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ATTORNEY GENERAL OPINION NO. 2012-32

Alan D. Conroy
Executive Director
Kansas Public Employees Retirement System
611 S. Kansas Avenue, Suite 100
Topeka, KS 66603-3869

RE: State Boards, Commissions and Authorities—Public Employees Retirement Systems; Kansas Public Employees Retirement System—Purchase of Participating Service Credit

State Boards, Commissions and Authorities—Public Employees Retirement Systems; Compensation in Excess of Internal Revenue Code Limitations—Compensation in Excess of Limitations Set Forth in Internal Revenue Code; Requirements and Limitations

Synopsis: K.S.A. 74-4919a(1) authorizes an employee who is a member of the Kansas Public Employees Retirement System (KPERs) to purchase the first-year of service credit by applying for such purchase and paying the amount determined by the employee's attained age and the actuarial assumptions and tables currently in use by KPERs if such employee has not retired and is employed by a participating employer. Cited herein: K.S.A. 2011 Supp. 74-4902; 74-4909; K.S.A. 74-4911; K.S.A. 2011 Supp. 74-4917; K.S.A. 74-4919a; 74-4919c; K.S.A. 2011 Supp. 74-4919g; 74-4919h; 74-4919j; 74-49,123; 26 U.S.C. § 415; 26 C.F.R. § 1.401-1.

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Dear Mr. Conroy:

As Executive Director for the Board of Trustees of the Kansas Public Employees Retirement System (Board), you ask for our opinion on whether, pursuant to K.S.A. 74-4919a and K.S.A. 2011 Supp. 74-49,123, a member of the Kansas Public Employees

Retirement System (KPERs), K.S.A. 74-4901 *et seq.*, whose employment with a participating employer¹ began in 2002 can purchase the employee's "year of service" within one month after such employment ended in 2012 for reasons beyond the employee's control. Based on the analysis below, the answer is no.

K.S.A. 74-4911(1) establishes the "year of service" that is at issue. Under K.S.A. 74-4911(1), a person employed by a KPERs-participating employer becomes a member of KPERs only after completing one year of service with the participating employer.² Information submitted with your letter indicates the Board has interpreted language in K.S.A. 2011 Supp. 74-49,123 and K.S.A. 74-4919a as allowing former employees to purchase their first year of participating service credit. Over the past 5 years, the Board has applied its interpretation to more than 50 former employees who were members of KPERs.

We begin by reviewing K.S.A. 2011 Supp. 74-49,123.

K.S.A. 2011 Supp. 74-49,123

In determining that a former employee may purchase the first-year service credit, the Board relied upon the following language in K.S.A. 2011 Supp. 74-49,123:

(c) In addition to the federal internal revenue code provisions otherwise noted in each retirement plan's law, and in order to satisfy the applicable requirements under the federal internal revenue code, the retirement plans shall be subject to the following provisions, notwithstanding any other provisions of the retirement plan's law:

...

(6) Subject to the provisions of this subsection, benefits paid from, and employee contributions made to the retirement plans shall not exceed the maximum benefits and the maximum annual additions, respectively, permissible under section 415 of the federal internal revenue code.

...

(C) Effective for permissive service credit contributions made in limitation years beginning after December 31, 1997, if an active member makes one or more contributions to purchase permissive service credit under a retirement plan, then the requirements of this section shall be treated as met only if [one of the two listed conditions are met].

¹ K.S.A. 2011 Supp. 74-4902(24) ("an eligible employer who has agreed to make contributions to [KPERs] on behalf of its employees").

² The legislature amended K.S.A. 74-4911(1) in 2007 so that a person whose employment began on or after July 1, 2009, with a KPERs participating employer became a member on the first day of such employment. L. 2007, Ch. 164, § 14(1); now K.S.A. 2011 Supp. 74-4911(1).

...

