



OFFICE OF THE COUNTY ATTORNEY

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MEMORANDUM

TO: Eric Wallmark
VIA: Marc Hansen *Marc Hansen*
FROM: Amy Moskowitz *Amy A. Moskowitz*
DATE: September 12, 2005
RE: Pension Payments of Rehired Retirees

Issue

Whether a part time employee working for HOC and who is receiving a non-disability pension may continue to receive pension payments.

Short Answer

A reemployed retiree employed on a part time basis may continue receiving pension payments if the reemployed retiree does not participate in the retirement system.

Law

Discontinuance of Pension Payments

Section 33-52(b) of the Montgomery County Code provides:

A member must not receive pension payments while serving in an appointed or elected County office that receives any compensation paid by the County. A member appointed to a full-time County position must become a member of the retirement system or the Retirement Savings Plan under Sections 33-37 and 33-115 and make member contributions until later separation under Article III or Article VIII. The retirement

benefit of an employee who resumes membership in the optional or integrated plan must be recalculated when the employee later separates from service. The retirement benefit under Article III of an employee who becomes a member of the Retirement Savings Plan must resume when the employee later separates from service.

This first sentence appears to only terminate pension payments to elected or appointed individuals and not for regular County employees. Before this provision was amended in 1998 the sentence included explicit language that terminated pension payments to any member returning to County service. However, the Office of Human Resources continued to terminate payments for all rehired full-time employees apparently under the theory that the 1998 amendment did not intend to make any policy change on this issue. See Addendum for further details.

Before 1998 and after 1978, Section 33-52(b) provided:

If a member receiving pension payments returns to service to the County or is appointed or elected to any County office, the salary or compensation of which is wholly or partly paid by the County, pension payments will cease. The member will again become a member of the retirement system and resume member contributions until subsequent retirement as provided by other provisions of this article.

From the inception of the retirement system until 1978, the following provision appeared:

If a member receiving pension payments under subsection (c) [discontinued service pension] returns to the service of the county or he is appointed or elected to any county office, the salary or compensation of which is wholly or partly paid by the county, his pension payments will thereupon cease, his pension optional election will be rescinded and he will again become a member of the retirement system and resume his member contributions until he retires as provided by other provisions of this article.

See Addendum regarding the 1978 change.

Part-time Employee Participation

Under 33-37, a full time employee must participate in the retirement system as a condition of employment. Under the same section, part-time employees may, but are not required to, participate in the retirement system. A part time employee may elect to participate at anytime, but once the employee elects to participate, the employee cannot terminate participation.

Since the retirement system's inception, part time employees have had the option to participate while full time employees must participate as a condition of employment.

History and Prior Guidance

Over the years, numerous opinions addressed under what circumstances pension payments of rehired employees must terminate. Most opinions addressed specific situations.

December 22, 1970 memo from David Cahoon (County Attorney) to J.P. Gaquin (Personnel Director). Mr. Cahoon addressed the re-employment of an elected official. He states that the Code provision regarding an elected official's pension, unlike the discontinued service pension, does not require termination of pension payments upon re-employment.

November 8, 1972 memo from Richard McKernon (County Attorney) to Harvey McConnell (Office of Human Resources). Mr. McKernon addressed how former Council members may be hired on a part time basis (e.g., regular part time employee v. contract employee). He concluded that rehiring an employee as a part time employee would cause the individual to have the employee's retirement benefits cease but the employee would accrue additional retirement benefits whereas rehiring an employee as a contract employee has no impact on pension payments. He did not cite any Code provisions and did not establish any connection between the termination of pension payments and the resumption of participation in the retirement system.

March 16, 1981 letter from Clyde Sorrell (County Attorney's Office) to Robert Tierney (retired member). Mr. Sorrell wrote this letter to a retired employee who wished to return on a temporary basis (less than 12 months) to replace an employee while the County processed that employee's disability retirement. After the County processed the disability, the County would hire another person as a regular full time employee. Mr. Sorrell concluded that the two sentences of 33-52(b) must be read together so that the discontinuance of pension payments requires the rehired individual to currently participate in the retirement system. If the individual does not participate in the retirement system, the individual could continue receiving pension payments. Because the County would hire Mr. Tierney as a temporary employee, he would not be eligible for benefits and could continue receiving pension payments.

