

PENSIONS, BENEFITS, AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM.

CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT.

COUNTIES, CITIES AND TOWNS: CERTAIN LOCAL GOVERNMENT OFFICERS.

Retirement System, and not Attorney General, is appropriate agency to determine whether city retiree may continue to receive retirement benefits during his employment by city as independent contractor performing substantially same duties he performed as full-time city employee. Retirement System has determined that because contract position is not eligible for coverage under Retirement System, retiree employed under contract to city may continue to receive retirement allowance. City must open application process for contract employment to all qualified independent contractors; may not offer contract for employment to single contractor. Retiree under contract to city who is not eligible to participate in Retirement System does not meet definition of employee carrying out functions of government. City is not authorized to fill position covered under Retirement System with independent contract retiree receiving retirement allowance, who is not eligible to participate in System, but is afforded all other benefits provided to city employees.

The Honorable Riley E. Ingram
Member, House of Delegates
April 9, 1999

You request an opinion of the Attorney General on behalf of the City Attorney for the City of Hopewell regarding contract employees and their status with the Virginia Retirement System¹ ("Retirement System").

The City Attorney first asks whether a retired city employee ("retiree") may continue to receive a retirement allowance² if the city employs him as a contract employee, for a specific contractual period, to perform substantially the same duties he performed as a full-time salaried employee with the City of Hopewell ("city employee"). The City Attorney next asks whether the city must open the application process for contract employment to all individuals, or whether it may offer contract employment to a specific individual. Finally, the City Attorney asks whether it is lawful to fill a position that is covered under the Retirement System with a contract employee who is not eligible to participate in the System, yet is afforded all other benefits provided to city employees.

The City Attorney relates that the City of Hopewell participates in the Retirement System.³ He further represents that the city's resolution requesting employee participation in the Retirement System has been approved by the Board of Trustees of the Retirement System ("Board"). The city's "eligible employees may become members of the retirement system."⁴ Section 51.1-132 of the *Code of Virginia* defines "eligible employees" as including "employees of the political subdivision who are regularly employed full time on a salaried basis and whose tenure is not restricted as to temporary or provisional appointment." Anyone receiving "a service retirement allowance," however, is not permitted to receive such allowance from the Retirement System "at any time" while he is "in service as an employee in a position covered for retirement purposes under the [Retirement System]."⁵

In his letter, the City Attorney relates that the Retirement System has advised the City of Hopewell that a contract position is not eligible for retirement system coverage, and, therefore, a retired contract employee may continue to receive his retirement allowance. I note that § 51.1-124.22(A)(3) authorizes the Board to employ other persons and incur expenditures deemed "necessary for the efficient administration of the Retirement System." In addition, the Board has the power and duty to make "determinations necessary to carry out the provisions" of Title 51.1.⁶

For the purposes of this opinion, I must assume that the employee advising the city on this matter is duly authorized by the Board to provide interpretations to inquiring local governments regarding eligibility requirements for participation in the Retirement System.

The City Attorney's first inquiry is whether a retiree may continue to receive retirement benefits should the city employ him as a contract employee for a specified period to perform substantially the same duties he performed as a city employee.

A 1987 opinion of the Attorney General concludes that, in rendering official opinions pursuant to § 2.1-118, the Attorney General has declined to render such opinions when the request (1) does not involve a question of law, (2) requires the interpretation of a matter reserved to another entity, (3) involves a matter currently in litigation, and (4) involves a matter of purely local concern or procedure.⁷ Prior opinions also conclude that a request for an official opinion made pursuant to § 2.1-118 concerning the propriety of the actions of another entity interpreting matters reserved solely to it is not subject to review by the Attorney General and must be treated as the binding determination with regard to the matter.⁸ The Retirement System has express authority to make "determinations necessary to carry out the provisions" of Title 51.1,⁹ and it may do so through persons employed by the Board.¹⁰

The City Attorney reports that the Retirement System has advised the City of Hopewell that a contract position is not eligible for coverage under the Retirement System, and, therefore, a retired contract employee may continue to receive his retirement allowance. I am of the opinion that the Retirement System is the appropriate agency to make such a determination.¹¹ Consequently, I respectfully decline to render an opinion on whether a retiree may continue to receive retirement benefits should the City of Hopewell employ him as a contract employee, for a specified period of time, to perform substantially the same duties he performed as a city employee.