(iii) For purposes of this paragraph, the term "permissive service credit" means service credit:

- (a) Specifically recognized by a retirement plan's law for purposes of calculating a member's benefit under that retirement plan;
- (b) which such member has not received under a retirement plan; and
- (c) which such member may receive under a retirement plan's law only by making a voluntary additional contribution, in an amount determined under the retirement plan's law and procedures established by the board, which does not exceed the amount necessary to fund the benefit attributable to such service credit.

You state in your letter that, because K.S.A. 2011 Supp. 74-49,123 lacks a definition for "active member," the Board adopted a policy interpreting "active member." That interpretation includes former employees only if their employment was terminated due to unforeseen circumstances,³ their first-year service credit was purchased within 45 days of their employment being terminated, and they had not withdrawn the KPERS contributions or commenced a benefit. You indicate that the rationale for this interpretation of "active member" is the former employee has earned the service credit, the former employee pays both the employer's and employee's contributions to purchase the service credit, and the service credit is calculated by quarters so that a member who works one day into a quarter will receive credit for the entire quarter. These reasons are useful to calculate the former employee's retirement benefit, but none is useful to extend the former employee's ending employment date with the participating employer.

The information you provided also states the Board adopted its interpretation to be consistent with federal law, specifically 26 U.S.C. § 415(n). That provision relates to special rules for the purchase of permissive service credit in a qualified retirement plan. Under federal regulation, a qualified retirement plan "may cover former employees as well as present employees and employees who are temporarily on leave."⁴ Thus, a provision authorizing former employees to purchase service credits is discretionary, not mandatory.

The critical point here is the Board did not promulgate its interpretation of K.S.A. 2011 Supp. 74-49,123(c)(6)(C) in a regulation⁵ although it has the authority to do so.⁶ As a result, the Board's interpretation of "active member" does not have the force of law.⁷

³ The unforeseen circumstances are the employer submitted the necessary documents late; the employee was terminated or laid-off from employment without notice or suffered a serious health condition; the employee's financial institution sent the payment late or an incorrect amount; or (4) the employee and employer are engaged in a settlement agreement for wrongful termination.

⁴ 26 C.F.R. § 1.401-1(b)(4). Emphasis added.

⁵ See Agency 80 of Kansas Administrative Regulations.

⁶ K.S.A. 2011 Supp. 74-4909(2).

⁷ *Bruns v. Kansas State Bd. of Technical Professions*, 255 Kan. 728, Syl. 2 (1994) (a state agency's internal policy that "is adopted to govern the agency's enforcement or administration of legislation is a rule

Nevertheless, we concur that K.S.A. 2011 Supp. 74-49,123(c)(6)(C) is necessary to the analysis, but not because it refers to an "active member." The question of whether a former employee may purchase the first-year service credit is answered in the definition of "permissive service credit."⁸ In other words, a former employee can purchase "permissive service credit" only if the laws governing KPERS "specifically recognize" the purchase of the first-year service credit "for purposes of calculating a member's benefit under that retirement plan," the member has not received the benefit under the plan, and the amount for such purchase is determined by the retirement plan.⁹ Thus, we next review K.S.A. 74-4919a.

K.S.A. 74-4919a

The Board relied upon the following language in K.S.A. 74-4919a(1):

An employee of a participating employer who becomes a member as provided in K.S.A. 74-4911 and amendments thereto, after completion of one year of continuous employment as therein provided may purchase participating service credit for such year of employment by making application therefor. Such application and payment may be made at any time after the employee becomes a member and continues to be employed by a participating employer.

You state that the Board has interpreted the above language the same as it has interpreted the term "active member" in K.S.A. 2011 Supp. 74-49,123(c)(6)(C). Thus, the Board interprets K.S.A. 74-4919a(1) to include former employees if they meet the conditions discussed in the above analysis of K.S.A. 2011 Supp. 74-49,123(c)(6)(C).