August 4, 1981 memo from Paul McGuckian (County Attorney) to Casey Bula, (Department of Liquor Control). Mr. McGuckian concluded that an individual may receive pension payments while employed in a part time position not eligible for benefits and may not receive pension payments if employed in a position eligible to earn pension benefits. Mr. McGuckian refers to the Code, but it is unclear how he arrived at this conclusion.

March 12, 1987 Memo from Linda Berk (County Attorney's Office) to Bruce Sherman (County Attorney's Office). Ms. Berk addressed whether the County must terminate pension payments for those rehired on a temporary part time basis. She stated that it is only equitable to construe 33-52 as requiring the termination of pension payments only when an individual is re-hired and eligible to participate in the retirement system. She does not provide any rationale or legal basis for her statement. She warns against the County manipulating the status of such employees and states that her memo does not address career part time employees.

May 1, 1987 Memo from Linda Berk (County Attorney's Office) to Hilton Wade (OHR) Ms. Berk concluded that an individual who returns to full time employment cannot receive pension payments. However, if the individual returns on a part-time basis, only if the employee becomes a member of the retirement system should pension payments terminate. If the individual returns to part time employment but does not become a member of the retirement system, the pension payments should continue. She believes that the law intends to prevent a

person from receiving pension payments while the person makes pension contributions. Therefore an individual not making pension contributions can continue receiving pension payments.

December 5, 1990 Draft Letter from Terry Finn (Outside Counsel) to Hilton Wade (Division of Employee Services). Mr. Wade asked Mr. Finn whether an employee rehired on a temporary basis, for at least three months, could continue to receive pension payments. Mr. Finn concluded that, subject to the administrative exception discussed below, an individual returning to County employment must have the employee's pension payments terminated regardless of whether the individual currently participates in the retirement system. He states that the first sentence of 33-52(b) clearly requires a termination of pension payments and does not condition the termination on whether the re-hired employee again participates in the retirement system. In essence, the first sentence is independent of the second sentence. In addition, he believes a Court would conclude that the Council enacted the provision to prevent double dipping (i.e., a person should not receive both a salary and pension payments).

Mr. Finn addresses the 1987 opinion from the County Attorney's office as a practical solution for dealing with the County's employment needs. However, he believes that statutory interpretation must follow the plain meaning rule addressed in Montgomery County v. Lindsay, 50 Md. App. 676 (1982).

Mr. Finn believes the County can make an administrative exception where strict adherence produces an administratively expensive and inconvenient approach and does not substantially conflict with the intent of the County Council. Because Aetna [an outside party] makes the pension payments, the process of stopping and starting benefits could take 60 days. It would be impractical to stop and start pension benefits for an employee re-hired for less than three months. He notes that this administrative exception does not work for part time employees.

October 1, 1991 Memo from Linda [Berk] Thall (County Attorney's Office) to William Garrett (Office of Personnel) via Joyce Stern (County Attorney). Ms. Thall concludes that the prior opinions by the County Attorney's Office correctly interpreted 33-52(b) in requiring the termination of pension payments only when the individual currently participates in the retirement system. If the individual does not resume participation, the employee may continue receiving pension payments. She rationalizes that the two sentences must be read and interpreted together. As authority, she cites North Charles General Hospital, Inc. v. Employment Security Administration, 286 Md. 115 (1979). She states this case requires the language of a statute to be construed in relation to all its provisions. As in her previous opinion, she cautions against the use of temporary employees to circumvent the termination of pension payments requirement.

March 22, 1993 Memo from Linda [Berk] Thall (County Attorney's Office) to Hilton Wade (Division of Employee Services) via Joyce Stern (County Attorney). Mr. Wade asked Ms. Thall to re-evaluate past decisions regarding rehiring and termination of pension payments. Ms. Thall follows the rationale of her 1991 memo concluding that the sentences of 33-52 must be read together to give the section meaning. Reading the sentences together would only require the termination of pension payments when the individual currently participates in the retirement system. She also notes the lack of legislative history and notes the practice of the Office of

Human Resources has been to continue pension payments of individuals rehired for temporary positions. Lastly, Ms. Thall again warns against the Department abusing this interpretation when there are temporary employees who have worked more than a year.

