

VOLUME NO. 36

Opinion No. 24

HIGHWAY PATROL RETIREMENT SYSTEM — involuntary retirement — retirement age — payments in case of death from natural causes — res judicata.

HELD: 1. Section 31-215, Revised Codes of Montana 1947, must be interpreted to the effect that a patrolman who is discontinued from service, not voluntarily, after having completed ten (10) years of service, but before reaching age 60, may elect to take either of the following as his retirement allowance:

(a) The full amount of accumulated deductions standing to his credit; or

(b) the actuarial equivalent of the accrued portion of the service retirement allowance which would have been payable to him commencing at age 60, pursuant to section 31-216, Revised Codes of Montana 1947, had he not discontinued service.

2. The beneficiary of a deceased patrolman, who dies of natural causes before attaining age 60, regardless of his length of service has a choice under section 31-219(b), Revised Codes of Montana 1947, of either:

(a) Taking the full amount of the accumulated deductions standing to the decedent's credit; or

(b) taking an annuity which would be the actuarial equivalent of the accrued portion of the service retirement allowance which would have been payable to the decedent commencing at age 60, pursuant to section 31-216, Revised Codes of Montana 1947, had death not discontinued his service.

3. Retirement allowances heretofore granted under an erroneous interpretation of section 31-215, Revised Codes of Montana 1947, must stand unchanged by this subsequent reinterpretation of said section.

September 19, 1975

Mr. Lawrence P. Nachtsheim, Administrator
Public Employees Retirement Division
Department of Administration
1712 Ninth Avenue
Helena, Montana 59601

Re: Highway Patrol Retirement System

Dear Mr. Nachtsheim:

You have requested my opinion on the following questions:

1. To what age does the term "retirement age" refer as that term is used in section 31-215, Revised Codes of Montana 1947, which provides that a highway patrolman who is discontinued from service, not voluntarily,

after having completed ten years of service, but before reaching "retirement age," may elect to take certain retirement benefits?

2. As so interpreted, what is the application of section 31-215, Revised Codes of Montana 1947, to section 31-219, Revised Codes of Montana 1947, when a deceased highway patrolman does not have ten years of creditable service?

3. What, if anything, should be done with respect to the retirement allowances heretofore granted under section 31-215, Revised Codes of Montana 1947, inasmuch as all exceed the benefit that would be due under the above interpretations of said section 31-215, Revised Codes of Montana 1947?

Each is separately discussed below:

1. Interpretation of section 31-215, Revised Codes of Montana 1947.

Section 31-215, *supra*, purports to grant a patrolman discontinued from service, not voluntarily, after having completed 10 years of total service, **but before reaching retirement age**, an option to take either

. . . (a) the full amount of accumulated deductions standing to his credit; or . . .

(b) a member's annuity of equivalent actuarial value to his accumulated deductions standing to his credit, **plus the actuarial equivalent of a state annuity having a value equal to the present value of a state annuity then standing to his credit.** (Emphasis supplied)

There is no problem if option (a) is elected, but the underscored language of option (b), in calling for a determination of "the present value of a state annuity then standing to" the credit of a member, implies money in hand, while the most recent valuation indicates that the assets remaining after providing for inactive members and annuitants was less than \$250,000, which figure is exceeded by over \$200,000 by the accumulated deductions of active members alone, so that no "state annuity" stands to anyone's credit, in the sense of a funded benefit.

What the legislature may have intended was something similar to section 68-2005, *supra*, of the Public Employees' Retirement Act, viz:

The annual amount of retirement allowance payable to a member following his early retirement is the actuarial equivalent of the accrued portion of the service retirement allowance which would have been payable to him at age sixty (60) pursuant to section 68-2003.

This construction makes obvious actuarial sense, **except** that the Highway Patrolmen's Retirement Act does not give any age for assumed commencement of benefits under section 31-215, *supra*, and there are three possible occasions on which benefits may ordinarily commence under that act, which is unlike the PERS act in that respect. These give rise to three possible constructions.

The first possibility stems from section 31-213, *supra*, which permits retirement after 20 years of service. Thus in calculating the benefit under section

31-215, supra, one could assume commencement of benefits when the member would have completed 20 years of service, had he not terminated prior thereto. It is my opinion that this construction is improper because it is an option and a privilege only if the member serves 20 years, and since the applicant has not accumulated this service it seems an unlikely basis for a "state annuity."

The second possibility stems from section 31-211, supra, and section 31-213, supra, which permit retirement after 25 years of service at half salary. These sections to be applicable require 25 years of service, which applicants under section 31-215, supra, have not met, and to use it as the basis for the calculation under the latter section would require two further suppositions, (a) that the applicant would have retired after 25 years of service, and (b) that the 25 years would have been continuous and uninterrupted. The Highway Patrol Retirement System's actuary points out, for example, that experience indicates that of those completing 25 years of service, only 20 percent retire with exactly that much service, with 20 percent retiring each year thereafter.

