

Opinion No. 2013-127

February 3, 2014

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

Dear Senator Rapert:

You have requested my opinion on the following questions concerning retirement and other benefits for employees covered by the City of Conway's Non-Uniformed Employees' Pension Fund:<sup>1</sup>

1. A deputy court clerk for the Conway Municipal/District Court accepts a position as District Court Clerk for a division of the Ninth District Court and has worked in excess of twenty (20) years as a deputy court clerk and participated in the Non-Uniformed Employees' Pension Fund for the City pursuant to Ark. Code Ann. § 24-12-101 *et seq.* Can that employee now begin participating in the APERS retirement system [Arkansas Public Employees' Retirement System] as a court clerk and make application for retirement benefits pursuant to A.C.A. § 24-12-115 for prior service as a deputy court clerk?
2. In order to receive Non-Uniformed retirement benefits, as discussed above, would the deputy clerk have to "retire" first and separate employment as a deputy court clerk before being hired as a "new"

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<sup>1</sup> The establishment of a pension and relief fund for "paid nonuniformed employees" is governed by A.C.A. §§ 24-12-101 – 118 (Repl. 2002 and Supp. 2013). "Paid nonuniformed employees" is defined to include certain enumerated city officials, as well as "the other full-time paid nonuniformed employees of the city." A.C.A. § 24-12-101 (Supp. 2013). For further information regarding the City of Conway's non-uniformed pension program, see Op. Att'y Gen. 2003-129.

- employee, i.e., division clerk of the court or, chronologically, can the employee accept the “new” position as court clerk, begin participating in APERS, then make application for Non-Uniformed Pension benefits?
3. When the employee ceases contributing to the Non-Uniformed Pension, [and] begins contributing to APERS, do benefits, such as seniority for purposes of calculating sick leave and vacation benefits, remain the same and “carry forward” to the employee’s new court clerk position or must they be paid or otherwise resolved upon separation of employment as a deputy court clerk?
  4. Regarding non-court personnel, is there any prohibition pursuant to the Non-Uniformed Pension Fund, Ark. Code Ann. § 24-12-101 *et seq.* or some other state law that would prohibit a city employee who retires pursuant to Ark. Code Ann. § 24-12-115 from being considered for being rehired into the same position from which they retired, as long as they did not subsequently participate in the Non-Uniformed Pension Fund?

## **RESPONSE**

I am somewhat uncertain whether your first question is distinguishable from your second one. You ask about the employee’s participation in the Arkansas Public Employees’ Retirement System (APERS), but I assume eligibility under APERS is not at issue because a district court clerk’s membership in APERS is established pursuant to A.C.A. §§ 24-8-901–903 (Supp. 2013).<sup>2</sup> You may be asking whether her participation in APERS, standing alone, makes her ineligible for non-uniformed pension benefits under A.C.A. §§ 24-12-101 – 118. The answer to that question is “no,” in my opinion. It is my opinion in response to your second question that the deputy clerk in all likelihood may accept the court clerk position, begin participating in APERS, and then apply for the non-uniformed benefits. Indeed, according to my understanding, the board that administers the non-uniformed pension fund approved the former deputy clerk’s retirement application in this case. In my opinion, that decision would likely be upheld if challenged. The answer to your third question will depend upon the leave policies that have

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<sup>2</sup> These sections codify Act 1375 of 2003, which placed municipal and district court clerks in APERS as of January 1, 2005.

been adopted by the city council. The answer to your fourth question appears to be “no.”