Like its interpretation of "active member," the Board did not adopt its interpretation of K.S.A. 74-4919a(1) in a regulation;¹⁰ thus, it has no force of law.¹¹ Even if it had adopted such a regulation, it appears the interpretation conflicts with the clear language of K.S.A. 74-4919a(1).¹² The second sentence requires the employee to be a member of KPERS *and* "to be employed by a participating employer" when the application and payment is submitted. The requirement of current employment is consistent with the definition of an "employee,"¹³ which is the focus of these two sentences in K.S.A. 74-4919a(1). Because the above language is clear and unambiguous, it does not need

or regulation as a matter of law under [K.S.A. 2011 Supp. 77-415(c)(4) of the Kansas Rules and Regulations Filing Act] and to be effective must be filed and published as a rule or regulation").

⁸ The definition of "permissive service credit" in K.S.A. 2011 Supp. 74-49,123(c)(6)(C)(iii)(a)-(c) is nearly identical to the definition of the same phrase in federal law. See 26 U.S.C. § 415(n)(3)(A).

⁹ K.S.A. 2011 Supp. 74-49,123(c)(6)(C)(iii)(a).

¹⁰ *Supra*, note 4.

¹¹ *Supra*, note 5.

¹² 255 Kan. at 735 (a regulation cannot contravene or nullify a controlling statutory enactment).

¹³ K.S.A. 2011 Supp. 74-4902(14) (the person's employment with a participating employer is not seasonal or temporary and requires at least 1,000 hours of work per year).

interpretation.¹⁴ When employment terminates, so has the authority to purchase the first-year service credit. However, our analysis does not end here.

The third sentence in K.S.A. 74-4919a(1) uses the word "member," not "employee." We question whether the third sentence modifies the first two sentences or has independent meaning. It states:

Any member of the system who has not retired may purchase, subject to the provisions of K.S.A. 74-49,123 and amendments thereto, such service credit by paying the then present value of the retirement benefits based on such service by means of a single lump-sum payment in the amount determined by the actuary using the member's attained age and the actuarial assumptions and tables currently in use by this retirement system.

A "member" is defined as:

an eligible employee who is in the system and is making the required employee contributions; *any former employee who has made the required contributions to the system and has not received a refund if such member is within five years of termination of employment with a participating employer; or any former employee who has made the required contributions to the system, has not yet received a refund and has been granted a vested benefit.*¹⁵

Effective July 1, 2009, KPERS members who had completed five years of credited service at the date of termination were automatically vested in KPERS if the member did not withdraw the accumulated contributions prior to the commencement of retirement benefit payments.¹⁶ Under the factual scenario you submitted, even though no longer employed by a participating employer, the former employee was a "member" as he was within 5 years of his termination date, had not received a refund of contributions, and had vested in KPERS.

To determine whether the third sentence in K.S.A. 74-4919a modifies the preceding two sentences or is a separate provision that expands eligibility to purchase the first-year service credit to former employees who are "members," we follow the rules of statutory construction used by the courts. The fundamental rule is to give effect to the intent of the legislature as expressed in the statute's language. If the language of a statute is plain and unambiguous, courts must apply that language rather than determine what the law should or should not be, speculate as to legislative intent, add something not readily found in the statute, or resort to canons of statutory construction.¹⁷ However, where a

¹⁴ *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 629 (2008) (when the language in a statute is clear and unambiguous, there is no need for interpretation).

¹⁵ K.S.A. 2011 Supp. 74-4902(21) (emphasis added).

¹⁶ K.S.A. 2011 Supp. 74-4917(2).

¹⁷ *Higgins v. Abilene Machine, Inc.*, 288 Kan. 359, 361-62 (2009).

plain reading of the statute results in an ambiguity or a lack of clarity, statutory construction is necessary. In such instances, we examine other evidence of legislative intent such as legislative history and canons of statutory construction.¹⁸ Courts also determine legislative intent for a statutory provision from a general consideration of the entire act; in doing so, different provisions are reconciled to make them harmonious if possible.¹⁹

K.S.A. 74-4919a was enacted in 1971.²⁰ That original provision had only two sentences. The first sentence provided that an employee who was a KPERS member could purchase the first-year service credit if the employee applied for such purchase and paid to KPERS "a lump sum amount equivalent to four percent (4%) of compensation paid to such member for personal services during said year by said participating employer."²¹ The second sentence required the application and payment to "be made at any time after the employee becomes a member *and continues to be employed by a participating employer.*"²² Thus, the initial version of K.S.A. 74-4919a required employment with a participating employer at the time of purchase and established the amount that the employee paid for the purchase.

