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OPINION	:	No. 79-1107
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of	:	<u>April 18, 1980</u>
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SUBJECT: SAFETY MEMBERSHIP—Unless one comes within one of the specific statutory exceptions to the provisions of section 31558 of the Government Code, and unless the employing county has adopted the section containing such exception, one entering active law enforcement service when he is over 35 years old is not eligible for safety membership regardless of his past safety membership employment.

The Honorable John A. Drummond, County Counsel, Mendocino County, has requested an opinion on the following question:

If a person, now over 35 years old, was formerly employed in a law enforcement position in a county sheriff's department and was a safety member of the County Employees' Retirement System (which is governed by the County Employees' Retirement Law of 1937) and then voluntarily resigned his position and withdrew his retirement contributions, may such person again become a safety member in the County Employees' Retirement System?

CONCLUSION

Unless one comes within the terms of one of the specific statutory exceptions to Government Code section 31558, a person, now over 35 years old, who was formerly employed in a law enforcement position in a county sheriff's department and was a safety member of the County Employees' Retirement System (which is governed by the County Employees' Retirement Law of 1937) and who then voluntarily resigned his position and withdrew his retirement contributions may not again become a safety member of the County Employees' Retirement System when he is reemployed in a law enforcement position in that county's sheriff's department.

ANALYSIS

The County Employees Retirement Law of 1937 (Gov. Code §§ 31450–31898)¹ sets forth a system for the providing of retirement benefits to the employees of those counties and designated districts electing to come under the statute. (See §§ 31451, 31468, 31500, 31557.) Under this system all officers and employees of such counties and districts are, in general, members of such retirement system (§§ 31470, 31552, 31557). However, among such members a special category of membership is established which consists of those employees engaged in active law enforcement, fire suppression and other specified public safety work. Such members are denominated as “safety members.” (§ 31469.3.) The significance of being categorized as a safety member lies in the fact that such members are eligible for more favorable benefits than are general members of the system. (*Los Angeles County Fire Fighters. Local 1014 v. Board of Retirement* (1975) 46 Cal. App. 3d 762, 765; 62 Ops. Cal. Atty. Gen. 106, 107 (1979); 57 Ops. Cal. Atty. Gen. 202, 203, fn. 2 (1974); Attorney General unpublished opinion IL 64–142 (1964).)

However, by virtue of the provisions of section 31558, one must not be over 35 years old upon his entry into service with a county or district in order to be classified as a safety member.² (62 Ops. Cal. Atty. Gen. 106, *supra*, at p. 109; 56 Ops. Cal. Atty. Gen. 23, 24 (1973).)

To the extent pertinent, section 31558 provides:

“All existing members of a pension system established pursuant to either Chapter 4 (commencing with Section 31900) or Chapter 5

¹ Hereafter all section references are to the Government Code.

² In a recent opinion this office has concluded that this age limitation in section 31558 with respect to safety membership does not violate state and federal laws prohibiting age discrimination in employment. (62 Ops. Cal. Atty. Gen. 106, *supra*.)

(commencing with Section 32200) of this part and all employees eligible as safety members who at the time of entering service elected to become safety members, or who subsequently became members, shall become safety members and thereafter each person *not over 35 years of age when employed* in a position, the principal duties of which consist of active law enforcement or active fire suppression or juvenile hall group counseling and group supervision . . . shall become a safety member on the first day of the calendar month following his entrance into the service . . .” (Emphasis added.)

The question we consider here is whether one, who returns to county law enforcement service when he is over 35 years old, is entitled to safety member status if he had previously been employed by the county as a safety member in a law enforcement position when he was under 35 years old.

The determinative issue raised by this question is whether one is deemed under section 31558 to be a new employee when he returns after resigning from his original employment and is thus subject to the age limitation applicable to newly entering employees,³ or whether, upon returning, he is deemed to be merely resuming his prior status and is thus regarded as one entering service before the age of 35.

The general rule pertinent to this issue is that when a person voluntarily resigns his position, such person’s connection with his employment is completely severed and upon his return to such employment, he is deemed to be entering as a new employee. (*Abbott v. City of Los Angeles* (1960) 178 Cal. App. 2d 204, 209, 211; *Henry v. City of Los Angeles* (1962) 201 Cal. App. 2d 299, 320; *Board of Trustees of Firemen’s Pension Fund v. State* (Ind. 1933) 187 N.E. 330, 331; see also, *Kramer v. Board of Police Commrs.* (1919) 39 Cal. App. 396, 399–400.)

