

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 92

CITIES AND TOWNS - Policemen's membership in private pension trust plan supported by public funds precluded by membership in PERS;
EMPLOYEES, PUBLIC - Policemen's membership in private pension trust plan supported by public funds precluded by membership in PERS;
POLICE DEPARTMENTS - Policemen's membership in private pension trust plan supported by public funds precluded by membership in PERS;
PUBLIC FUNDS - Policemen's membership in private pension trust plan supported by public funds precluded by membership in PERS;
RETIREMENT SYSTEMS - Policemen's membership in private pension trust plan supported by public funds precluded by membership in PERS;
MONTANA CODE ANNOTATED - Sections 7-32-4120, 19-3-403(8), 19-10-305(1);
OPINIONS OF THE ATTORNEY GENERAL - 35 Op. Att'y Gen. No. 51 (1973);
REVISED CODES OF MONTANA, 1947 - Section 68-1602(8).

HELD: Section 19-3-403(8), MCA, prohibits use of funds received by a city pursuant to section 19-10-305, MCA, for a pension trust plan for police officers who are also members of the Public Employees' Retirement System.

29 June 1988

John Hunt
Plentywood City Attorney
215 First Avenue West
Plentywood MT 59254

Dear Mr. Hunt:

You have requested my opinion concerning the following question:

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Does the Public Employees' Retirement System Act (PERS), particularly section 19-3-403(8), MCA, preclude a city which is a PERS contractor from investing funds distributed under section 19-10-305, MCA, in a private pension trust plan for its police officers?

I understand that Plentywood policemen are PERS members and that they make contributions to PERS. Plentywood is not a member of the state-wide police retirement system (chapter 9 of Title 19, MCA), nor does it have a local plan under chapter 10 of Title 19, MCA. You also state that the Plentywood police do not make any contributions to the private pension trust fund established on their behalf by the city with funds distributed to Plentywood by the State Auditor's Office under section 19-10-305(1), MCA. Finally, it is my understanding that Plentywood policemen are entitled to benefits under the pension trust plan based on the duration of their service as police officers.

Section 19-10-305(1), MCA, provides in pertinent part:

After the end of each fiscal year, the state auditor shall issue and deliver to the treasurer of each city and town in Montana which has a police department and which is not a participant in the municipal police officers' retirement system his warrant for an amount computed in the same manner as the amount paid ... to cities and towns for fire department relief associations pursuant to 19-11-512.

Section 7-32-4120, MCA, further directs that "[a]ny city or town not governed by the provisions of chapter 9 or 10 of Title 19 shall only expend the payment received pursuant to 19-10-305 for police training or to purchase pensions for members of its police department."

Because Plentywood is a PERS contractor, the difficulty arises under section 19-3-403(8), MCA, which states in part:

The following persons may not become members of the [public employees] retirement system:

....

(8) persons who are members of any other retirement or pension system supported wholly or in part by funds of ... any state government, or political subdivision thereof

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and who are receiving credit in the other system for service, it being the purpose of this subsection to prevent a person from receiving credit for the same service in two retirement systems supported wholly or in part by public funds[.] [Emphasis added.]

Under PERS, "service" is defined as "employment of an employee." § 19-3-104(29), MCA.

The issue you raise was implicitly addressed in 35 Op. Att'y Gen. No. 51 (1973) wherein Silver Bow County, a PERS contractor, sought to make an additional contribution to its employees' union pension trust fund. In that opinion, it was stated:

Section 68-1602(8) [now § 19-3-403(8), MCA], ... prevents a public employee from receiving credit for the same employment from two (2) retirement systems supported by public funds.

35 Op. Att'y Gen. No. 51 at 125. In that opinion, the additional contributions were allowed because under the union contract, the contributions were in lieu of wages rather than "out of the county's own pocket." Thus, the Silver Bow County employees were "apparently ... not receiving credit in two (2) retirement systems supported by public funds, which is prohibited by section 68-1602(8)." 35 Op. Att'y Gen. No. 51 at 125. A 1974 amendment to the statute adopted the position taken by the Attorney General in the Silver Bow County case. § 19-3-403(8) (a), MCA.

However, in the instant case, the funds contributed by the City of Plentywood to the private pension trust fund are clearly public funds. This fact raises an obvious conflict between section 19-3-403(8), MCA, and section 7-32-4120(1), MCA, which requires that payments received under section 19-10-305, MCA, be expended only "for police training or to purchase pensions for members of its police department." (Emphasis added.)

In construing conflicting statutes, the paramount consideration is to give effect to the intention of the Legislature. Marriage of Jones, 44 St. Rptr. 422, 424, 736 P.2d 94, 95 (1987), citing § 1-2-102, MCA. An important consideration in this regard is the fact that section 19-3-403(8), MCA, was passed in 1973, long after sections 19-10-305 and 7-32-4120, MCA, were enacted in 1965. "Generally, where statutes irreconcilably conflict, the latest statute supersedes the prior enactment." Dolan v. School District No. 10, 195 Mont. 340, 346, 636 P.2d 825, 828 (1981). This rule of

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construction does not operate to defeat prior legislation which is more specific in its provisions, however,

"unless the intention to effect the repeal is clearly manifested or unavoidably implied by the irreconcilability of the continued operation of both [statutes], or unless there is something in the general law or in the course of legislation upon its subject matter that make it manifest that the legislature contemplated and intended a repeal."
[Emphasis in original.]

Dolan, 195 Mont. at 346, 636 P.2d at 828.

It is arguable that the PERS statutory scheme, and particularly section 19-3-403(8), MCA, is general legislation, and that sections 19-10-305 and 7-32-4120, MCA, are statutes that deal more specifically with the subject matter in question here. However, the specific legislative admonishment in section 19-3-403(8), MCA, that "it [is] the purpose of this subsection to prevent a person from receiving credit for the same service in two retirement systems supported wholly or in part by public funds" evinces a clear intent to prohibit use of public funds to set up a pension plan based on service for police officers who are also members of PERS.

THEREFORE, IT IS MY OPINION:

Section 19-3-403(8), MCA, prohibits use of funds received by a city pursuant to section 19-10-305, MCA, for a pension trust plan for police officers who are also members of the Public Employees' Retirement System.

Very truly yours,

MIKE GREELY
Attorney General