

VOLUME NO. 36

Opinion No. 56

PUBLIC EMPLOYEES — Public Employees Retirement Act; Death Benefits; Section 68-2302(2), Revised Codes of Montana 1947.

HELD: A deceased state employee who has served eight months of state employment is entitled to that portion of the death benefit

**allowed under the Public Employees Retirement Act described
in section 68-2302(2), Revised Codes of Montana 1947.**

February 17, 1976

Mr. Lawrence P. Nachtsheim, Administrator
Public Employees' Retirement Division
1712 Ninth Avenue
Helena, MT 59601

Dear Mr. Nachtsheim:

You have requested my opinion on the following question:

Whether a deceased state employee who has served only eight months of state employment is entitled to that portion of the death benefit allowed under section 68-2302(2), Revised Codes of Montana 1947.

Section 68-2302 provides in part:

The amount of death benefit is the sum of (1) and (2), as follows:

(2) An amount equal to one-twelfth (12th) of the compensation received by the member during the last twelve (12) months of such compensation, multiplied by the smaller of six (6) **or the number of years of his creditable service**; ... (Emphasis supplied)

The question thus becomes whether the phrase "number of years of his creditable service" necessarily implies that one or more years of state service must be accumulated to receive the benefit.

In order to determine the intent of the legislature, it is useful to compare the above language to that statutory language granting the death benefit prior to 1973. Former section 68-1101 stated:

(b) An amount, provided from contributions by the state, or by a contracting city, which shall be equal to one-twelfth (12th) of the annual compensation earnable by the deceased during the twelve (12) months immediately preceding his death multiplied by the **number of completed years of service** under the system, but not to exceed fifty percentum (50%) of such compensation. (Emphasis supplied)

It can be seen that the critical change has been from "number of completed years of service" to "number of years of creditable service." Clearly, it was the intent of the legislature to grant the death benefit for the amount of service without restriction as to number of years completed. Under the former provision, there is no doubt that "completed years of service" meant precisely that — at least one completed year.

The 1973 enactment of section 68-2302 repealed the completed year requirement, and thus, in the event that less than one year has been served, the fractional amount should then be allowed under the statutory formula. This result is in accord with the general rule of statutory construction adopted by the Supreme Court of Montana that whenever the legislature amends existing laws, a presumption arises that the legislature intended to change such laws and the

courts must give effect to these amendments. **Mitchell v. Banking Corporation of Montana**, 95 Mont. 23, 24 Pac. 2(d) 124 (1933). Although any presumption may be overcome by affirmative evidence, more is required than a mere belief by legislative lobbyists that the legislature did not in fact say what it intended. Indeed, legislation must be construed by the plain and ordinary words used, and the supposed unexpressed intent of the legislature cannot override the usual construction of the language employed. **Equitable Life Assurance Society v. Hart**, 55 Mont. 76, 173 Pac. 1062 (1918).

If the legislature had expressly intended that at least one full year of service be required in order to receive the death benefit, then it could have provided such a limitation in section 68-2301, R.C.M. 1947, which defines the eligibility requirements for that benefit. Section 68-2301 states in part:

The board shall grant a death benefit to the beneficiary of any member or former member who dies in any of the following statuses:

(1) While in service;

The language of the above statute is clear and unambiguous. A mandatory, unqualified duty rests upon the Board of Administration to grant the death benefit regardless of the time spent in state service. The time element is specifically intended to be only a measure of the amount of money received under the death benefit formula.

In addition, it should be noted that the benefits of public retirement systems are a matter of contract right and not the result of largess of the state. See: **Clarke v. Ireland**, 122 Mont. 191, 199 Pac. 2(d) 965 (1948). Thus, the statute should be liberally construed, and any ambiguity resolved in favor of the deceased employee.

THEREFORE, IT IS MY OPINION:

A deceased state employee who has served eight months of state employment is entitled to that portion of the death benefit allowed under the Public Employees Retirement Act described in section 68-2302(2), Revised Codes of Montana 1947.

Very truly yours,

ROBERT L. WOODAHL
Attorney General