Thus in *Abbott v. City of Los Angeles, supra*, 178 Cal. App. 2d 204, where the situation involved the resignation of several police and firemen at a time when the law provided for the more favorable “fluctuating” pension, and their reemployment when the less favorable “fixed pension” was in effect, the court declared:

“It is clear that the 12 resigned members lost their right to receive a fluctuating pension by reason of their resignations. The voluntary resignation of a municipal employee terminates all rights and duties of his employment

³ Note that section 31558 does not proscribe the employment of any persons over 35 in the specified positions. It merely proscribes the classification of such persons as safety members. (62 Ops. Cal. Atty. Gen. 106, 109, 111, *supra*, 56 Ops. Cal. Atty. Gen. 23, 24, *supra*; Attorney General unpublished opinion IL 71–27 (1971).)

and upon a rehiring he enters into a new contract with his employer. [Citations omitted.] Although the members had a vested right to a fluctuating pension by virtue of their original contracts of employment they lost it by quitting their positions before completion of the period of service necessary to qualify them for retirement.” (*Id.* at p. 209; accord, *Henry v. City of Los Angeles, supra*, 201 Cal. App. 2d at p. 320.)

In *Board of Trustees of Firemen’s Pension Fund v. State, supra*, 187 N.E. 330 (cited in the *Abbott* case, *supra*, at p. 209) the court dealt with a situation even more closely resembling the situation being considered here. In that case a fireman, who was originally employed before he was 35, resigned and, after some years, was reemployed when he was 44 years old. (187 N.E. at p. 330.) The applicable statute provided that firemen employed when they were over 35 years old would not be entitled to a fireman’s pension. (*Id.* at p. 331.) In construing that statute in light of the reemployed fireman’s claim to a pension, the court concluded:

“When the relator resigned his position, his connection with the fire department was completely severed, and he retained no right to the position or to any of its rights, benefits, or emoluments, and no basis remained upon which he could demand reinstatement or re-employment as a matter of right or justice. It may be conceded that, if one is removed from a fire force against his will, or over his protest, or if he is granted a leave of absence, he may retain some right which may be the basis of a reinstatement, which would give him the same status as though he had continued as a member of the force, but, on appointment to the force after a resignation, he must be deemed to enter the force upon the same basis as an employee who had not theretofore any connection with the department.

“

“The statute was intended to, and does, restrict admission to membership in the fund to those who at the time of appointment are not over thirty-five years of age. The relator does not come within this age requirement, and *the fact of his prior service adds nothing to his rights*” (*Ibid.*; emphasis added.)

Thus in the present situation “the fact of his prior service” before he was 35 does not of itself permit the disregarding of the age limitation in section 31558 and entitle the returning county law enforcement employee who is over 35 to safety membership status.

It has, however, been suggested that the provisions of section 31652(a) constitute an exception to the safety member age limitation of section 31558. In pertinent part, section 31652 (a) provides:

“Any member may redeposit in the retirement fund, prior to filing an application for retirement, by lump sum payment or by installment payments over a period of one year or for a longer time upon approval of the board, an amount equal to all of the accumulated normal contributions which he has withdrawn, plus regular interest thereon from the date of separation from the retirement system, and his membership is the same as if unbroken by such termination. Except as provided in this section his rate of contribution shall be based on age at the nearest birthday at time of reentrance into the system. If he does not redeposit all of the accumulated normal contributions previously withdrawn he shall be considered as a new member without credit for any previous service” (Emphasis added.)

Thus it might be argued that under section 31652(a) one returning to county law enforcement service, regardless of his age, could resume his safety member status as if he had never left such service merely by redepositing his previously withdrawn retirement contributions plus interest. For the reasons to be indicated, this argument must be rejected.

Primary among these reasons is the fact that there is no reference in section 31652(a) to the membership category of the returning employee, or to the effect upon such membership category of redepositing, or failing to redeposit retirement contributions. However, the section does expressly provide that if the returning employee does fail to make the required redeposit, “he shall be considered a new *member without credit for any previous service.*” (Emphasis added.)

Thus by its terms section 31652(a) is simply not directed to determining the membership category of the returning employee. It is directed only to the calculation for retirement purposes of such employee’s credit for time in service.

If we were to conclude that section 31652 (a) also affected the determination of one’s membership category and permitted a returning employee to resume his prior membership category, a returning employee could be placed in a category despite his lack of qualifications for that category merely by making the specified redeposit.

Thus, for example, if a former sheriff’s officer with safety member status returned to county service as a clerical worker, under the suggested interpretation of section 31652(a), such clerical worker would be entitled to reinstatement into the safety member category even though, as noted, that category is explicitly reserved to those whose principal

duties consist of active law enforcement, fire suppression, and other specified public safety work (§ 31469.3). As stated in *Neeley v. Board of Retirement* (1974) 36 Cal. App. 3d 815, a case in which the court rejected the claim of employees for safety member status: “We are not unmindful of the well-established rule that pension legislation, such as that here involved, should be liberally construed, resolving all ambiguities in favor of the applicant. [Citations omitted.] However, this rule of liberal construction is applied for the purpose of effectuating the obvious legislative intent [citation omitted] and should not blindly be followed so as to eradicate the clear language and purpose of the statute and allow eligibility for those for whom it was obviously not intended.” (*Id.* at p. 822.)

