

M E M O R A N D U M

October 1, 1991

TO: William P. Garrett, Director  
Office of Personnel

VIA: Joyce R. Stern *Joyce R. Stern*  
County Attorney

FROM: Linda B. Thall *Linda B. Thall*  
Senior Assistant County Attorney

RE: Reemployment of Retired Montgomery County Employees

This memorandum is in response to your inquiry and that of Hilton Wade regarding the reemployment by the County of retired County employees. Along with the two memoranda, a list of some of the retired County employees who have returned to County government service since their retirements was also provided. This list does not show whether the individuals named are employed on a contractual or temporary basis or whether they hold full-time or part-time merit system positions.

As noted in Hilton Wade's memorandum, §33-52(b) of the retirement law provides that the retirement benefits of a member will cease if that member returns to the service of the County or if the member is appointed or elected to any County office where the salary or compensation is wholly or partly paid by the County. In addition, that section further provides that upon such a return to service the retired member will again become a member of the retirement system and resume making contributions to the system until the individual's subsequent retirement.

In the past, staff members of the County Attorney's Office have taken the position that §33-52(b) only requires discontinuance of retirement benefit payments when the member returns to county service and resumes participation in the retirement system. See memoranda opinions issued by Assistant County Attorneys Linda D. Berk (May 1, 1987), Suzanne Levin (March 9, 1982), and Clyde H. Sorrell (March 16, 1981). These opinions held that if the returning member was precluded from resuming membership in the County retirement system by virtue of the nature of his position, §33-52(b) did not require termination of the individual's retirement benefit payments.

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Hilton's memorandum states that the past practice of the County has been consistent with these opinions in that retired individuals have been allowed to return to County employment for temporary periods without loss of their retirement benefits.

It is my understanding that retired County employees continue to return to County service, but in greater numbers than has been the case in the past. Your memorandum of July 31, 1991, states that in recent months more than 20 retirees have been collecting salary and retirement benefits. While it is not entirely clear from the information provided, it appears that most of these returning retirees are being brought back on a contractual or a temporary basis. As such, they are ineligible for merit system status and ineligible for a resumption of participation in the retirement system.

The Montgomery County Government Personnel Regulations (MCPR) define a temporary position as one that is required for a specific task for a period not to exceed twelve months. MCPR §3-11. In the alternative, a temporary position may be used intermittently on an as-needed basis. The Regulations permit the Chief Administrative Officer to authorize the continuance of a temporary position in excess of twelve months. The Regulations also warn, however, that "[t]emporary positions must not be used in lieu of full-time or part-time positions as a means to circumvent the requirement to provide benefits to which merit system employees are entitled." MCPR §3-11.

Based on prior conversations with you and with Hilton, our Office is concerned that retired individuals who were rehired by the County on a temporary basis may, in fact, have remained in these temporary positions for significantly more than the twelve-month period allowed by the MCPR. Also, you have informed us that one or more persons who recently availed themselves of discontinued service retirements when their positions were abolished have either returned or are contemplating a return to the County Government in specially created temporary positions where their job duties and level of compensation would be comparable to that which existed at the time of their retirements.

If the prior staff interpretations of Code §33-52(b) are followed, these individuals would be permitted to receive from the County not only a paycheck, but a continuing retirement

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benefit as well. This is because temporary employees are ineligible to participate in the retirement system. As noted above, Code §33-52(b) has been construed in the past not to require discontinuance of the retirement benefit when the returning member was not permitted to resume participation in the retirement system.

Based upon a review of the law, the memoranda opinions of the Assistant County Attorneys referenced above, and the December 5, 1990, draft opinion prepared by the County's outside pension counsel Terrence M. Finn, it is my conclusion that the staff opinions construing Code §33-52(b) are correct. In interpreting the meaning of statutory language, I am guided by the principle that the language of the statute must be read in context and in relation to all of its provisions. North Charles General Hospital, Inc. v. Employment Security Administration, 286 Md. 115, 405 A.2d 751 (1979). The first sentence of §33-52(b), which states that the County pension payments to a returning member must cease, must be harmonized by reading it in conjunction with the second sentence, which requires the returning member to resume participation in the County retirement system. This second sentence implicitly requires resumption of membership in the retirement system as a precondition to the discontinuance of the member's retirement benefit. Thus, the law precludes a member from receiving a County retirement benefit while the member is simultaneously contributing to the system and accruing additional retirement service credits. I have found no support for the broader conclusion that §33-52(b) was added to the retirement law for the purpose of preventing "double dipping", i.e., the collection of a paycheck and a retirement benefit from the County at the same time.

It does appear, however, that the practice of the County to date could be viewed as contributing to a misuse of temporary positions in violation of MCPR §3-11. By not requiring suspension of the retirement benefit during the period of reemployment in a temporary position, departments have been able to use these positions to offer an extra incentive to secure the services of former County employees who have retired (i.e., their ability to receive both a paycheck and a retirement benefit from the County). The rehiring of persons whose positions were only recently abolished (causing them to become eligible for a discontinued service retirement) is also suspect.

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For this reason, close attention must be paid to the requirements of MCPR §3-11. A retired County employee may return to County service on a temporary basis if the employee's services are required for a specific task not to exceed twelve months. While MCPR §3-11 does permit the Chief Administrative Officer to authorize employment in a temporary position beyond this twelve month limit, this authority should be used sparingly to ensure that the position is and remains a temporary one. If retired employees are routinely allowed to remain in temporary positions for long periods of time (in excess of twelve months), this would constitute a misuse of the temporary position to avoid the requirement for a discontinuance of the retirement benefit.

In conclusion, it is my opinion that, for the reasons stated above, Code §33-52(b) does not require the discontinuation of the retirement benefit of retired County employees who return to County employment in temporary positions. The terms of employment for such employees should be closely monitored, however, to ensure compliance with the provisions of MCPR §3-11. In the event that a more stringent construction of Code §33-52(b) is desired, i.e., termination of the retirement benefit of a returning retiree regardless of the individual's eligibility for a resumption of participation in the retirement system, you may wish to request the amendment of §33-52(b) so that such a result is expressly required by the Code.

cc: William H. Hussmann,  
Chief Administrative Officer  
E. Hilton Wade, Jr., Chief  
Division of Employee Services

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