***Question 1 - A deputy court clerk for the Conway Municipal/District Court accepts a position as District Court Clerk for a division of the Ninth District Court and has worked in excess of twenty (20) years as a deputy court clerk and participated in the Non-Uniformed Employees’ Pension Fund for the City pursuant to Ark. Code Ann. § 24-12-101 et seq. Can that employee now begin participating in the APERS retirement system [Arkansas Public Employees’ Retirement System] as a court clerk and make application for retirement benefits pursuant to A.C.A. § 24-12-115 for prior service as a deputy court clerk?***

I assume that eligibility to participate in APERS is not the actual focus of this inquiry, given that a district court clerk’s membership in APERS is established pursuant to A.C.A. §§ 24-8-901–903.<sup>3</sup> Accordingly, I assume you may be asking whether the former deputy court clerk’s participation in APERS, standing alone, makes her ineligible for non-uniformed pension benefits under A.C.A. § 24-12-101 – 118. The answer to that question is “no,” in my opinion. APERS is a different retirement system and I see no basis in sections 24-12-101 – 118 for concluding that a person whose non-uniformed benefits have vested (see discussion below) is ineligible for such benefits due to the person’s membership in another system.

***Question 2 - In order to receive Non-Uniformed retirement benefits, as discussed above, would the deputy clerk have to “retire” first and separate employment as a deputy court clerk before being hired as a “new” employee, i.e., division clerk of the court or, chronologically, can the employee accept the “new” position as court clerk, begin participating in APERS, then make application for Non-Uniformed Pension benefits?***

Your first question indicates that the individual whose benefits are at issue served as deputy court clerk for more than 20 years before accepting the position as court clerk. She thus had a vested right to receive non-uniformed pension fund benefits:

It shall be mandatory for the board [of trustees of the non-uniformed pension fund] to retire an employee who has performed faithful

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<sup>3</sup> *Id.*

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....<sup>4</sup>

Apparently, the former district court clerk did not apply for non-uniformed pension benefits under A.C.A. §§ 24-12-101 – 118 before becoming the clerk of the court. Your question, in effect, is whether the apparent absence of a break in service between the two positions makes her ineligible for the non-uniformed benefits. In other words, was the former district court clerk required to terminate employment altogether in order to be retired under sections 24-12-101 – 118?

I believe the answer to this question turns on the meaning of “retire” under A.C.A. § 24-12-115, set out above, which makes it mandatory on the board to “retire an employee who has performed faithful service as an employee for a period of twenty (20) years.” The term “retire” is not defined in the relevant statutes (A.C.A. §§ 24-12-101–118). We have the benefit, however, of general guidelines for determining its meaning in order to give effect to the intent of the legislature, recognizing that giving effect to legislative intent is the basic rule of statutory construction to which all other interpretive guides defer.<sup>5</sup>

A court will not construe any word to be superfluous and will give each word its plain and ordinary meaning.<sup>6</sup> In construing any statute, it may be necessary and appropriate to place it beside other statutes relevant to the subject and give it meaning and effect derived from the combined whole.<sup>7</sup> It may also be appropriate to consider the context in which the terms are used.<sup>8</sup>

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<sup>4</sup> A.C.A. § 24-12-115(b) (Repl. 2002). The board must also “retire an employee who has attained the age of sixty (60) and has served as an employee for at least ten (10) years....” *Id.* As one of my predecessors noted, the required lengths of service (10 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....” Op. Att’y Gen. 2002-323 at 3.

<sup>5</sup> See *Vanderpool v. Fidelity & Cas. Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997).

<sup>6</sup> *Macsteel, Parnell Consultants v. Ark. Ok. Gas Corp.*, 363 Ark. 22, 210 S.W.3d 878 (2005).

<sup>7</sup> *City of Blytheville v. McCormick*, 56 Ark.App. 149, 939 S.W.2d 855 (1997).

<sup>8</sup> *Bush v. State*, 338 Ark. 772, 776, 2 S.W.3d 761 (1999) (“It is axiomatic that the meaning of certain words or phrases cannot be determined in isolation, but must be drawn from the context in which they are used.”).

