

VOLUME NO. 38

OPINION NO. 19

COUNTY OFFICERS AND EMPLOYEES - PERS coverage for county employees funded by CETA;

COUNTY GOVERNMENT - Amendment of adopted budget for expenditures required by law;

RETIREMENT SYSTEMS - PERS coverage for county employees funded by CETA;

MONTANA CODE ANNOTATED - Sections 19-3-201, 19-3-402(2), 19-3-403, 7-6-2324, 7-6-2341.

- HELD: 1. A county which contracts into PERS may not adopt a policy of blanket exclusion of workers hired under a CETA program.
2. A county may make emergency expenditures not reflected in its budget to cover the employer's share of PERS, when the responsibility to pay that share arose after adoption of the budget for that fiscal year.

22 May 1979

J. Fred Bourdeau, Esq.  
Cascade County Attorney  
Cascade County Courthouse  
Great Falls, Montana 59401

Dear Mr. Bourdeau:

You have requested an opinion on several questions arising from the following facts. Cascade County is a party to an agreement with the State of Montana under which the County's employees are covered by the Public Employees Retirement System (PERS). § 19-3-201, MCA (§ 68-1701, R.C.M. 1947). As of September 26, 1978, the County employed thirty-four persons with funds provided by the federal government under the Comprehensive Employment and Training Act, (CETA), 29 USC § 801, et seq. On September 26, 1978, the Employment Security Division of the State Department of Labor and Industry (the Division) notified the county that effective October 1, 1978, federal regulations prohibited use of CETA funds to pay the employer's share of the CETA employees' PERS coverage. The notification letter further stated:

Effective October 1, 1978, agencies that employ PSE [CETA] participants, and provide retirement benefits to employees, will be required to pay, from non-CETA funds, the employer's share of funds that go for CETA-PSE employee's retirement. (Emphasis in the original.)

You have requested my opinion on the following questions:

1. Since the thirty-four employees in question were hired prior to the enactment of the regulation in question, is the State obligated to pay the employer's share of PERS on each of these employees until he or she is terminated or assumes status as a permanent, non-CETA employee?
2. May the county legally exclude CETA employees from coverage under PERS?
3. May the county alter its adopted budget to finance the payment of the employer's share of PERS for these employees?

Regarding your first question, I am aware of no statute or rule of law which would allow the county to shift to the State the burden of paying the employer's PERS share for CETA workers employed by the county. Generally, when a county partakes in a program administered or funded by the State, it does so subject to the rules and regulations laid down by the State. The county could assert a contract between the county and the State giving rise to an enforceable right to shift this burden to the State, but the

existence of such a contract and its potential consequences are not appropriate subjects for an Attorney General's opinion. Likewise, the question of whether the Division's action in requiring the county to pay the employer's share from its non-CETA revenues impairs the obligation of such a contract under Article I, section 10 of the United States Constitution is a question of federal law. I therefore express no opinion on these questions.

You also inquire whether the county may exclude its CETA employees from the coverage of its PERS agreement with the State. Section 19-3-402(6), MCA (section 68-2510, R.C.M. 1947), provides that employees whose compensation is paid from federal funds are eligible for PERS if they are not members of the federal retirement system. In contrast, however, section 19-3-201(b), MCA (68-1701, R.C.M. 1947), seems to allow political subdivisions whose employees are covered by PERS through contract with the State to exclude groups of employees by "departments, duties, age, or similar classifications." Theoretically, under this provision a county could amend its agreement with PERS to exclude CETA employees from coverage.

Two considerations forestall this result. Initially, it appears likely that exclusion of CETA employees from PERS would jeopardize Montana's continued participation in the program. 29 U.S.C. § 848(a)(4) requires each CETA program receiving federal funds to assure that CETA employees receive "workmen's compensation, health insurance, unemployment insurance, and other benefits at the same level and to the same extent as other employees...." (Emphasis added.) A blanket exclusion of CETA employees from PERS coverage would arguably violate this provision and could result in loss of CETA funds for state and county programs.

More significantly, the 46th Legislature explicitly addressed the question of PERS coverage for CETA workers. Senate Bill 190, a copy of which is enclosed, amended section 19-3-403 to exclude from PERS coverage those CETA employees who elect to be excluded, and to allow a CETA worker who elects exclusion to opt back into the program if he or she subsequently assumes a non-CETA position. The negative implication of this amendment requires a county which has contracted into PERS to offer PERS coverage to those CETA workers who do not elect exclusion. I therefore conclude that political subdivisions may not exclude from PERS those CETA employees who do not wish to be excluded.

You also inquire whether a county may alter its adopted budget to finance the employer's contribution to PERS. Generally, county budgets must be adopted by the second Monday in August of each year, and section 7-6-2324, MCA (section 16-1906, R.C.M. 1947), limits the county to expenditure of only those funds set forth in the adopted budget. However, section 7-6-2341, MCA (section 16-1907, R.C.M. 1947), allows the commissioners of a county to make expenditures and incur liabilities in excess of budget by unanimous adoption of a resolution stating the fact that the expenditures or liabilities are necessary to "meet mandatory expenditures required by law...." Assuming the validity of the requirement that counties pay the employer's contribution, it is my opinion that this section allows the county to make the necessary expenditure notwithstanding its absence from the adopted budget.

THEREFORE, IT IS MY OPINION:

1. A county which contracts into PERS may not adopt a policy of blanket exclusion of workers hired under a CETA program.
2. A county may make emergency expenditures not reflected in its budget to cover the employer's share of PERS, when the responsibility to pay that share arose after adoption of the budget for that fiscal year.

Very truly yours,

MIKE GREELY  
Attorney General