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Office of The Attorney General
State of Connecticut

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Peter R. Blum, Chairman
State Employees Retirement Commission
55 Elm St.
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Dear Chairman Blum:

You have requested this office's opinion regarding the proper construction of statutory language governing disability retirements under the Connecticut Municipal Retirement System ("CMERS"). Specifically, you have asked us to interpret the meaning of the phrases "permanently and totally disabled," "gainful employment," and "in the service of the municipality" as contained in Conn. Gen. Stat. § 7-432. In addition, you have inquired whether an employee's "disability" should be determined on a physical/medical standard, or whether it should be determined on an availability of employment standard. Finally, you have asked about the circumstances in which an individual who is a CMERS disability retiree (or any retiree) may continue to receive retirement benefits if gainfully employed for twenty or more hours per week.

In offering an interpretation of these statutory provisions, however, we would not be writing on a blank slate. The information provided to this office indicates that recently, in May, 2011, the Retirement Services Division of the Office of the State Comptroller ("Division") altered the way in which it interprets and administers the statutory language governing municipal disability retirements and reemployment rules, creating some confusion among applicants, staff and Commission members. To address your question properly, we must first review the historical backdrop in light of this recent change.

CMERS has been serving Connecticut's municipalities since the 1940s by administering the collection, reconciliation and disbursement of municipal pension contributions to employees who are part of a participating CMERS

entity.[1] Along with administering pension contributions and disbursements, CMERS manages the application and eligibility process for individuals who seek to retire due to a disability. Your inquiries focus on both eligibility for a disability retirement and the relationship between receipt of retirement benefits and reemployment, therefore requiring us to review Conn. Gen. Stat. §§ 7-432, 7-438.

Connecticut General Statutes § 7-432 provides in relevant part:

> Any member shall be eligible for retirement and for a retirement allowance who has completed at least ten years of continuous service if he becomes permanently and totally disabled from engaging in any gainful employment in the service of the municipality. For purposes of this section, "gainful employment" shall not include a position in which a member customarily works less than twenty hours per week. If such disability is shown to the satisfaction of the Retirement Commission to have arisen out of and in the course of his employment by the municipality, . . . he shall be eligible for retirement irrespective of the duration of his employment. Such retirement allowance shall continue during the period of such disability. The existence and continuance of disability shall be determined by the Retirement Commission upon such medical evidence and other investigation as it requires . . . .

(Emphasis added). In addition, Connecticut General Statutes § 7-438 provides in relevant part:

> (a) Any member retired under this part[2] who again accepts employment from this state or from any municipality of this state

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[1] Not all municipal employees participate in CMERS or are governed by its provisions. Conn. Gen. Stat. § 7-425(2) defines "participating municipality" to mean "any municipality which has accepted [CMERS], as provided in section 7-247." In turn, Conn. Gen. Stat. § 7-427(a) governs how a municipality accepts CMERS: "Any municipality . . . may, by resolution passed by its legislative body and subject to such referendum as may be hereinafter provided, accept this part as to any department or departments of such municipality as may be designated therein . . . . The acceptance of this part as to any department or departments of a municipality shall not affect the right of such municipality to accept it in the future as to any other department or departments. . . ." Thus, some municipalities have accepted CMERS and some have not; also, some municipalities that have accepted CMERS have not accepted it as to every department within the municipality.

[2] The phrase "any member retired" includes those who qualify for a regular retirement under Connecticut General Statutes § 7-428, and those who qualify for a disability retirement under Connecticut General Statutes § 7-432, as both statutes are contained in Part II of Chapter 113 for the General Statutes.

> other than a participating municipality, shall continue to receive his retirement allowance while so employed, . . . but any such member shall not be eligible to participate or be entitled to credit in any municipal retirement system for the period of such municipal employment.
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> (b) If a member is retired under this part and again accepts employment from the same municipality from which he was retired or any other participating municipality, he shall be eligible to participate, and shall be entitled to credit, in the municipal employees' retirement system for the period of such municipal employment. Such member shall receive no retirement allowance while so employed except if his services are rendered for not more than ninety working days in any one calendar year . . . .[3]

(Emphasis added).

As explained to this office, before its approximate 2011 revised statutory interpretation, the Division required the following materials as part of the application for a disability retirement: (1) a disability application; (2) medical progress reports and diagnostic results; (3) an accident report, if any; (4) a Form CO-649 completed by the applicant's physician; and (5) correspondence from the municipality indicating whether any other employment for the applicant was immediately available.[4] This information was forwarded to the Medical Examining Board ("MEB") for a strictly record review. Based on that record, the MEB determined whether the applicant was "permanently and totally disabled" from the position and would provide a list to the State Employees Retirement Commission ("Commission") for a final decision. During this time, the Division interpreted the state's disability standard – "permanently and totally disabled from engaging in any gainful employment in the service of the municipality" – to mean that 1) the applicant could not physically perform the duties of the position he or she was applying to retire from, and 2) no alternate position was immediately

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[3] Conn Gen. Stat. §§7-432 and 7-438 were amended in June 2011. See 2011 Conn. Pub. Acts No. 11-251. Because these changes do not alter the legal analysis, this opinion will reference the current statutes.