The second inquiry is whether the City of Hopewell is required to open the application process for contract employment to all individuals, or whether the city may offer contract employment to one specific individual.

The City Attorney advises that the city desires to enter into a contract with a retiree for a position that will provide the retiree with all benefits, except retirement coverage benefits, afforded city employees. Furthermore, the City Attorney advises that the retiree will perform substantially the same duties he performed as a city employee. For the purposes of this opinion, I shall assume the following: (1) the retiree is an independent contractor who will perform nonprofessional services for the city; (2) the city will not select and engage the retiree in any manner similar to the selection process for city employees; (3) the city will pay the retiree a sum specified in the contract for nonprofessional services; (4) the retiree will be dismissed pursuant to the terms and conditions of the contract; and (5) the city will exert no control over the results, progress, details, means and methods of the retiree's work.

The Virginia Public Procurement Act, §§ 11-35 through 11-80, requires that all public contracts with nongovernmental contractors be awarded pursuant to competitive procedures, "unless otherwise authorized by law."¹² The City of Hopewell is a "public body,"¹³ subject to the requirements of the Procurement Act, and all private individuals seeking to enter into a contract with the city as independent contractors are "nongovernmental contractors." Section 11-37 defines the term "services" to mean "any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies." The Act defines "nonprofessional services" as "any services not specifically identified as professional services."¹⁴ A "public contract" is "an agreement between a public body and a nongovernmental source that is enforceable in a court of law."¹⁵

Since § 11-41 requires that "[a]ll public contracts with nongovernmental contractors" be procured competitively, "unless otherwise authorized by law," the threshold question is whether the contract is one entered into by, and binding upon, a "public body." If that question is answered affirmatively, then such contract must be competitively procured, "unless otherwise authorized by law."¹⁶ Section 11-35(D) allows local governing bodies to adopt, "by ordinance or resolution," their own competitive procurement policies and procedures rather than follow the precise procedures detailed in the Procurement Act. I note that the city has not adopted a local competitive procurement policy or procedure. Further, the City Attorney does not indicate that the retiree in question is the only contractor practicably available for that which is to be procured,¹⁷ nor does he recite facts indicating the applicability of any other statutory exemption to the requirement for competitive procurement.

Consistent with the plain meaning and intent of the Procurement Act,¹⁸ and based on my assumption that this will be a contract with an independent contractor, I am of the opinion that the city may not offer the contract for employment to a single contractor, but, rather, must open the application process for contract employment to all qualified independent contractors.

The final inquiry is whether the city may lawfully fill a position that is covered under the Retirement System with a contract employee who is not eligible to participate in the System because he is receiving a retirement allowance, yet is afforded all other benefits provided to city employees.

Title 15.2 contains several provisions addressing aspects of the employer/employee relationship in local government. Section 15.2-1500 specifically provides that "[e]very locality shall provide for all the governmental functions of the locality, including, without limitation ... the employment of ... employees needed to carry out the functions of government."¹⁹ The statute does not define the terms "employment" and "employee." In the absence of any such definition, the term must be given its common, ordinary meaning.²⁰ "Employment" generally is defined as "activity in which one engages or is employed"; "an instance of such activity"; "the act of employing: the state of being employed."²¹ "Employee" is "one employed by another usu. for wages or salary and in a position below the executive level."²² Furthermore, the verb "employ" generally means "to use or engage the services of"; "to provide with a job that pays wages or a salary."²³

Prior opinions of the Attorney General conclude that, where no applicable statutory definition of the term "employee" exists, it must be given its ordinary meaning, considering the context in which it is used.²⁴ A 1991 opinion notes that the common law test used for determining the existence of an employer/employee relationship involves the consideration of four elements: "(1) the employer's selection and engagement of the employee; (2) the payment of wages to the employee; (3) the employer's retention of the power of dismissal; and (4) the employer's retention of the power of control."²⁵ The most significant of these elements is the power of control.²⁶ "In determining whether [an employer/employee] relationship exists, the crucial question is whether the [employer] ha[s] the right to control not merely results but the progress and details of the work."²⁷

Applying the rules of statutory construction and the above definitions to this inquiry, I must conclude that a retiree under contract to the City of Hopewell, who is not eligible to participate in the Retirement System, does not meet the definitions of "employment" and "employee." Section 15.2-1500 requires that the City of Hopewell provide for all of its governmental functions, "including, without limitation, the organization of all departments ... of government, ... which are necessary and the employment of ... employees needed to carry out the functions of government." I am of the opinion that a contract employee, as described by the City Attorney, does not meet the definition of an employee performing the functions of government.

