VOLUME NO. 44 **OPINION NO. 44**

JUDGES - Nonretroactivity of amendment to statute regarding judges' retirement system;
RETIREMENT SYSTEMS - Nonretroactivity of amendment to statute regarding judges' retirement system;
STATUTES - Nonretroactivity of amendment to statute regarding judges' retirement system;
STATUTORY CONSTRUCTION - Nonretroactivity of amendment to statute regarding judges' retirement system;
MONTANA CODE ANNOTATED - Sections 1-2-209, 19-5-502;
MONTANA LAWS OF 1989 - Chapter 664.

HELD: The benefit increase provided for in the amendment to section 19-5-502, MCA, which became effective on July 1, 1991, applies prospectively to judges in the Montana judges' retirement system who retire or retired after its effective date. It does not apply retroactively to judges who retired prior to the effective date of the amendment, regardless of whether they retired before or after the date the amendment was enacted.

December 4, 1992

Kelly Jenkins, Counsel
Public Employees' Retirement Board
Department of Administration
1712 Ninth Avenue
Helena MT 59620-0131

Dear Mr. Jenkins:

On behalf of the Public Employees' Retirement Board, you have requested my opinion on the following questions:

1. Does the benefit increase provided for in the amendment to section 19-5-502, MCA, which became effective on July 1, 1991, apply to judges in the Montana judges' retirement system who retired prior to the effective date of the amendment?

2. Is the answer different for judges who retired after the 1989 enactment of the amendment, but before its July 1, 1991 effective date?

Prior to July l, 1991, section 19-5-502, MCA, provided:

> Upon retirement from service, a member shall receive a service retirement allowance which shall consist of the state annuity plus the member's annuity. The member's annuity shall be the actuarial equivalent of his aggregate contributions at the time of retirement. The state annuity shall be in an amount which, when added to the member's annuity, will provide a total retirement allowance of 3 1/3% per year of his final salary for the first 15 years' service and 1% per year for each year's service thereafter.

The amendment to section 19-5-502, MCA, which became effective on July 1, 1991, altered only the section's final sentence. That sentence now provides:

> The state annuity shall be in an amount which, when added to the member's annuity, will provide a total retirement allowance of 3 1/3% per year of his final salary for the first 15 years' service and **1.785%** per year for each year's service after 15 years. [Emphasis added.]

Your question concerns whether this amendment, which provides for larger retirement allowances, applies to judges who retired prior to the effective date of the amendment.

Resolution of this issue involves a two-step process. First, it must be determined if the proposed application of the amendment would be retroactive in effect. If not, the application sought is prospective and the inquiry ends. If the application sought would be retroactive, then in order to validate such an application, there must exist a legislative intent that the amendment operate retroactively. Neel v. First Federal Savings and Loan Association, 207 Mont. 376, 383-84, 675 P.2d 96, 100 (1984).

A retroactive law is one which "takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions already past." Neel, 207 Mont. at 384, 675 P.2d at 101. Applying amended section 19-5-502, MCA, to judges who retired prior to the effective date of the amendment would constitute a retroactive application of the law because application of the amendment to those judges would impose a new obligation on the retirement fund, an obligation to pay previously retired judges increased benefits based upon a new formula. See Lugar v. New, 418 N.E.2d 248, 254 (Ind. Ct. App. 1981) (the rights and obligations of the parties in the annuity contract the retired employees now hold became vested prior to the amendment. The effect

of the amendment as advocated by the retirees would materially alter the contract and impose additional obligations on the pension fund).

Under Montana law, there is a presumption against retroactive application of statutes. Neel, 207 Mont. at 386, 675 P.2d at 102. A statute is presumed to operate prospectively and not retrospectively unless it appears by clear, strong language or by necessary implication that the Legislature intended to give it retroactive force and effect. § 1-2-209, MCA; Neel, 207 Mont. at 386, 675 P.2d at 102; Sheehan v. Rohrer, 464 A.2d 739, 740 (R.I. 1983). The language of amended section 19-5-502, MCA, does not indicate any legislative intent that it have retroactive effect. The language looks to the future, not to the past. It provides that "*[u]pon retirement* from service, a member *shall* receive a service retirement allowance." The language does not refer or apply to judges who have already retired. I find no clear, strong language or necessary implication that the Legislature intended to give the amendment retroactive force and effect. I therefore conclude that it may be applied prospectively only.