Applying these principles, I first note that it is difficult to give the word “retire” a singular “plain meaning.” According to the *New Oxford American Dictionary*, the verb “retire” means “leave one’s job and cease to work, typically upon reaching the normal age for leaving employment.”<sup>9</sup> The noun “retirement” is defined in *Black’s Law Dictionary* as “termination of one’s own employment or career, esp. upon reaching a certain age or for health reasons....”<sup>10</sup> *Shorter Oxford Dictionary* defines the verb “retire” as “withdraw, esp. to or from a specified place, position, or occupation....”<sup>11</sup> These dictionary definitions can yield multiple meanings. In the case at hand, the person applying for non-uniformed benefits clearly withdrew from her position as deputy court clerk, but she did not cease to work altogether.

The undefined term “retire” may therefore be ambiguous in the abstract. When the term is read in context, however – which is essential to assessing its plain meaning – I believe it becomes clear that in order to “retire” or be “retired” under A.C.A. § 24-12-115,<sup>12</sup> one must *terminate employment covered by the non-uniformed pension plan*. This follows initially from section 24-12-115’s reference to “service” in the phrase “*retire* an employee who has performed faithful *service* as an employee....” (Emphasis added.) This may reasonably be understood to mean service that entitles the employee to benefits under this statutory scheme, i.e., service as a “paid non-uniformed employee.”<sup>13</sup> The retired employee is placed on the pension roll at one-half pay,<sup>14</sup> and “the list of *retired paid nonuniformed employees*” must be maintained by the board of trustees.<sup>15</sup> Section 24-12-111 is further instructive, wherein it provides for the refunding of contributions to an employee who leaves employment before vesting in non-uniformed benefits.<sup>16</sup> The employee in that instance forfeits his or her “credited

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<sup>9</sup> *New Oxford American Dictionary* 1,491 (Angus Stevenson & Christine A. Lindberg eds., 3d ed. Oxford Univ. Press 2010).

<sup>10</sup> *Black’s Law Dictionary* 1,431 (Bryan A. Garner ed., 9th ed., West 2009).

<sup>11</sup> *Shorter Oxford English Dictionary* vol. II, p. 2,574 (Oxford Univ. Press 1993).

<sup>12</sup> See A.C.A. § 24-12-115(c)(1) (referring to the “employee so retired.”).

<sup>13</sup> See A.C.A. § 24-12-101 (Supp. 2013) for definition of “paid nonuniformed employees.”

<sup>14</sup> A.C.A. § 24-12-115(c)(1) (“In cases arising under subsections (a) and (b) of this section, the board shall place an employee so retired upon the pension roll at one-half (½) pay.”).

<sup>15</sup> A.C.A. § 24-12-106(a) (Repl. 2002) (emphasis added).

<sup>16</sup> A.C.A. § 24-12-111(d)(1) (Repl. 2002).

service” as a member of the non-uniformed pension fund, and is ineligible thereafter for any benefits for such “service”:

Upon receiving a refund of the amounts deducted from his or her monthly salary from the pension and relief fund for paid nonuniformed employees of the city, the employee shall forfeit his or her credited service as a member of the pension and relief fund and shall not be eligible thereafter to receive any benefits under the provisions of this act for his or her service.<sup>17</sup>

Taken together, and in light of the above definitions of “retire,” these code sections indicate that a “retired paid nonuniformed employee” is one who has been approved for benefits under A.C.A. §§ 24-12-101–118 after terminating his or her covered employment, that is, his or her employment covered by the city’s non-uniformed pension fund.<sup>18</sup> An applicant for non-uniformed benefits plainly cannot qualify without ceasing employment in a position covered by the non-uniformed fund. In the case at hand, the employee had terminated her service as deputy court clerk when she applied for the non-uniformed benefits. She was serving as the clerk of the court clerk and enrolled in APERS at that point. The fact that she moved directly to the court clerk position – a position that is not covered by the non-uniformed pension fund – would not appear to be a basis for denying her benefits.

Indeed, it seems that this was the determination of the non-uniformed fund’s board of trustees. According to my understanding, the board approved this individual’s retirement and she is currently drawing benefits. It is well established that the interpretation of a law by administrative agents who are charged with administering that law will be given considerable deference, and will not be overturned unless clearly wrong.<sup>19</sup> In my opinion, the board’s decision to retire this individual would not be held by a court to be clearly wrong. I am further

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<sup>17</sup> *Id.* at (2).

