

VOLUME NO. 36

Opinion No. 25

HIGHWAY PATROL RETIREMENT SYSTEM — military service — purchase of — vesting in interest. Sections 31-213, 31-215 and 31-223, Revised Codes of Montana 1947.

HELD: Military service may be purchased pursuant to section 31-223(2), Revised Codes of Montana 1947, and used for the computation of the eligibility or length of service period required under section 31-213, Revised Codes of Montana 1947, provided the member has met the minimum criteria for vesting in interest under section 31-215, Revised Codes of Montana 1947.

September 30, 1975

Mr. Lawrence P. Nachtsheim, Administrator
Public Employee's Retirement Division
1712 Ninth Avenue
Helena, Montana 59601

Dear Mr. Nachtsheim:

You have requested my opinion as to the effect, if any, of the 1974 Amendments to the Montana Highway Patrolmen's Retirement Act (Chapter 361, Laws of Montana 1974) with reference to the following question:

Whether the purchase of military service under section 31-223(2), Revised Codes of Montana 1947, can be used to qualify under the twenty (20) year retirement provision formerly contained in section 21-212, but now incorporated in section 31-213?

Section 31-208, which was not amended by Chapter 361, Laws of Montana 1974, provides that in computing the length of service for retirement purposes, credit should be given each contributor "for each year of service to the patrol", and that "time during which a contributor is absent from the service without pay shall not be counted in computing the service of a contributor except service with the armed forces of the United States in time of war". Thus, the only exception to the rule that only actual service to the patrol could be used in computing the length of service or vesting in interest period for retirement purposes was that time during which a member served in the armed forces "in time of war".

Under section 31-223, as it existed prior to the 1974 amendments, now section 31-223(1), provision was made for members of the patrol who were in the armed forces on July 1, 1945 or who thereafter were inducted into the armed forces, to have such military service credited to and made a part of their service retirement allowance by paying into the fund either during or after such service. Read with section 31-208, this contemplated that such military service could be used only for computing benefits and not for computing length of service or the vesting in interest period for retirement purposes unless such service was "in time of war".

Sections 31-211, 31-212, and 31-213, as they existed prior to the 1974 amendments, contemplated that the maximum retirement allowance was one-half of average final salary after twenty-five years of service calculated as provided in section 31-208, but that members had the option of retiring after twenty years of service, in which case the maximum retirement allowance "shall be proportionately reduced".

The involuntary retirement allowance, payable to a member who is retired not for cause and before retirement age as provided by section 31-215, does not have a "length of service" element in its calculation although eligibility does depend on the member having "completed ten (10) years of total service". The retirement allowance which is provided under subdivision (b) of section 31-215 is computed on a formula basis ($2\% \times \text{final salary} \times \text{years of service}$) because it

best approximates the "actuarial value" of the member's deductions plus the state's contributions after applying an actuarial reduction for years of service not completed before "retirement age".

Section 31-216 makes retirement compulsory at age 60. Although poorly drafted, it should be construed as providing for the retirement allowance of one-half salary if the 60 year old member had twenty-five years of service or one of the options contained in section 31-215 if he had less than twenty-five years of service.

Section 31-217 provides that a member voluntarily resigning or discharged for cause before becoming entitled to a retirement allowance is entitled only to his accumulated contributions. In an informal opinion directed to the Montana Highway Patrol dated August 14, 1967, former Attorney General Forrest H. Anderson held that a member who voluntarily resigns is entitled to the allowance provided under section 31-215. Then Attorney General Anderson indicated that to deny him these rights and allow only his accumulated contributions provided by section 31-217 would unconstitutionally affect his contractual rights to a pension since these rights had vested in interest after ten years of actual service with the patrol.

Accordingly, the scheme of the act as construed by the Attorney General prior to the 1974 amendments was that ten years of **actual** service to the patrol was required before a member was entitled to a retirement allowance, the only exception being "service with the armed forces of the United States in time of war" upon which the member paid contributions, if such service occurred after July 1, 1945.

