

## Opinion No. 86

**Public Employees Retirement System  
—Rules and Regulations, Public  
Employees Retirement System—  
Retirement—Resignation.**

**Held:** The Public Employees Retirement Board may legally promulgate a regulation defining the word "retirement" as it is defined in the statute (Section 2 (ad) Chapter 212, Laws of 1945, as amended by Chapter 297, Laws of 1947) and recognizing such "retirement" may be effected voluntarily by an elective officer who is a member of the retirement system by his resignation from such office upon his reaching retirement age.

December 19, 1947

Mr. Fergus Fay, Secretary  
Public Employees Retirement  
System  
Power Block  
Helena, Montana

Dear Mr. Fay:

You have requested the opinion of this office concerning the validity of the following regulation promulgated by the Public Employees Retirement Board:

"'Retirement' shall mean withdrawal from active service with a retirement allowance granted under the provisions of Chapter 212, Laws of 1945, as amended by Chapter 297, Laws of 1947. Such retirement may be effected voluntarily by an elective officer who is a member of the retirement system by his resignation from such office upon his reaching retirement age."

The power of the retirement board to establish rules and regulations is set out in Section 14(b) of Chapter 212, Laws of 1945, as amended by Chapter 297, Laws of 1947:

"(b) The board may establish such rules and regulations as it deems proper within the limitations of this act and for its proper administration, operation and government. . . ."

Our Supreme Court—in the case of *McFatrige, et al v. District Court, et al* (1941) 113 Mont. 81, 88, 122 Pac. (2d) 834—has clearly defined the limits of a board such as yours in adopting rules and regulations:

" . . . The board is an administrative body, functioning as a bureau of the executive department of the state government. It has no law making power. Any attempt to create for itself authority and discretion not given by the legislature must fail. The board is authorized to make rules and regulations, but these must be limited in their purpose and effect as aid in the administration of the law. . . ." (Emphasis mine).

It was the power and authority of the Montana Liquor Control Board which was in question in the *McFatrige* case, supra, and Section 22 of Chapter 84, Laws of 1937, was the statutory provision under which the Liquor Control Board had promulgated regulations. Section 22 provided much the same as Section 14(b) of your act, supra, provides:

" . . . For the purpose of the administration of this Act the board shall make, promulgated and publish such rules and regulations as the said board may deem necessary for carrying out the provisions of this Act and for the ordinary and efficient administration thereof."

Our Court was definite in stating such a regulatory power could not be exercised in such fashion as to widen the scope of the law and extend the powers of the board to matters beyond the purview of the legislative enactment.

Study of the above quoted regulation which has been promulgated by the retirement board reveals the first sentence thereof is but a restatement of the statutory definition of the word "retirement" contained in paragraph (ad) of Section 2 of Chapter 212, Laws of 1945, as amended by Chapter 297, Laws of 1947. The second sentence of the regulation which your board has promulgated is but an aid to understanding of the act of resignation as it relates to "retirement."

Resignation, as we all know, is a withdrawal from active services; but

neither Chapter 212, Laws of 1945, nor Chapter 297, Laws of 1947 mentions resignation. Because resignation is so commonly and widely accepted as one form of retirement—a voluntary form—it seems obvious to me the statement in your regulation to the effect retirement may be effected voluntarily by resignation is entirely proper. It does not widen the scope of the retirement law or extend the powers of the retirement board to any matters beyond the purview of the legislative enactment, so far as I can determine.

It is, therefore, my opinion the Public Employees Retirement Board may legally promulgate a regulation defining the word "retirement" as it is defined in the statute (Section 2(ad) Chapter 212, Laws of 1945, as amended by Chapter 297, Laws of 1947) and recognizing such "retirement" may be effected voluntarily by an elective officer who is a member of the retirement system by his resignation from such office upon his reaching retirement age.

Sincerely yours,  
R. V. BOTTOMLY,  
Attorney General