The majority of cases concerning the prospective or retrospective application of pension statutes are in accord with my conclusion, holding that amendments increasing pension benefits do not apply retroactively to persons who retired prior to the amendment absent language expressly making the increased benefits applicable to those already retired. E.g., Sheehan, 464 A.2d at 740; Anderson v. City of Seattle, 471 P.2d 87, 88-89 (Wash. 1970); Atchison v. Retirement Board of Police Retirement System of Kansas City, 343 S.W.2d 25, 31 (Mo. 1960); Lugar, 418 N.E.2d at 254.

My conclusion that the Legislature intended the increase in the retirement allowance to have prospective application is further supported by the legislative history of the amendment. Proponents testified before the legislative committees considering the amendment that the prior law penalized judges who worked over 15 years and that the amendment was offered to encourage judges to stay on the bench longer than 15 years. Minutes, Senate Committee on Judiciary, January 31, 1989, Sen. Mazurek (sponsor), at 11; Minutes, House Committee on State Administration, March 8, 1989, Sen. Mazurek (sponsor), at 2-3, Chronister, at 4. The intent of the amendment as presented to the Legislature was clearly to encourage judges to remain on the bench, not to benefit judges who had already retired. Moreover, in response to a question from a member of the House Committee on State Administration, the assistant administrator of the Public Employees' Retirement Division informed the committee that "a judge who retires after the effective date of the bill would have his benefits accrue at the new rate; anyone currently retiring would not have a change in his retirement allowance because of this bill." Minutes, House Committee on State Administration, March 8, 1989, King, at 6. The recorded legislative history contains no evidence of an intention to apply the amendment retrospectively. I therefore conclude that the amendment to section 19-5-502, MCA, may be applied prospectively only.

Your second question concerns whether judges who retired after the 1989 enactment of the amendment, but before its July 1, 1991 effective date, should be treated differently than are judges who retired prior to the 1989 enactment of the statute. It has also been brought to my attention that, while the effective date of the portion of Senate Bill 241 that amended section 19-5-502, MCA, was expressly delayed until July 1, 1991, other sections of SB 241 that are unrelated to your inquiry became effective on July 1, 1989. See 1989 Mont. Laws, ch. 664, §§ 2, 3, 7. A question has been raised regarding judges who retired after the July 1, 1989, effective date of the portion of the bill which is unrelated to your inquiry, but before the effective date of the amendment to section 19-5-502, MCA. I find no basis for concluding that the timing of the enactment of the amendment, or the effective date of another portion of the bill, in any way alters the effective date of the amendment at issue. It is the general rule in Montana that a statute speaks as of the time it takes effect and not as of the time it was passed. Butler v. Local 2033 American Federation of State, County and Municipal Employees, 186 Mont. 28, 34, 606 P.2d 141, 142 (1980); Peterson v. Livestock Commission, 120 Mont. 140, 146, 181 P.2d 152, 156 (1947). As the Montana Supreme Court has noted, "Legislation is not effective for any purpose until it becomes operative." *Id.* The sections of SB 241 which amended section 19-5-502, MCA, and which are applicable to this opinion were not operative until July 1, 1991. They therefore had no effect prior to that time. I conclude that all judges who retired prior to the July 1, 1991, effective date of the amendment are subject to the provisions of the law as it existed prior to July 1, 1991.

THEREFORE, IT IS MY OPINION:

> The benefit increase provided for in the amendment to section 19-5-502, MCA, which became effective on July 1, 1991, applies prospectively to judges in the Montana judges' retirement system who retire or retired after its effective date. It does not apply retroactively to judges who retired prior to the effective date of the amendment, regardless of whether they retired before or after the date the amendment was enacted.

Sincerely,

MARC RACICOT
Attorney General