



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

October 11, 2013

The Honorable Richard H. Black
Member, Senate of Virginia
Post Office Box 3026
Leesburg, Virginia 20177

Dear Senator Black:

I am responding to your request for an official advisory opinion pursuant to § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether the Virginia Retirement System (“VRS”) is permitted to recover from retirees the overpayments in benefits resulting from an error that occurred in calculating the 2009 Cost of Living Adjustment (“COLA”).

Response

It is my opinion that VRS may recover the overpayments in benefits paid out to its retirees that were a result of an error in calculating the 2009 COLA.

Background

Annually, the actuary employed by VRS calculates and presents to the VRS Board of Trustees the Cost of Living Adjustments. The VRS COLA is applied to the service and disability retirement benefits for retirees, survivors and beneficiaries. For fiscal year beginning July 1, 2009, the VRS actuary prepared and presented the COLA as 3.84 percent. VRS adopted this percentage and applied it to benefits beginning July 1, 2009.

In 2012, it was determined that the 2009 COLA should have been measured at 3.42 percent. The miscalculation resulted in an overpayment amount of 0.42 percent. To correct the overpayments, VRS recalculated the 2009 benefit amount using the correct 2009 COLA and reapplied the subsequent COLAs to arrive at a corrected 2011 benefit amount. This corrected benefit served as the baseline to which the 2012 COLA of 3.08 percent was applied to arrive at the gross benefit amount for 2012. This adjustment corrected the 2009 error and provided the correct COLA going forward. The correction was done automatically and no action was required by the retirees. All retirees affected were provided notice of such correction and the reduction in benefits that resulted.

Applicable Law and Discussion

Section 51.1-124.9 of the *Code of Virginia* enables VRS to correct any benefit error and adjust payments accordingly. Specifically, § 51.1-124.9(A)(1) provides that,

If any change or error in records results in any member or beneficiary receiving more or less than he would have been entitled to receive from the Retirement System had the records been correct, the Board shall, subject to the provisions of subsection B, correct the error and as far as practicable adjust the payments so that the actuarial equivalent of the correct benefit shall be paid.^[1]

The Code further provides that the VRS Board of Trustees “may waive any repayment which it believes would cause hardship” if a member has been overpaid “through no fault of his own and could not reasonably have been expected to detect the error.”² The language of these provisions clearly evinces a legislative intent to enable VRS to recoup overpayments resulting from miscalculations,³ but does not dictate a specific methodology by which VRS is to “adjust the payments.”

The Code expressly allows VRS to recover overpayments by deducting the overpayment from the retirees’ group life insurance.⁴ You note concern, however, regarding employees who do not receive such insurance benefits; yet, such deductions from insurance benefits are not the only way by which VRS may lawfully recover overpayments of benefits. In correcting the 2009 COLA error, VRS chose to adhere closely to the statutory requirement that it “adjust the [benefits] payments so that the actuarial equivalent of the correct benefit shall be paid.”⁵ In lieu of a reduction in the monthly benefit going forward, VRS also offered the option that a beneficiary could elect to send VRS a specific lump sum payment by November 15, 2012, to repay VRS for the overpayment amount that had been made over the three-year period prior to VRS’ discovery of the error.

Thus, it is my opinion that VRS acted lawfully in accordance with the terms of § 51.1-124.9(A)(1) in the methods utilized to recoup benefit overpayments to retirees resulting from an error in calculating to 2009 COLA.

¹ VA. CODE ANN. § 51.1-124.9(A)(1) (2013). Subsection (B) of § 51.1-124.9 provides authorization to VRS to recover overpayments subject to certain qualifications and limitations that are not germane to your specific inquiry.

² Section 51.1-124.9(A)(2). The use of the word “may” in a statute indicates that the provision is permissive and discretionary rather than mandatory. *See Masters v. Hart*, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949) (“Unless it is manifest that the purpose of the legislature was to use the word ‘may’ in the sense of ‘shall’ or ‘must,’ then ‘may’ should be given its ordinary meaning - permission, importing discretion”). A decision to waive repayment, however, is left to the discretion of the Board of Trustees when the statutorily prescribed circumstances exist.

³ “Under basic rules of statutory construction, we determine the General Assembly’s intent from the words contained in the statute.” *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003) (citing *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001); *Thomas v. Commonwealth*, 256 Va. 38, 41, 501 S.E.2d 391, 393 (1998)).

⁴ Section 51.1-124.22(A)(13) (2013) (“Overpayments from benefits received under the Virginia Retirement System ... may be deducted from life insurance benefits[.]”).

⁵ Section 51.1-124.9(A)(1).

Conclusion

Accordingly, it is my opinion that VRS may recover the overpayments in benefits paid out to its retirees that were a result of an error in calculating the 2009 COLA.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken C II". The signature is stylized with a large, sweeping "K" and "C", and the Roman numeral "II" is written to the right of the "C".

Kenneth T. Cuccinelli, II
Attorney General