

Opinion No. 2013-006

February 13, 2013

The Honorable Jason Rapert
State Senator
Post Office Box 10388
Conway, Arkansas 72034

Dear Senator Rapert:

You have requested my opinion concerning the retirement benefits of a former district court clerk for the City of Conway. You state that the former clerk, who is aged 53, has applied for retirement benefits from the City of Conway Non-Uniformed Pension Fund (hereinafter “Non-Uniformed Fund) based on her continuous service of over 22 years as both deputy court clerk and court clerk.¹

As further background for your questions, you report that the former clerk participated in the 6% contributory Non-Uniformed Fund pursuant to A.C.A. § 24-12-101 *et seq.*² from November, 1990, until December 31, 2000, when she became a member of the judges’ and clerks’ retirement plan.³ You explain that she requested to be transferred to the judges’ and clerks’ retirement plan effective

¹ You report that she was hired as a deputy court clerk for the Conway Municipal Clerk on November 20, 1990, and was then appointed to the position of court clerk on March 27, 2000.

² Under this body of law, cities may create a pension fund for “paid nonuniformed employees.” A.C.A. § 24-12-101 (Supp. 2011). Participating employees must contribute not less than 6% of their salary to the fund. A.C.A. § 24-12-111 (Repl. 2002). According to an opinion issued by my immediate predecessor, the City of Conway established a nonuniformed pension program in the 1960’s. Op. Att’y Gen. 2003-129. I refer you to that opinion, which is available on my office’s website, <http://www.arkansasag.gov>, for some general information concerning participation in Conway’s Non-Uniformed Fund.

³ Cities of the first and second class with a municipal court were required to create a local retirement plan for municipal court judges and clerks under A.C.A. § 24-8-301 *et seq.* Op. Att’y Gen. 89-046. As explained further below, these plans, which did not cover deputy court clerks (*see* Op. Att’y Gen. 97-391), were closed effective December 31, 2004.

December 31, 2000, and that she last contributed to the Non-Uniformed Fund on December 31, 2000. She then became a member of the Arkansas Public Employees Retirement System (“APERS”) on January 1, 2005.⁴ You state that she continued to work as the district court clerk until December 31, 2012.

Against this backdrop, you ask:

1. Is the former employee currently entitled to immediate retirement benefits (at age 53) pursuant to the Non-Uniformed Pension Fund, Ark. Code Ann. § 24-12-115 or some other provision of Ark. Code Ann. § 24-12-101 *et seq.*, notwithstanding that the employee voluntarily ceased participation in that Fund as of December 31, 2000?
2. Is the former employee vested and entitled to retirement benefits at age sixty (60) from the Non-Uniformed Pension Fund pursuant to any provision of Ark. Code Ann. § 24-12-101 *et seq.*?

RESPONSE

As an initial matter, I must point out that I am not authorized to render judgment on any particular individual’s eligibility for retirement benefits or the amount of benefits to which any individual is entitled. As stated by one of my predecessors, “[t]he determination of any individual’s eligibility and the computation of benefits available to any individual depends to a great extent upon the facts of each case and must be decided by the board of the retirement system.”⁵ For this reason, I cannot opine definitively as to the eligibility of the former employee you have described. However, to the extent your questions require the interpretation of state law, I will proceed to respond.

Question 1 - Is the former employee currently entitled to immediate retirement benefits (at age 53) pursuant to the Non-Uniformed Pension Fund, Ark. Code

⁴ The local retirement plans for municipal court judges and clerks were closed effective December 31, 2004, by Act 1374 of 2003. A.C.A. § 24-8-321 (Supp. 2011). All municipal and district court clerks who were members of a municipal judges’ and clerks’ retirement fund became members of APERS on January 1, 2005, pursuant to Act 1375 of 2003. A.C.A. § 24-8-903 (Supp. 2011).

⁵ Op. Att’y Gen. 2004-135. *See also* Op. Att’y Gen. 98-162 (noting that no conclusive opinion could be provided regarding any particular individual’s entitlement to retirement benefits).

Ann. § 24-12-115 or some other provision of Ark. Code Ann. § 24-12-101 et seq., notwithstanding that the employee voluntarily ceased participation in that Fund as of December 31, 2000?

