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January 9, 1989

The Honorable Larry A. Tucker  
Senate President-elect  
The Senate of West Virginia  
State Capitol  
Charleston, West Virginia 25305

Dear Mr. President-elect:

You have requested clarification of the Attorney General's opinion of December 12, 1988, regarding the rehiring of persons who have retired under the early retirement incentive program. Specifically, you have asked the following questions:

(1) A person takes early retirement under the incentive program from a skilled, technical position.

Could the Senate hire this person for the session, for the purpose of training a replacement and pay them under contract? This retiree would be under the Senate's supervision.

No. To reiterate, Senate Bill No. 10 prohibits an early retiree from accepting "further employment from the state or any of its political subdivisions." As stated in our previous opinion, the key element in determining whether a person is an employee is "the right or power of control or supervision in connection with the work to be done." Syl. pt. 1, in part, Spencer v. Travelers Insurance Company, 148 W.Va. 111, 133 S.E.2d 735 (1963).

Accordingly, the Senate may hire a retiree with special skills under contract to train a replacement, but may not retain control or supervision over his or her work. In addition, although the completion of this contractual obligation could take the entire session, the Senate could not fill a regular staff position for the session with a retiree under contract.

(2) Two employees take early retirement under the incentive plan. One is a skilled position, one is in an unskilled position. (i.e., computer operator, custodian).

With the approval of the Joint Committee on Government and Finance, can the President of the Senate fill both positions?

Possibly yes. W.Va. Code 5-10-22c(d) provides, in part:

Within every spending unit, department, board, corporation, commission, or any other agency or entity wherein two or multiples of two members elect to retire either under the temporary early retirement incentives set forth above, or under regular, voluntary retirement, and countable on an agency-wide or entity-wide basis, no more than one of such vacated positions may be filled, with the second position being abolished upon the effective day of the member's retirement.


This abolishment provision makes no distinction between skilled and unskilled positions. Generally speaking, for every two members who retire only one of the vacated positions may be filled. However, the above subsection also contains the following exception:

Provided, That this vacant position abolishment provision shall not apply to . . . any position or positions, . . . which . . . the president of the senate or speaker of the house of delegates, in respect of the legislative branch, may exempt or amend, under such abolishment provision, upon his respective recommendation that such exemption or amendment is necessary to provide for continuity of governmental operation or to preserve the health, welfare or safety of the people of West Virginia, and with the prior concurrence of the joint committee on government and finance in such recommendation, after the chairman thereof shall cause such committee to meet.

Accordingly, if the President of the Senate, with the concurrence of the Joint Committee on Government and Finance, recommends an exemption for the above-described positions on the grounds that it is necessary to provide for continuity of governmental operation or to preserve the health, welfare or safety of the people of West Virginia, he may fill both positions.

Very truly yours,

CHARLES G. BROWN  
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