Hon. Mark Boyer
Commissioner of Administration

March 15, 1995

663-92-0330

465-2127

Residency status for receipt of Alaska cost-of-living allowance under PERS and TRS

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The commissioner of administration in the prior administration asked us for interpretation of AS 14.25.142 and 39.35.480, similar statutes of the Teachers' Retirement System (TRS) and the Public Employees' Retirement System (PERS) regarding the ten percent cost-of-living allowances given to TRS and PERS benefit recipients living in Alaska. Both statutes provide that eligible recipients may receive the allowances "[w]hile residing in the state."[1] Both statutes also define "residing in the state" as "domiciled and physically present" in Alaska; however, they both also provide, "Being absent from the state for a continuous period of 90 days or less or six months or less when ordered by a physician does not change a person's status as residing in the state."

In 1989 the Teachers' Retirement Board amended one of its regulations, 2 AAC 36.210, to include the following language:

> In this section, domiciled and physically present means that the member must actually be present in Alaska for at least 93 days during any 183-day period. A member forfeits the cost-of-living allowance retroactively to the member's last day in

[1] Both statutes limit the eligibility for COLAs to retirees age 65 or older or to persons receiving disability benefits. However, the PERS statute was not amended to so read until 1986, and the TRS statute was not so amended until 1990. Prior to the effective date of those amendments there were no restrictions on which benefit recipients were eligible for the COLA. Under article XII, section 7 of the Alaska Constitution, persons who joined the systems before the effective dates of these changes are not subject to the new limitations. Thus, virtually all current retirees under age 65, and the vast majority of such retirees for years to come, will be eligible for COLAs as soon as they retire.

> Alaska for failure to meet the 93-day requirement. Upon request by the administrator, the member must provide evidence of periods that the member has been present in the state.[2]

You have asked whether this language is consistent with AS 14.25.142, and, if so, whether the amended regulation can be constitutionally applied to persons joining the TRS prior to its adoption. We believe that the regulation is consistent with the statute. However, we also understand that the TRS has, prior to the adoption of the regulation, paid the COLA to benefit recipients whom TRS considered to be residents but who would not have met the 93/183 days test. In light of that, we conclude that the regulation should only be applied to those joining TRS after its adoption.[3]

Chapter 128, SLA 1977 repealed and reenacted both AS 39.35.480 and AS 14.25.142 in essentially their present forms.[4] The statutes can be read in two ways. First, they can be read as saying that residence is maintained as long as a benefit recipient is never absent from the state for more than 90 consecutive days, even if by any objective standards the recipient clearly has his or her residence elsewhere. Second, they can be read as saying that normal objective standards of domicile are applicable, but that neither system may, in applying those standards, declare that a continuous absence of less than 90 days by itself disqualifies a recipient. We believe that the second reading is the one that a court would adopt.

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[2] The Public Employees' Retirement Board, at its April 1989 meeting, also considered adding similar language to the PERS COLA regulation, 2 AAC 35.240 (which at that time was identical to the TRS COLA regulation). It decided not to add this language, PERB Minutes of April 5, 1989, at 5, and has not to date added it.

[3] By the same reasoning, we believe that the Public Employees' Retirement Board could, if inclined, amend its regulations in a manner similar to 2 AAC 36.210(b), but that the amendment could be prospective only.

[4] As noted, the PERS statute was amended in 1986, and the TRS statute in 1990, to limit the eligibility of retirees for the COLA. Both statutes were earlier amended, in 1979, to increase the period of allowable absence to 90 consecutive days, or six months when illness is involved. The language under discussion here, defining "residing in the state," has not been changed since the 1977 enactment.

We reach this conclusion because we believe that the second reading is more consistent with the plain language of the statutes than the first. As noted, both statutes define "residing in the state" as meaning "domiciled and physically present." The Alaska Supreme Court in State v. Adams, 522 P.2d 1125, 1132 (Alaska 1974), a case decided before the current COLA language in the TRS and PERS statutes was added, had stated, "Domicile is established by an actual physical presence in the state coupled with a coincident intent to make the state one's permanent place of abode."[5] The second reading is consistent with this definition. The first reading, under which a person can still be seen as "residing in the state" even though clearly no longer domiciled there, is not consistent.[6]

Our conclusion that the new regulation should be enforced prospectively only derives from Sheffield v. APEA, 732 P.2d 1083 (Alaska 1987). That case, like the situation here, involved the question of whether a regulatory change reducing a retirement benefit (the adoption of updated actuarial tables for the actuarial reduction required upon early retirement) could be applied to persons joining PERS before the updated tables were adopted. The state defendants argued that article XII, section 7 did not apply because the change was not statutory, but was done through regulations. However, the court explicitly rejected this argument, stating that "the form of the change should be disregarded in favor of its impact." Id. at 1087. Since the new regulation here would clearly have an adverse impact on some retirees, and there are no offsetting benefits, we do not believe it can be applied to them.

We stress, however, that our opinion does not mean that

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[5] This statement is consistent with the definition of "domicile" in Black's Law Dictionary at 435 (5th ed. 1979). That dictionary, citing a Pennsylvania case, gives as its primary definition of domicile "[t]hat place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning." See also AS 01.10.055(a), defining "residency" as "being physically present in the state with the intent to remain in the state indefinitely and to make a home in the state."

[6] Of course, even the plain meaning of a statute must give way to legislative intent if there is sufficiently strong evidence that the plain meaning does not reflect that intent. See, e.g., State v. City of Haines, 627 P.2d 1047, 1049 (Alaska 1981). Here, however, we have examined the legislative history of the two statutes, and have found nothing enlightening on legislative intent.

a TRS retiree who joined the system prior to the effective date of amended 2 AAC 36.210 is entitled to the COLA by setting foot in Alaska every 89 days, while maintaining a permanent residence elsewhere. We understand that the TRS has never recognized such individuals as entitled to the COLA, since they obviously are not "residing in the state." Rather our opinion addresses those retirees who, for instance, spend the winter months in Arizona but live in Alaska the rest of the year, so that they can reasonably claim to be residents. It is those persons who, in our opinion, are entitled to the COLA notwithstanding their failure to meet the 93/183 day test.[7]

If we may be of further assistance, please let us know.

JBG:clh

cc: Robert Stalnaker, Director

Div. of Retirement & Benefits

[7] Of course, all retirees, regardless of when they joined the TRS, are subject to the statutory requirement that a continuous absence from the state may not exceed 90 days (or six months for medical reasons). This requirement has been in the COLA statutes for both TRS and PERS since they were enacted.