Accordingly, in view of the express qualification of section 31558 limiting safety members to those “nor over 35 years of age when employed,” we conclude that section 31652(a), which does not refer to safety membership, was not intended to afford eligibility for safety member status to those returning to county service after they are 35 years old. Thus, while section 31652 (a) addresses the matter of reinstatement to membership in the retirement system, it is left to other statutes to designate the category of such membership.

Persuasive support for this conclusion lies in the fact that the Legislature has enacted several specific provisions in the 1937 County Retirement Law which do allow one employed in active law enforcement to become a safety member under specified conditions even though he entered such employment after the age of 35. These provisions require continuous active law enforcement during specified periods (§§ 31558.1, 31558.2) or resumption of such employment within 90 days after leaving such employment under the state or a county retirement system (§ 31834). And such provisions are applicable only in those counties electing to come within their terms.

What is most relevant in this regard is the fact that each of these particular provisions are expressly made operative “[N]otwithstanding any of the provisions of Section 31558 to the contrary” (§§ 31558.1, 31558.2, 31834.)⁴

Such explicit declarations, excepting these provisions from the operation of the age limitation of section 31558, are significantly absent from the provisions of section 31652(a). As observed in *Marsh v. Edwards Theatres Circuit, Inc.* (1976) 64 Cal. App. 3d 881, 891;

⁴ Similar exceptions “[n]otwithstanding any of the provisions of Section 31558 to the contrary” are available under specified condition to designated fire protection personnel (§§ 31558.1, 31834), lifeguard and rescue personnel (§ 31834), and juvenile hall counselors (§ 31558.6). See also this office’s unpublished opinion, IL 64.142, *supra*, which concluded that section 31652.2 also constituted an exception to the age limitation of section 31558. However, section 31652.2 was repealed in 1972. (Stats. 1972, ch. 126, § 2, p. 2166.)

“Where a statute on a particular subject omits a particular provision, the inclusion of such a provision in another statute concerning a related matter indicates an intent that the provisions is not applicable to the statute from which it was omitted.”

Thus the absence in section 31652(a) of any references to section 31558 is an indication that the Legislature intended that section 31652 (a) was not to operate as an exception to section 31558.

We also note that this conclusion is consistent with the Legislature’s purpose in establishing age limitations with respect to safety member status in a retirement system.

The legislative purpose for such limitations was set forth in 59 Ops. Cal. Atty. Gen. 659 (1976) which quoted from the California State Personnel Board’s report to the Legislature dated March 15, 1975, as follows:

“. . . “safety” employment is characterized by two key determinations. These are: 1. Public protection, *and* 2. Physical capacity.’ (p. 1.) The Report went on to observe that:

‘While many people believe that the early retirement aspect of safety retirement is primarily designed to recognize occupational risks, this is not the case. *The primary objective of early retirement is to keep the average age of employees at a lower level than in other retirement categories.* [Emphasis added]. A presumption is made that the nature of the work requires physically capable employees and that younger employees are better suited to fulfill their mission. Physical capacity is essential to the successful performance of these duties.’ (p. 2.)

Safety retirement, however, is primary (sic) designed to provide better protection to the *public* because *physically* more’ capable employees are on duty. These factors should be determinants of safety membership.

While many occupations may serve the public, relatively few are public protective. It appears that a strong link exists between protecting people from *physical harm* and the employee having a required *physical capacity.*’ (pp. 3–4.)”

(59 Ops. Cal. Atty. Gen. at p. 663. See also 62 Ops. Cal. Atty. Gen. 106, *supra*, at p. 107 for a similar evaluation of the purpose of the age limitation for safety members specified in section 31558.)

In this same vein the court in *Neeley v. Board of Retirement, supra*, 36 Cal. App. 3d at p. 822, stated:

“The age limitation for service as a safety member (Gov. Code § 31662.4) clearly suggests a legislative intent that such members be young, agile and able to respond to violence and danger [citation omitted] and that their principal duties concern physically active work, such as the arrest and detention of criminals, which exposes such officers and employees to physical risk in the law enforcement field.”

Thus to construe section 31652(a) as permitting an employee to reenter safety membership status regardless of age merely by making the necessary deposit of retirement contributions would be inimical to a legislative purpose designed to secure greater public protection through encouraging the employment of a younger more physically capable law enforcement work force. “Words of a statute must be given such interpretation as will promote rather than defeat the general purpose and policy of the law.” (*Stewart v. Board of Medical Quality Assurance* (1978) 80 Cal. App. 3d 172, 179.)

Therefore, unless one comes within one of the specific statutory exceptions to the provisions of section 31558, and unless the employing county has adapted the section containing such exception, one entering active law enforcement service when he is over 35 years old is not eligible for safety membership regardless of his past safety membership employment.