[4] If a position were available, the municipality forwarded the available job posting information to the Medical Examining Board for review.

available in the municipality that was covered by MERS and that the applicant was qualified to perform.

As further explained to this office, from approximately the 1990s (and perhaps before) until 2011, the Division permitted retirees to return to work without implicating their retirement benefits if: 1) the retiree worked for a private employer; 2) the retiree worked for the same municipality or another municipality as long as the position was not covered by CMERS; or 3) the retiree worked for the same municipality in any position covered by CMERS but the position was for ninety days or less per calendar year, or under twenty hours per week.

Finally, notwithstanding the statute's admonition that "[t]he existence and continuance of disability shall be determined by the Retirement Commission upon such medical evidence and other investigation as it requires" (emphasis added), no follow-up procedures have been in place to monitor whether disability retirees continue to be disabled. Conn. Gen. Stat. § 7-432. We have, however, learned anecdotally that the Division and the Commission have occasionally – but not often -- come into some information prompting action to revoke a disability retirement.[5]

In 2011, § 7-438 was changed to include the following language: "Such member shall receive no retirement allowance while so employed except if (1) such employment is for less than twenty hours per week, or (2) his services are rendered for not more than ninety working days in any one calendar year." (Emphasis added.) 2011 Conn. Pub. Acts No. 11-251. In addition, § 7-432 was also amended to include the following language: "For purposes of this section, 'gainful employment' shall not include a position in which a member customarily works less than twenty hours per week." Id.

At about the same time that the Legislature made these changes to §§ 7-432, 7-438, the Division altered its interpretation and application of both §§ 7-432, 7-438. Specifically, as explained to this office, the information now required

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[5] We suggest that the Commission be more rigorous in determining whether a disability "continues." Although the Legislature clearly contemplated that certain retirees – including disability retirees – might continue to work after being granted a disability retirement, in some cases certain types of employment might constitute evidence of the lack of the "continuance of [such] disability." We are available to discuss whether it would be advisable or appropriate to promulgate regulations, for example, to address a process for determining "[t]he existence and continuance of disability."

by the Division to process a disability retirement application consists of the following materials: (1) a disability application; (2) medical progress reports and diagnostic results; (3) an accident report, if any; (4) a "Physicians Statement" from the treating physician(s); (5) a "Members Statement" from the applicant; and (6) an "Employer Statement," which addresses other job availability. The MEB still limits its review to the paper record, and it provides a list to the Commission for a final decision.

However, the MEB no longer employs the same disability standard, which as stated above had been: 1) the applicant could not physically perform the duties of the position he or she was applying to retire from, and 2) no alternate position was immediately available in the municipality that was covered by CMERS and that the applicant was qualified to perform. Rather, Division staff informed this office that the MEB now considers whether the applicant's condition prevents him or her from performing any work at all for more than twenty hours per week. That is, the MEB will not approve a disability application if there is any other position within a municipality that the applicant could perform, regardless of whether that alternate position is 1) available; 2) a position the applicant is qualified or trained to perform; or 3) within a CMERS unit or not. Not surprisingly, this new standard has resulted in more denials of disability retirements, and more particularly has resulted in denials to applicants with conditions that likely would have qualified them for disability retirements in the past.

The Division has also altered its interpretation of its "return to work rules," limiting a retiree's return to work for a participating municipality to ninety days or less per calendar year, or twenty hours per week, regardless of whether or not the position is covered by CMERS. This restriction applies to any municipality that contains any group of employees covered by CMERS. A retiree may still return to work for any employer who has no employee covered by the CMERS; however, if the individual works for a municipality, he or she may not participate in the pension plan of the municipality. Disability retirees clearly now are limited to twenty hours or less per week "during the period of such disability." 2011 Conn. Pub. Acts No. 11-251.

Having administered the statutes as newly interpreted for more than a year, the Commission has now essentially asked my office to opine on whether the "historical" interpretations or the "new" interpretations are correct.

I note that the statutes, which have been amended over the years and which implicate competing policies of providing for disabled employees while protecting pension funds, are not "models of clarity." See Foley v. State Elections Enforcement Commission, 297 Conn. 764, 782 (2010). In my view, neither the agency's historical interpretations of the statutes nor its revised interpretations are clearly wrong. Under these circumstances, the Legislature not the Attorney General is better suited to choose among competing agency-approved interpretations.

