

August 14, 1992

Mr. Alan H. Winkle  
Executive Director  
PERSI  
**STATEHOUSE MAIL**

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Mr. Winkle:

This letter is in response to your letter requesting legal guidance on the following questions:

1. May a person who would otherwise be a mandatory active member of PERSI by virtue of being an employee as defined in § 59-1302(14), Idaho Code, avoid mandatory membership in PERSI simply by waiving salary?
2. If an employer, as defined in § 59-1302(15), is required by either statute or ordinance to pay a salary to an employee, may the employer allow the employee to waive salary for the purpose of avoiding mandatory membership in PERSI?

The questions presented stem from concerns raised by some part-time board, council and commission members. These individuals typically receive recompense for their out-of-pocket expenses and a small stipend for their services, the amounts of which are set pursuant to § 59-509, Idaho Code. For the purpose of determining PERSI membership, the stipend paid to part-time board, council and commission members (hereinafter "part-time board members") has been deemed to be a "salary." As a result, these part-time board members are considered members of the Public Employee Retirement System of Idaho (PERSI).

Some of the part-time board members have questioned their mandatory membership in the PERSI system. Since the stipend they receive from their service to the state is very small, and their contribution to PERSI miniscule, the benefit derived by them from participation in PERSI is frequently not worth the disadvantages that participation brings. It appears the primary disadvantage to participation by otherwise self-employed individuals sitting as part-time board members is the loss of tax benefits on their independent retirement accounts. Thus, some have inquired whether they could voluntarily opt out of the system by waiving their right to payment as provided by Idaho Code § 59-509.

## ANALYSIS

The preliminary issue which must be addressed in this analysis is whether the PERSI statutes mandate inclusion of part-time board members. Pursuant to Idaho Code § 59-1302(2) an active member is defined as, "[a]ny employee who is not establishing the right to receive benefits through his or her employer's participation in any other retirement system established for Idaho public employees, . . ." (Emphasis added.) Idaho Code § 59-1302(14) defines "employee" as follows:

(a) any person who normally works twenty (20) hours or more per week for an employer or a school teacher who works half-time or more for an employer and who receives salary for services rendered for such employer; or

(b) elected officials or appointed officials of an employer who receive a salary.

(Emphasis added.) "Salary," for purposes of PERSI participation, is defined as follows:

(31) "Salary" means the total salary or wages paid to a person who meets the definition of employee by an employer for personal services currently performed, including the cash value of all remuneration in any medium other than cash in the amount reported by the employer for income tax purposes and also including the amount of any voluntary reduction in salary agreed to by the member and employer where the reduction is used as an alternative form of remuneration to the member.

(Emphasis added.) Section 59-1302(31), Idaho Code. In addressing the issue of mandatory inclusion of part-time appointed board members in PERSI, it must be determined whether part-time board members meet the definition of "employee" as delineated above. For purposes of PERSI participation, an appointed part-time board member is an "employee" as long as he/she receives a salary. The issue then becomes whether the stipend received pursuant to § 59-509, Idaho Code, constitutes a "salary" for purposes of PERSI participation.

Idaho Code § 59-509 is entitled "Honorariums or compensation for members of boards, commissions and councils." In designating the compensation to be paid to part-time board members, the legislature did not designate it as a "salary." It is interesting to note that immediately following Idaho Code § 59-509, in section 59-510, the legislature uses the term "salary" to delineate payments for full-time commissioners of the Industrial Commission, the State Tax Commission and the Public Utilities Commission.

As a general rule, part-time board members provide experience and services in excess of the compensation provided pursuant to Idaho Code § 59-509. It does not appear that the compensation or honorarium, ranging from \$15.00 per day to \$75.00 per day, was intended to be a quid pro quo for services rendered by these board members. Pursuant to Black's Law Dictionary, "honorarium" is defined as:

an honorary or free gift; a gratuitous payment, as distinguished from hire or compensation for service . . . .

Black's Law Dictionary (revised 4th ed. 1968). In light of the experience that part-time board members frequently bring to their position and the service they provide, the stipends paid pursuant to Idaho Code § 59-509 appear to fit more accurately within the definition of "honorarium." Unfortunately, there is no Idaho case law on point discussing the issue of mandatory inclusion of part-time board members in the PERSI system, nor is there any case law in other jurisdictions with similar retirement systems which addresses this specific issue. As a result, it is helpful to analogize to other areas.