Under section 31-223, prior to its 1974 amendment, if a member was inducted into the armed forces, he could either continue to make his payments into the fund or repay the board for doing so within two years after his return to the patrol, and such military service was to "be credited to and made a part of the member's service allowance". Harmonizing the last quoted clause of section 31-223 with the provision of section 31-208, providing that service with the armed forces of the United States in time of war could be counted in computing the service of a contributor, I must conclude that prior to the 1974 amendments the military service of a patrol member inducted into such service, and for which he contributed, could not be counted as service with the patrol to calculate the age at which the retirement allowance vests in interest, except so much as occurred in time of war.

Chapter 361 of the 1974 Session Laws amended the Highway Patrolmen's Retirement Act in several particulars. Section 7 thereof repealed section 31-212 which provided that a contributor who has served twenty years of creditable service with the patrol had the option of retiring with a "proportionately reduced" retirement allowance. Section 31-213 was amended by deleting the final sentence, viz:

. . . The member's annuity shall be the actuarial equivalent of his aggregate contributions at the time of retirement and the state annuity

shall be in an amount which, when added to the member's annuity will provide a total retirement allowance of one-half (1/2) of his average final salary.

In its place a formula for computing service retirement allowances based on each year of service after twenty was substituted. This amendment has little, if any, relationship to the first sentence which still provides that a service retirement allowance consists of the state annuity plus the member's annuity. This new provision reads as follows:

... The service retirement allowance shall be computed as follows: Twenty (20) through twenty-five (25) years, two per cent (2%) of his final salary for each year of service; twenty-six years and over, two per cent (2%) of his final salary for each year of service through the twenty-fifth plus one per cent (1%) of his final salary for each year of service past twenty-five (25).

The only significant changes in the statutory scheme that I can discern from the repeal of section 31-212 and the amendment to section 31-213 are that the meaning of the words "proportionately reduced" in former section 31-212 relating to the computation of the retirement allowance payable upon voluntary retirement with less than twenty-five years and at least twenty years of service has been clarified; and the former limitation of a maximum retirement allowance to one-half of average final salary, regardless of the number of years served, has been relaxed so that a patrolman with thirty years of service may not retire at 55% of his average final salary rather than 50% thereof.

In addition, a new paragraph was added to section 31-223 dealing with credit for service in the armed forces of the United States, which new paragraph reads as follows:

A member with fifteen (15) years or more of service with the Montana Highway Patrol may at any time prior to his retirement make a written election with the department to qualify all or any portion of his active service in the armed forces of the United States for the purpose of calculating retirement benefits up to a maximum of five (5) years if he is not otherwise eligible to receive credit for this same service pursuant to subsection (1). To qualify this service he must contribute to the account the amount determined by the department to be due based on his compensation and normal contribution rate as of his sixteenth year and as many succeeding years as are required to qualify this service with interest from the date he becomes eligible for this benefit to the date he contributes. He may not qualify more of this service than he has service with the Montana Highway Patrol in excess of fifteen (15) years.

The purpose of this provision is to permit a member with at least fifteen years of service with the Highway Patrol to qualify up to five years of active military service acquired prior to his joining the patrol, and to qualify such military service at the rate of one year for each year of patrol service after the fifteenth.

The question, based on a hypothetical situation, is whether a patrolman with 17 1/2 years of actual service to the patrol which followed 2 1/2 years of

active military service could voluntarily retire after qualifying the military service and be eligible for a retirement allowance of 40% of his average final salary under amended section 31-213 or must he wait to attain twenty years of service to the patrol before being able to voluntarily retire, at which time his retirement allowance, including the 2 1/2 years of military service qualified under paragraph (2) of section 31-223 would be 45% of his average final salary.

The aforementioned paragraph which was amended into section 31-223 as subdivision (2) was adopted from section 68-1605.1 of the Public Employees Retirement Act. Under PERS a person acquires a vested right to a retirement allowance computed on the formula system ($1/65 \times \text{final compensation} \times \text{years of service}$) after ten years of creditable service [sections 68-2001 and 68-2003]. Military service credited under section 68-1605.1 may not be used in computing that ten years required for vesting; but it is used to compute the retirement allowance based on thirty years of state service under section 68-2001(1).