August 1994 Draft Letter from Terry Finn (Outside Counsel) to Linda Thall (County Attorney's Office). [Note: Although the final version of the letter is not in the file, a subsequent letter from Terry Finn indicates that he had sent a final version]. Similar to his 1990 letter, Mr. Finn concludes that 33-52 requires the termination of pension payments upon a return to employment. Mr. Finn does state that it is arguable that the two sentences could be read together, along with the separate Code provision requiring participation in the retirement system for full time employees. Reading these provisions together could suggest that an individual might continue to receive pension payments if the employee does not currently participate in the retirement system. However, like his 1990 letter, he states that a Court would look to the underlying policy of the provision. There are two separate policies. One policy, represented by the first sentence, is to prevent double dipping such that a person should not receive a salary and pension payments at the same time. The second policy, represented by the second sentence, requires participation in the retirement system. But most importantly, the discontinuance stated in the first sentence is not conditioned on participation and the sentences operate independently each with their own requirements.

January 2, 2000 Letter from Constance Donovan (County Attorney's Office) to Joy Lawson (Office of Human Resources). While this opinion mainly discussed qualification issues associated with retirees receiving pension benefits, Ms. Donovan concluded that the County can rehire employees as temporary or contract employees and continue their pension payments. She did not give any rationale or basis for her conclusion.

Current Practice by the Office of Human Resources

I understand that the Office of Human Resources continues to make pension payments to rehired employees working in temporary positions. I further understand that the Office of Human Resource terminates pension payments for employees rehired as full time employees. The Office of Human Resource's policy achieves the advantage of making available to the government a pool of experienced retirees to fill the County's employment need created when a critical employee leaves County employment. However, the Office of Human Resources does not have a policy regarding part time employees.

Analysis

While the current language of 33-52(b) differs slightly from the language addressed in the prior opinions, the question of how to interpret the language remains the same. The language expressly states these two principles, (1) pension payments terminate upon re-employment and (2) re-hired (full-time) employees resume participation in the retirement system. The question becomes: Are the two different principles separate and unrelated or is there a relationship between the two principles? Either interpretation is logical.

The first interpretation is that each principle stands on its own. There is no ambiguity or condition imposed in the first sentence which states that pension payments terminate upon re-employment. Likewise, there is no ambiguity in the sentences that follow which address resumption of participation in the retirement system. Under this interpretation, pension payments terminate upon an individual's re-employment in any capacity, including as a temporary or part time employee. In addition, if rehired as a full time employee, the individual must participate in the retirement system. However, the termination of the pension payments occurs regardless of whether the individual resumes participation in the retirement plan because the sentences as written do not impose this condition.

The second interpretation requires reading the principles together and making an inference. Because the principles are in the same provision, it is logical to infer that the only reason pension payments terminate is that the person resumes participation in the retirement system. If there is no relationship between the sentences, they would not be in the same subsection. Under this interpretation pension payments do not terminate if an individual does not participate in the retirement system.

Because statutory construction entails reviewing legislative history, ideally legislative history would provide the intent of the County Council. The provision addressing termination of pension payments upon reemployment of a retiree appeared in 1966, in the first plan document. At that time, pension payments terminated only for those who retired on a discontinued service pension and returned to County employment. However, Richard McKernon's 1972 opinion which states that pension payments terminated upon part-time reemployment did not limit the termination of pension payments only to an individual receiving a discontinued service pension. Therefore, it is possible that the County did not administer this provision as written. In any event, the original version assumes that an individual may again participate in the retirement system and does not take into consideration the fact that an individual may not resume participation.