The third possibility is to use section 31-216, supra, which makes retirement compulsory, regardless of years of service, at age 60. It further provides that if at that age the retiree has 25 years of service he shall receive the full retirement allowance (1/2 of his average final salary), and if he has served less than 25 years, "he shall be entitled to the same options as provided in section 31-215." While this last clause takes us back to where we started, it also ties section 31-215, supra, to section 31-216, supra. Of at least equal significance is the fact that the sections are also tied to each other by the phrase in section 31-215, supra, pertaining to involuntary retirements after completion of 10 years of service "**but before reaching retirement age,**" since the only statute pertaining to a retirement age is section 31-216, supra.

In my view, the provisions of retirement acts where vague, or subject to varying interpretations, should be construed and interpreted to make actuarial sense. This is so not only because a retirement system should be actuarially sound, but also because all of Montana's retirement acts were largely the product of actuaries, and it must be assumed that these actuarial draftsmen, though perhaps deficient in the art of draftsmanship, intended to produce a law that was internally consistent, that left the basis for the necessary actuarial calculation of retirement benefits as free from conjectural or speculative elements as possible, and which would result in an actuarially sound system.

Therefore, it is my opinion that section 31-215, Revised Codes of Montana 1947, must be interpreted to the effect that a patrolman who is discontinued from service, not involuntarily, after having completed ten (10) years of service, but before reaching age 60, may elect to take either of the following as his retirement allowance:

- (a) The full amount of accumulated deductions standing to his credit; or
- (b) the actuarial equivalent of the accrued portion of the service retirement allowance which would have been payable to him commencing at age 60, pursuant to section 31-216, Revised Codes of Montana, 1947 had he not discontinued service.

2. Interpretation of section 31-219(b), Revised Codes of Montana, 1947.

Paragraph (b) of section 31-219, *supra*, does not differentiate between patrolmen who die from natural causes before reaching retirement age (60) and who have served 10 years, and patrolmen dying under the same circumstances with less than 10 years service. In each case, the intent appears to grant to the decedent's beneficiary the same options available to a patrolman involuntarily discontinued from service after more than 10 years of service. If a refund of the accumulated deductions was all that was intended, it would seem that both section 31-215, *supra*, and section 31-217, would have been referred to, the former for decedents with more than 10 years of service, and the latter section for those with less than 10 years of service.

Therefore, as I have interpreted the options available under section 31-215, Revised Codes of Montana 1947, it is my opinion that the beneficiary of a deceased patrolman, who dies of natural causes before attaining age 60, regardless of his length of service, has a choice of either

(a) taking the full amount of the accumulated deductions standing to the decedent's credit; or

(b) taking an annuity which would be the actuarial equivalent of the accrued portion of the service retirement allowance which would have been payable to the decedent commencing at age 60, pursuant to section 31-216, Revised Codes of Montana 1947, had death not discontinued his service.

3. Effect of present interpretation of section 31-215, Revised Codes of Montana 1947, upon retirement allowances previously granted under that section.

The third question posed reduces itself essentially to whether the Board should now recompute retirement allowances previously granted by the Highway Patrolmen's Retirement Board under section 31-215, *supra*, and under an obviously erroneous interpretation thereof, and not only pay in the future in accordance with the new calculation, but also attempt to recoup what was erroneously paid in the past.

The Highway Patrol Retirement System was created in 1945 (Chapter 37, Laws of Montana 1945, now codified as Chapter 2 of Title 31, R.C.M. 1947), and was administered by the Montana Highway Patrolmen's Retirement Board until that Board was abolished by the Executive Reorganization Act of 1971 (Chapter 272, Laws of Montana 1971, codified as Title 82A, R.C.M. 1947) and all of its functions except the quasi-judicial functions transferred to the Department of Administration, and its quasi-judicial functions transferred to the Board of Administration of the Public Employees' Retirement System. See Paragraph (4) of section 82A-202, *supra*, and section 82A-211, *supra*. Paragraph (10) of section 82A-103, *supra*, defines "quasi-judicial function" as meaning,

. . . an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determination in

controversies. The term includes, but is not limited to, the **functions of interpreting, applying, and enforcing existing rules and laws; granting or denying privileges, rights, or benefits;** issuing, suspending, or revoking licenses, permits, and certificates; determining rights and interests of adverse parties; evaluating and passing on facts; **awarding compensation;** fixing prices; ordering action or abatement of action; adopting procedural rules; **holding hearings;** and any other act necessary to the performance of a quasi-judicial function. (Emphasis supplied)

It is clear that the granting of retirement benefits and interpreting, applying and enforcing the Highway Patrolmen's Retirement Act became the province of the Board of Administration of the Public Employees' Retirement Act in 1971. It is important to note that these functions, by whatever agency exercised, are quasi-judicial in character and expressly so recognized by statute.

Therefore, it is my opinion that because the Montana Highway Patrolmen's Retirement Board in interpreting the Highway Patrolmen's Retirement Act and in granting retirement benefits pursuant to an interpretation of the law which may have been erroneous was exercising in each such instance a quasi-judicial function, the doctrine of **res judicata** should operate to prevent the reduction of the previously granted awards.