By regulation and revenue ruling, the IRS has concluded that directors of corporations and similarly situated individuals are not employees. Sections 31-3121(d)-1(b), 31-3306(i)-1(e) and 31-3401(c)-1(f) of the Employment Tax Regulations provide, in pertinent part, that the director of a corporation, in his capacity as the director, is not an employee of the corporation.

It appears that the position of a part-time appointed board member is analogous to a position on a board of directors in the corporate environment. Like directors of a corporation, part-time board members handle policy making, are not subject to control and supervision, and are not paid a regular salary. In addition, like directors, part-time board members frequently maintain full-time positions with other entities or are self-employed in their own businesses. As a result, the determination by the IRS that directors are not employees when acting in their capacity of directors is a helpful analogy for the analysis of the issue presented here. It would seem that the logic applied in making a determination that directors of corporations, acting as directors, are not employees is equally applicable when looking at the issue of whether part-time appointed board members receiving compensation pursuant to Idaho Code § 59-509 are employees of the state for purposes of mandatory participation in PERSI.

It is also helpful to look at the purpose behind the PERSI statutes. Section 59-1301, Idaho Code, defines the purpose of the Public Employee Retirement System as a means whereby "public employees in the state of Idaho . . . may be retired from active service without prejudice and without inflicting a hardship upon the employees retired, and to enable such employees to accumulate pension credits to provide for old age, disability, death and termination of employment . . . ." (Emphasis added.) It is apparent

from the language contained in this section that the intent of the legislature in creating the Public Employee Retirement System was to provide a benefit to the employees of the state of Idaho. In the present circumstance, part-time appointed board members indicate that rather than providing a benefit, PERSI membership frequently results in a hardship to appointed board members providing their services to the state. Clearly, mandatory membership in PERSI resulting in a hardship to the individual member is the antithesis of the legislative purpose as expressed in Idaho Code § 59-1301.

Therefore, it would be my opinion that part-time appointed board members do not meet the definition of "employee" for purposes of mandatory PERSI participation. The compensation received by part-time board members appears to be more appropriately defined as an "honorarium" rather than a salary and, as such, one of the key elements of the definition of "employee" would not be met. Further, forcing mandatory participation on part-time appointed board members which results in a hardship is contrary to the intent of the legislature as stated in § 59-1301, Idaho Code.

The questions asked in your letter deal specifically with individuals meeting the definition of "employee" pursuant to Idaho Code § 59-1302(14). If an individual meets this definition, your question would be whether that individual employee could avoid mandatory membership in PERSI by waiving his/her salary. An individual employee may waive his/her salary only if the state is given the discretion to pay or not to pay for the services provided in that position. In response to your second question, if an employer is required by statute or ordinance to pay a salary to the employee, the employer would not have authority to waive this requirement nor would the employer be able to allow the employee to waive his/her salary benefits. Where, as required by Idaho Code § 59-509, the state is required to pay the benefits delineated, the state would have the duty to make payment to the individual for the services rendered; however, these issues become irrelevant if the individual is not considered to be an "employee" pursuant to the definition provided in Idaho Code § 59-1302(14).

## **CONCLUSION**

The intent of the statute creating PERSI was to provide benefits to the employees of the state; not to create hardship. Nonetheless, a hardship has apparently been created by the mandatory inclusion of part-time appointed board members in the retirement system. It would be my opinion that part-time appointed board members do not fall within the parameters of the definition of "employees" as provided by Idaho Code § 59-1302(14) and inclusion of the individuals would also be contrary to the purpose of the statute as stated in Idaho Code § 59-1301.

However, as I also indicated in the analysis, this issue has not been presented to a court in this jurisdiction for a determination, and the issue has not been decided by any

courts of other jurisdictions with similar statutes. Without guidance from any court on this point, it is difficult to ascertain with any degree of certainty whether a court would agree with the opinion provided here. Therefore, in an effort to comport with the intent of the legislature in creating the PERSI system and to provide needed clarification to the statutes, it would be my recommendation that legislation be drafted to allow part-time appointed board members the opportunity to voluntarily opt out of participation in the retirement system . This has been done in a number of states, notably California. It would seem contrary to the legislative intent behind the PERSI statutes to continue to force mandatory participation on individuals when such participation creates a hardship to them.

I hope this adequately addresses the issues presented. If I can be of further assistance, please let me know.

Very truly yours,

TERRY B. ANDERSON  
Chief, Business Regulation  
and State Finance Division