in items which are mandatorily negotiable, but which were not noticed for negotiation by either party and which were neither discussed during negotiations nor included within the resulting agreement. Dodge City Nat'l Education Ass'n v. U.S.D. No. 443, 6 Kan.App.2d 810, Syl., 635 P.2d 1263, rev. denied 230 Kan. 817 (1981)." Id. at Syllabus ¶4.

Based upon this recent Supreme Court decision, the action of the Board of Trustees is open to serious question. However, we do not know the provisions of the negotiated agreement between the community college and its professional employees, and thus cannot state conclusively that the action of the Board of Trustees violated the principle of law espoused in the NEA-Wichita case. By referencing that decision, however, we are confident the attorneys for the community college can assist the college in resolving this matter.

Very truly yours,

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