Simply stated, the doctrine of **res judicata** is that a judgment, when rendered on the merits, is an absolute bar to a subsequent action, between the same parties or those in privity with them, upon the same claim or demand. See **Western Montana Production Credit Association v. Hydroponics, Inc.**, 147 Mont. 157, 161, 410 P.2d 937 (1966).

Application of that doctrine to the judicial function is well recognized. Judicial opinions vary widely as to whether, and to what extent, it should be applied to quasi-judicial action by administrative agencies. See 2 Davis, **Administrative Law Treatise**, Sections 18.02-18.07. Without discussing these often conflicting authorities, it is sufficient to say that whether or to what extent the courts will apply the doctrine to administrative action appears generally to depend on the type of administrative action being reviewed, with the result that we often find the same court in one case making the broad statement that the doctrine is not applicable to the decisions of administrative agencies, and in another type of case applying the doctrine. Thus, I conclude that the doctrine is, and should be, applied to some types of administrative action, and is not, and should not be, applied to other types. See **United States v. Utah Construction Co.**, 384 U.S. 394, 421, 86 S.Ct. 1545, 16 L.Ed 2d 642 (1965).

I base my opinion that the doctrine is applicable to this situation on the decision of the United States Supreme Court in **United States v. Moser**, 266 U.S. 236, 45 S.Ct. 66, 69 L.Ed. 262 (1924). That case involved a statute which provided that any Navy officer, with a creditable record, who served during the Civil War, shall, when retired, be retired with the rank and three-fourths of the sea pay of the next higher grade. Another statute provided that when any Navy officer had been 40 years in the service of the United States he was entitled to

retirement upon application therefor. Moser was a Navy captain who had served 40 years from the date of his entrance into the Naval Academy who applied for retirement, contending that his service at the Naval Academy constituted service during the Civil War, and hence that he was entitled to retirement allowance of three-fourths of the pay of a rear admiral, rather than of a captain. He instituted suit in the Court of Claims three times for installments of his retirement benefits on this theory, and each was decided in his favor. Between the first and second of these suits, in another suit brought by a difference claimant, one Jasper, the Court of Claims reached a different result, the change of opinion being brought about by a later statute which had not been called to its attention in Moser's first suit, and, which, in terms, excluded the period of service as a cadet. In the second and third suits brought by Moser, the Court of Claims declined to follow its decision in the **Jasper** case, holding that, by reason of its decision in the first **Moser** case, the question was **res judicata**. Finally, **Moser** brought this fourth suit in the Court of Claims, with the government defending on the same grounds. The Court of Claims again decided in favor of Moser, basing its opinion not only of **res judicata**, but also reversing its opinion in the Jasper case. On the government's appeal to the United States Supreme Court, that Court found it unnecessary to determine whether the Jasper decision had been right or wrong, holding instead that the Court of Claims was "clearly right in its application of the doctrine of **res judicata**," saying:

The contention of the government seems to be that the doctrine of **res judicata** does not apply to question of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a **fact, question, or right** distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged, but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based. (Citations omitted). A determination in respect of the status of an individual, upon which his right to recover depends, is as conclusive as a decision upon any other matter. ...

The problem which you have presented for my resolution does not have any element of any false statement or false records or inadvertent mistakes in records which resulted in an award of benefits either too great or too small. Such mistakes of facts on which the computation of benefits is based, can give rise to a right in the Board under section 31-224, supra, to "correct such error" and to "adjust the payments which shall be made to the contributor or annuitant in a manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid."

In the present case, it appears that you are dealing solely with a misapprehension of the law by a previous Board. Therefore, that being the case,

it is my opinion that the principle of **res judicata** should apply, and the retirement allowance previously granted should stand.

THEREFORE, IT IS MY OPINION:

1. Section 31-215, Revised Codes of Montana 1947, must be interpreted to the effect that a patrolman who is discontinued from service, not voluntarily, after having completed ten (10) years of service, but before reaching age 60, may elect to take either of the following as his retirement allowance:

- (a) The full amount of accumulated deductions standing to his credit; or
- (b) the actuarial equivalent of the accrued portion of the service retirement allowance which would have been payable to him commencing at age 60, pursuant to section 31-216, Revised Codes of Montana 1947, had he not discontinued service.

2. The beneficiary of a deceased patrolman, who dies of natural causes before attaining age 60, regardless of his length of service has a choice under section 31-219(b), Revised Codes of Montana 1947, of either:

- (a) Taking the full amount of the accumulated deductions standing to the decedent's credit; or
- (b) taking an annuity which would be the actuarial equivalent of the accrued portion of the service retirement allowance which would have been payable to the decedent commencing at age 60, pursuant to section 31-216, Revised Codes of Montana 1947, had death not discontinued his service.

3. Retirement allowances heretofore granted under an erroneous interpretation of section 31-215, Revised Codes of Montana 1947, must stand unchanged by this subsequent reinterpretation of said section.

Very truly yours,

ROBERT L. WOODAHL
Attorney General