This pension right, which has vested in interest, is protected by the contract clause of the Constitution [§31, Article II, Montana Constitution (1972); **Clarke v. Ireland**, 122 Mont. 191, 199 P.2d 965 (1948)]. It is nonetheless still subject to loss upon the occurrence of a condition subsequent such as termination for cause. **Kern v. City of Long Beach**, 29 Cal. 2d 848, 852, 179 P.2d 799 (1947); and see generally 52 A.L.R. 2d 337.

The 1974 amendments have not affected the benefits provided by section 31-215. As with PERS, eligibility for a retirement allowance in the Highway Patrolmen's Retirement System requires at least ten years of actual service with the patrol under the involuntary retirement provision contained in section 31-215. Section 31-215 provides that "involuntary" retirement allowance is payable to a member who is retired before retirement age and not for cause provided he has completed "ten (10) years of total service". As with PERS, the allowance is computed on a formula basis ($2\% \times \text{final salary} \times \text{years of service}$), because it best approximates the "actuarial value" of the member's deductions plus the state's contributions after applying an actuarial reduction for years of service not served before retirement age. As with PERS, military service credited under section 31-223 may not be used in computing that ten years required for vesting in interest.

That said paragraph (2) of section 31-223 was adopted from section 68-1601.1 of the Public Employees Retirement Act is significant. As above indicated, the interpretation and administration of the Public Employees Retirement Act has in the past and still allows the purchase of all service time for purposes of qualifying for a retirement based on thirty years of service provided the member has served at least ten years of actual service. It will be presumed when the Legislature adopts a statute that it acted with knowledge of previous construction of similar statutes and to have adopted such construction. **State By and Through State Highway Commission v. Yost Farm Co.**, 142 Mont. 239, 211, 384 P.2d 277 (1963). Moreover, such contemporaneous executive construction of a similar law will be considered by the courts in the interpretation of a statute. **State v. Brannon**, 86 Mont. 200, 211, 283 P.2d 202 (1929).

It has been suggested that this is contrary to the meaning which should be given to the provisions of section 31-208 and Section 31-223 (2). Section 31-208 provides that:

[i]n computing the **length of service** of a contributor, for retirement purposes, full credit shall be given to each contributor for each year of service rendered to the patrol. . . The time during which a contributor is absent from the service without pay shall not be counted in computing the service of a contributor except service with the armed forces of the United States in time of war. (Emphasis supplied)

Section 31-223 provides that a member may "at any time prior to his retirement" elect to qualify all or any portion of his active military service "for the purpose of calculating retirement benefits", as distinguished from computing length of service for retirement purposes.

The purpose intended by section 31-208 was to prevent a vesting in interest of retirement rights by the possible combination of years of military service, other than those served during a "time of war", with years of actual service to compute length of service with the patrol.

In light of the above mentioned holding by former Attorney General Forrest H. Anderson that retirement benefits under the Highway Patrolmen's Retirement Act vest in interest under section 31-215 after ten years of actual service, the purpose motivating the enactment of section 31-208 is clearly served. By the terms of section 31-223(2), the member must have "fifteen (15) years or more of service with the Montana Highway Patrol" before he can qualify military time for computation of benefits. It is therefore apparent that military service cannot be used to acquire a vested right in interest to a retirement allowance, unless that service was during a "time of war" pursuant to the exception contained in section 31-208. It is my opinion that the 1974 amendments to the Montana Highway Patrolmen's Retirement Act had no effect upon the pre-1974 requirements that a highway patrolman must have at least ten years of service to the patrol before his right to a retirement allowance vests in interest.

THEREFORE, IT IS MY OPINION:

Military service may be purchased pursuant to section 31-223(2) Revised Codes of Montana 1947, and used for the computation of the eligibility or length of service period required under section 31-213, Revised Codes of Montana 1947, provided the member has met the minimum criteria for vesting in interest under section 31-215, Revised Codes of Montana 1947.

Very truly yours,
ROBERT L. WOODAHL
Attorney General