The amendments pertinent to our discussion occurred in 1995. None of the legislative history indicates that the legislature intended to expand K.S.A. 74-4919a(1) so that former employees who were KPERS members could purchase the first-year of service credit.²³ The legislative history instead shows that the Board requested that payments for service credit purchases be changed from the method based on a percentage of the employee's compensation to a method using actuary tables.²⁴ As a result, the legislature amended K.S.A. 74-4919a(1) by deleting the language in the first sentence regarding the computation of the purchase amount and adding the third sentence regarding the computation of the purchase amount based upon the present value of the retirement benefits, the member's current age, and actuary tables.²⁵ The legislature also amended other KPERS statutes requiring the Board to use the actuarial method to determine the amount for purchasing prior service credits.²⁶

Based upon the legislative history, the third sentence does not expand eligibility to purchase the first-year service credit to former employees who are "members." Rather, it addresses compliance with K.S.A. 2011 Supp. 74-49,123(c)(6)(c)(iii). As noted

¹⁸ *Id.* at 362.

¹⁹ *Redd v. Kansas Truck Center*, 291 Kan. 176, 195 (2010).

²⁰ L. 1971, Ch. 253, § 1.

²¹ *Id.*

²² *Id.* (emphasis added).

²³ *Minutes*, House Committee on Appropriations, March 9, 1995; *Minutes*, Senate Committee on Ways and Means, March 24, 1995; and *Minutes*, Senate Committee on Ways and Means, March 30, 1995.

²⁴ *Minutes*, House Committee on Appropriations, March 9, 1995, Attachment 6-2; *Minutes*, Senate Committee on Ways and Means, March 24, 1995, Attachment 6-2; and *Minutes*, Senate Committee on Ways and Means, March 30, 1995, Attachments 5-2 and 7.

²⁵ L. 1995, Ch. 267, § 11.

²⁶ See L. 1995, Ch. 267, §11(1) and (3) (now K.S.A. 74-4919a[1] and [3]); § 12 (now K.S.A. 74-4919c); § 14(2) (now K.S.A. 2011 Supp. 74-4919g[2]); § 15(1) (now K.S.A. 2011 Supp. 74-4919h[1]); and § 16(1) (now K.S.A. 2011 Supp. 74-4919j[1]).

above, K.S.A. 2011 Supp. 74-49,123(c)(6)(C)(iii) has three requirements to qualify as a "permissive service credit." First, the retirement plan must specifically recognize such purchase for calculating the member's benefit; second, the member has not received such benefit under the retirement plan; and third, the retirement plan's law requires the member to make "a voluntary additional contribution, in an amount determined under the retirement plan's law." The first two sentences in K.S.A. 74-4919a(1) address the first and second requirements for a permissive service credit. The third sentence in K.S.A. 74-4919a(1) addresses the third requirement for a permissive service credit—the method to compute the voluntary additional contribution made by the employee.

Conclusion

Based upon the above analysis, the legislative intent is that the first, second, and third sentences of K.S.A. 74-4919a(1) are read together. The third sentence of K.S.A. 74-4919a(1) does not provide an independent right for a KPERS member to purchase that member's first-year service credit if such member is not employed by a participating employer at the time of purchase. An employee who is a KPERS member may purchase the first-year of service credit by applying for such purchase and paying the amount determined by the employee's attained age and the actuarial assumptions and tables currently in use by KPERS if such employee has not retired and is employed by a participating employer.

Sincerely,

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