The Division and the Commission changed their interpretations without any intervening guidance from the Legislature. These changed interpretations are particularly problematic because they can result in – and perhaps have already resulted in -- disparate treatment of individuals based only on the date the conditions arose that gave rise to their disability retirement applications, without any direction from the legislature of a need to alter the administration of this program prospectively. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994). Given the prior interpretation and administration of the statutes discussed above, many municipal employees, and their bargaining representatives, had settled expectations about what the CMERS system would afford them if they became disabled, or retired from a position and sought to continue working. This has likely affected choices individuals have made for themselves (such as purchasing or not purchasing insurance), as well as choices bargaining representatives have made for their membership (such as negotiating for certain benefits instead of other benefits).

At least two principles suggest that an agency should not lightly undertake to alter its consistent interpretation of laws it is charged to administer. First, "in certain circumstances, the legislature's failure to make changes to a long-standing agency interpretation implies its acquiescence to the agency's construction of the statute." Longley v. State Employees Retirement Commission, 284 Conn. 149, 164 (2007). "It is true that the legislature is presumed to be aware of the interpretation of a statute and its subsequent nonaction may be understood as a validation of that interpretation." Berkley v. Gavin, Commissioner of Revenue Services, 253 Conn. 761, 776-77 n.11 (2000)((Internal quotation marks omitted). A court would employ the doctrine of legislative acquiescence "not simply because of legislative inaction, but because the legislature affirmatively amended the statute subsequent to a judicial or administrative interpretation, but chose not

to amend the specific provision of the statute at issue." Id.; see also State v. Salamon, 287 Conn. 509, 525 (2008) ("[l]egislative concurrence is particularly strong [when] the legislature makes unrelated amendments in the same statute").

In this instance, in June 2011, the legislature amended slightly the language of §§ 7-432, 7-438; however, it was silent with respect to defining the language "totally and permanently disabled," "gainful employment," or "in the service of the municipality." See 2011 Conn. Pub. Acts No. 11-251. As early as the 1990s, the Division articulated its interpretation of these statutes to permit a disability retirement recipient to work for a municipality (even the same municipality), as long as it was in a non-CMERS unit. The Legislature is presumed to have been aware of the long-standing agency interpretation/application of the statutes prior to the 2011 legislative change. Therefore, its "nonaction" with respect to defining the statutory language that is the basis of your request "may be understood as a validation of that [long-standing] interpretation." Berkley, supra, 776-77 n. 11. The Division's past practice apparently met with the Legislature's approval as it did not amend any other language within the statutes.

Second, "an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable." Longley supra, 164; see also Department of Public Safety v. FOIC, 298 Conn. 703, 717 (2010). In the absence of a defined agency declaration regarding its practice, and a limited history with respect to application of its practice, courts are reluctant to accord such deference to the agency. See Connecticut Assn. of Not-for-Profit Providers for the Aging v. Dept. of Social Services, 244 Conn. 378, 390 n. 18 (no deference warranted to agency interpretation when agency failed to make public statement of its practice, and four years "hardly constitutes a 'time-tested' agency interpretation"). As a result, if an applicant were to appeal a denial of retirement benefits and contest the Commission's interpretation of any of these terms, there is a serious question as to whether a court would afford deference to the Commission's new legal interpretations. Such a lack of deference might very well be appropriate both because the Commission's new interpretation is not "time-honored," and its previous interpretation was.

Both of the maxims of statutory construction recited above militate against any new interpretations of the relevant statutes without legislative direction to undertake such a re-interpretation. Whether and under what circumstances a

municipal employee ought to be eligible for a disability retirement at the Fund's expense is a matter of state policy. Just as it "is decidedly not the role of [the] court to make the public policy determinations"; neither is it for an executive agency to do the same. See Raftapol v. Ramey, 299 Conn. 681, 713 (2011) ("The legislature will be required to grapple with numerous questions implicating significant public policy issues--that body, with the ability to hold public hearings and seek out expert assistance, is the appropriate one to make such public policy determinations."). An executive agency – like a court – must determine from the words of the statute the legislature's intention in carrying out that articulated public policy. "In areas where the legislature has spoken, the primary responsibility for formulating public policy must remain with the legislature." State v. Wilhelm, 204 Conn. 98, 103 (1987).

Thus, we cannot counsel you that it is appropriate to deviate from your agency's historical applications of the Commission's statutes without legislative direction on these issues. My advice is that your agency should return to administering disability retirement applications and return-to-work rules based on pre-2011 interpretations. Any change to the applications of the statutes discussed above – which might very well be in order – should come only after legislative action.

We remain available to address your questions as necessary.

Very truly yours,

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