<sup>18</sup> While it does not bear directly on your question, I note that this termination requirement is consistent with that of the state-supported retirement system, APERS. *See* A.C.A. § 24-4-520(a) (Supp. 2013) (requiring that members of APERS “terminate *covered employment* to be eligible for retirement[.]”) (emphasis added).

<sup>19</sup> *Arkansas State Highway & Transp. Dep’t v. Lamar Advantage Holding Co.*, 2011 Ark. 195, 381 S.W.3d 787.

reinforced in this conclusion by the general maxim that pension acts should be liberally construed in favor of those to be benefited.<sup>20</sup>

***Question 3 - When the employee ceases contributing to the Non-Uniformed Pension, [and] begins contributing to APERS, do benefits, such as seniority for purposes of calculating sick leave and vacation benefits, remain the same and “carry forward” to the employee’s new court clerk position or must they be paid or otherwise resolved upon separation of employment as a deputy court clerk?***

There are no provisions in the Arkansas Code regulating the leave time of non-uniformed employees. As explained by my immediate predecessor, the absence of a controlling state law leaves this matter open for regulation by a city’s governing body:

The Code expressly includes among “state affairs” subject to the “general laws” of the state “[h]ours and vacations, holidays, and other fringe benefits of employees.” A.C.A. § 14-43-601 (a)(1)(G) (Repl. 1998). Subsection (a)(2) of this statute provides that a city council may legislate upon state affairs “if not in conflict with state law.” The Code contains no provisions regulating the leave time of non-uniformed employees, thus leaving this field open for regulation by the city council.<sup>21</sup>

Your question regarding leave benefits for a deputy district court clerk must therefore be referred to local counsel, who will be familiar with any policies that have been fixed by the city council and whether those policies apply to deputy court clerks under the terms of the city regulations.

***Question 4 - Regarding non-court personnel, is there any prohibition pursuant to the Non-Uniformed Pension Fund, Ark. Code Ann. § 24-12-101 et seq. or some other state law that would prohibit a city employee who retires pursuant to Ark. Code Ann. § 24-12-115 from being considered for being rehired into the same position from which they retired, as long as they did not subsequently participate in the Non-Uniformed Pension Fund?***

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<sup>20</sup> *Looper v. Gordon*, 201 Ark. 841, 147 S.W.2d 24 (1941).

<sup>21</sup> Op. Att’y Gen. 2005-052 at 6. See also generally Op. Att’y Gen. 2006-112 (opining that a city council is empowered under state law to establish employment policies respecting deputy district court clerks).

The answer to this question appears to be “no.” The general rule is that retirees may return to covered employment and continue to receive their retirement benefits, as long as it is understood they cannot rejoin their retirement systems.<sup>22</sup> And as my predecessor observed, the general rule appears to apply to non-uniformed employees covered by A.C.A. § 24-12-101 *et seq.*<sup>23</sup>

The board may wish to consult local counsel to explore imposing a bona fide separation of service requirement on persons seeking to be rehired into the same position from which they retired. Although state law explicitly specifies the subject of retirement pensions as being “state affairs” rather than “municipal affairs,”<sup>24</sup> it goes on to authorize cities to act upon such state affairs as long as the cities’ acts with regard to such matters do not conflict with state law on the same subject.<sup>25</sup> The Arkansas Code is currently silent on the issue of a break in service for employees covered by a non-uniformed pension fund, thus arguably leaving municipalities free to address the matter pursuant to A.C.A. § 14-43-601.

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

Sincerely,

DUSTIN MCDANIEL  
Attorney General

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<sup>22</sup> Op. Att’y Gen. 2005-035.

<sup>23</sup> *Id.*

<sup>24</sup> A.C.A. § 14-43-601(a)(1)(F) (Supp. 2013).

<sup>25</sup> *Id.* at (a)(2)(B).