In addition, no legislative history exists regarding the version adopted in 1978. Because the 1978 legislation added the integrated plan, the legislative history discussed this feature in detail. Because the legislation focused on reducing County costs, it seems logical that all reemployed participants would have their pension payments discontinued rather than only those who retired on a discontinued service pension. In addition, most private pension plans terminate pension payments upon re-employment. Finally, as stated above, the Council may have amended this provision to reflect how the plan was being administered. In any case, the Council's intent is unknown as to under what circumstances pension payments terminate upon re-employment. The Council may not have considered this as an issue and may have assumed returning employees would participate in the retirement system because employee classification issues (benefit employees v. non benefit employees) did not exist to the extent they exist today.

As discussed above, this office has issued opinions which follow the second interpretation. This second interpretation has a logical basis and follows the view that courts have taken in reviewing the total statutory scheme, in other words reviewing the statute as a whole. *Morris v. Prince George's County*, 319 Md. 597. In addition, the Office of Human Resources has followed the second interpretation for many years. Courts generally advocate following an agency's

interpretation of a statute it administers. *Selig v. State Highway Admin.*, 383 Md. 655. Therefore, the Office of Human Resources can continue pension payments for rehired employees who are not required to or who elect not to resume participation in the retirement system.

cc: Steve Farber
Linda Herman
Charles Thompson
David Stevenson

Addendum

1998 Change

Before 1998, 33-52(b) provided:

“If a member receiving pension payments returns to service to the County or is appointed or elected to any County office, the salary or compensation of which is wholly or partly paid by the County, pension payments will cease. The member will again become a member of the retirement system and resume member contributions until subsequent retirement as provided by other provisions of this article.”

On March 13, 1998, the County Executive requested that the County Council revise this provision (along with other provisions) to correct inadvertent errors made when the Retirement Savings Plan was implemented in 1994. The request to revise 33-52 was to clarify that an individual returning to employment could participate in the Retirement Savings Plan.

The Bill submitted by the County Executive, and approved by the County Attorney’s office, only made a minor change to the first sentence of 33-52(b) and read as follows:

“If a member receiving pension payments returns to the service of the County or is appointed or elected to any County office, the salary or compensation of which is wholly or partly paid by the County, pension payments [will] *must* cease. [The member will again] *A member appointed to a full-time position must* become a member of the retirement system *or the Retirement Savings Plan under the participant requirements in Sections 33-37 and 33-115* and [resume] *make* member contributions until subsequent retirement as provided by other provisions of [this article] *Article III or Article VIII.*

However, the Bill as introduced to the County Council changed the first sentence and read:

“[If] A member [receiving] *must not receive* pension payments [returns to the service of the County or is] *while serving in an* appointed or elected [to any] County office, [the salary or] compensation [of which is wholly or partly] paid by the County [, pension payments will cease.] [The member will again] *A member appointed to a full-time position must* become a member of the retirement system *or the Retirement Savings Plan under the participant requirements in Sections 33-37 and 33-115* and [resume] *make* member contributions until [subsequent] *later* retirement [as provided by other provisions of this article] *under Article III or Article VIII.*

Therefore, it appears that the County Executive did not intend to change the meaning of this provision to require that only appointed and elected officials would have their pension payments terminated if rehired. Presumably the County Council’s drafter revised the language in an attempt to make it more reader friendly and also did not intend to change the meaning. Because the second sentence uses the word “appointed”, the drafter may have believed using the word “appointed” referred to a returning employee and only used that word in the first sentence. It is

important to note that the drafter made other changes to the provision, presumably also to make it more read friendly.

In addition, the only discussion in the Bill history file is a concern noted by the Management and Fiscal Policy Committee that the provision did not provide how repayments would be recalculated. A sentence was added to the final bill. There was no discussion on the termination of pension benefits of rehired employees.

1978 Change

In 1978, Bill 13-78 made major changes to the retirement system, most notably implementing the integrated plan. While the bill file contains testimony regarding many of the changes, many of which sought to restrict benefits in some way, there is no reference to the change made to termination of pension payments upon re-employment. However, a summary of the changes do not indicate that there is a change to this provision, only that the section is in a different place. No change to this provision was made from the bill's introduction to the bill's enactment.