It appears that the set of statutes governing the situation you have described are A.C.A. §§ 24-12-101 through -118 (Repl. 2002 and Supp. 2011), which provide for cities to create a pension fund for “paid nonuniformed employees.” The benefits provision for voluntary retirement under such a pension system is A.C.A. § 24-12-115, which states in relevant part:

(b) It shall be mandatory on the board to retire an employee who has performed faithful service as an employee for a period of twenty (20) years at the employee’s option or election, to be exercised by making written application therefor, or to retire an employee who has attained the age of sixty (60) years and has served as an employee for at least ten (10) years at the employee’s option or election, to be exercised by making written application therefor.

(c)(1) The board shall, in cases arising under subsections (a) and (b) of this section, place an employee so retired upon the pension roll at one-half (1/2) pay.

(2) The minimum monthly pension paid to a retired employee shall not be less than fifty dollars (\$50.00) per month regardless of whether the employee’s monthly salary shall equal this minimum sum or not.⁶

These provisions of law were aptly summarized in Attorney General Opinion 2002-323, a copy of which is enclosed for your convenience. My predecessor’s analysis is worth excerpting at some length:

[Subsections 24-12-115(b) and (c)] create two requirements for receiving benefits: a length of service requirement, and an age requirement. In addition, employees who elect to participate in the pension fund for paid nonuniformed employees are required to contribute a portion of their salaries into the fund. A.C.A. § 24-12-

⁶ A.C.A. § 24-12-115 (Repl. 2002).

111.^[7] The city is also required to contribute a percentage of the participating employees' salaries to the fund. *Id.* The above-quoted section permits retirement after 20 years of service without regard to age, and retirement after 10 years of service if the employee reaches age 60. **The idea is that after these designated lengths of service, the contributions to the fund by and on behalf of the employee will be sufficient (in addition to the tax revenues that are placed in the fund, see A.C.A. § 24-12-104) to support the payment of the required benefits.**

The required lengths of service (10 years and 20 years) are, in effect, vesting requirements. **Participating employees who serve these designated lengths of time, who have contributed as required, and who (in the case of the 10-year vesting requirement) have also reached the designated age, have met the requirements for receiving benefits from the fund.** These individuals have a vested contractual interest in the pension fund. The statute states no other requirement for receiving benefits, such as a requirement that the employee remain employed by the city after vesting in order to receive benefits.

Any individual who participates and contributes to the fund is entitled to receive, upon termination of employment, a refund of his or her contributions during employment, even if he or she does not meet the vesting or age requirements for receiving benefits. See A.C.A. § 24-12-111. However, **employees who meet the vesting, age, and contribution requirements are entitled to receive benefits under A.C.A. § 24-12-115, even if they are no longer employed by the city.**⁸

I agree in all respects with this analysis. Of particular significance for purposes of your first question, I believe it is clear from the emphasized language in this excerpt that an employee must make the required contributions in order for the years of service to count toward the vesting requirements. Stated another way,

⁷ See n. 2, *supra*.

⁸ Op. 2002-323 at 2-3 (emphasis added).

nothing in A.C.A. §§ 24-12-101 through -118 contemplates crediting service for periods of service when the employee made no contributions to the fund.

The background facts you have provided indicate that contributions to the Non-Uniformed Fund by the former employee in question ceased shortly after the employee had served ten years. While I cannot, as stated above, definitely opine on this employee's eligibility for benefits from the Non-Uniformed Fund, I can and will opine generally that in order to meet the length-of-service requirements under A.C.A. § 24-12-115 (either 10 or 20 years), the employee must contribute throughout the service period.

Question 2 - Is the former employee vested and entitled to retirement benefits at age sixty (60) from the Non-Uniformed Pension Fund pursuant to any provision of Ark. Code Ann. § 24-12-101 et seq.?

Again, I cannot render judgment on any particular individual's eligibility for retirement benefits. I can only reiterate that participating employees will have met the requirements for receiving benefits from the fund if they served the required lengths of time, contributed as required (see response to Question 2 above), and (in the case of the 10-year vesting requirement) have also reached the designated age. Additionally, as stated in Opinion No. 2002-323, "employees who meet the vesting, age, and contribution requirements are entitled to receive benefits under A.C.A. § 24-12-115, even if they are no longer employed by the city."

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/EAW:cyh

Enclosure