Accordingly, I must also conclude that the City of Hopewell is not authorized to fill a position covered under the Retirement System with an independent contract employee, as described by

the City Attorney, who, by virtue of his receiving a retirement allowance, is not eligible to participate in the System, but is afforded all other benefits provided to city employees.

¹Tit. 51.1, ch. 1, Va. Code Ann. §§ 51.1-124.1 to 51.1-168.

²"*Retirement allowance*" means the retirement payments to which a member [of the Retirement System] is entitled." Section 51.1-124.3.

³See § 51.1-130 (governing body of political subdivision may adopt resolution requesting that its eligible employees become members of Retirement System); § 51.1-124.3 ("*Employer*" means ... the political subdivision participating in the Retirement System.").

⁴Section 51.1-130(A).

⁵Section 51.1-155(B)(1).

⁶Section 51.1-124.22(A)(8).

⁷1987-1988 Op. Va. Att'y Gen. 69, 72, and opinions cited therein.

⁸Op. Va. Att'y Gen.: 1997 at 10, 12; *id.* at 133, 134; 1987-1988 at 140, 141; *id.* at 352, 352.

⁹Section 51.1-124.22(A)(8).

¹⁰Section 51.1-124.22(A)(3).

¹¹I also note that it is an elementary rule of statutory interpretation that the construction given to a statute by public officials charged with its enforcement is entitled to great weight and, in doubtful cases, will be regarded as decisive. See *Bed Company v. Corporation Commission*, 205 Va. 272, 275, 136 S.E.2d 900, 902 (1964) (citing *Commonwealth v. Appalach. El. Power Co.*, 193 Va. 37, 45, 68 S.E.2d 122, 127 (1951)).

¹²Section 11-41(A).

¹³See § 11-37 (defining "public body").

¹⁴*Id.* "Professional services" encompass "the practice of accounting, actuarial services, architecture, land surveying, landscape, architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering." *Id.*

¹⁵*Id.*

¹⁶Section 11-41(A).

¹⁷"Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation." Section 11-41(D).

¹⁸"[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent." *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); see also 1997

Op. Va. Att'y Gen. 88, 89 (stating that statute's plain meaning and intent govern). Analysis of legislative intent includes appraisal of the subject matter and purpose of the statute, in addition to its express terms. See *Vollin v. Arlington Co. Electoral Bd.*, 216 Va. 674, 222 S.E.2d 793 (1976). Moreover, "[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it." *Temple v. City of Petersburg*, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944). It is equally well-settled that when a statute creates a specific grant of authority, the authority exists only to the extent plainly granted. 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.23 (5th ed. 1992 & Supp. 1998); 1997 Op. Va. Att'y Gen. 115, 116.

¹⁹ See *supra* note 18 for statutory construction principles applicable to the quoted statement.

²⁰ See *Anderson v. Commonwealth*, 182 Va. 560, 565, 29 S.E.2d 838, 840 (1944); Op. Va. Att'y Gen.: 1997 at 202, 202; *id.* at 72, 73; 1993 at 210, 213.

²¹ Merriam Webster's Collegiate Dictionary 379 (1996).

²² *Id.*

²³ *Id.*

²⁴ See Op. Va. Att'y Gen.: 1998 at 9, 10; 1991 at 140, 142; 1987-1988 at 413, 414.

²⁵ 1991 Op. Va. Att'y Gen., *supra*, at 143 (citing *A. C. L. R. Co. v. Tredway's Admx.*, 120 Va. 735, 93 S.E. 560 (1917)).

²⁶ See *Southern Stevedoring Corp. v. Harris*, 190 Va. 628, 58 S.E.2d 302 (1950); 1991 Op. Va. Att'y Gen., *supra* note 24, at 143.

²⁷ *N & W Railway v. Johnson*, 207 Va. 980, 983, 154 S.E.2d 134, 136 (1967); 9B M.J. *Independent Contractors* § 5 (1995); 1991 Op. Va. Att'y Gen., *supra* note 24, at 143.