TEXAS HEALTH AND HUMAN SERVICES COMMISSION

KYLE L. JANEK, M.D.
EXECUTIVE COMMISSIONER

November 7, 2012

FILE # ML-47168-12
I.D. # 47168

RQ-1098-GA

The Honorable Greg Abbott
Attorney General of Texas
209 West 14th Street
Austin, Texas 78701

Dear General Abbott:

As Executive Commissioner of the Health and Human Services Commission (HHSC), I request a formal opinion of your office regarding whether HHSC is authorized, or in the alternative, a reinstated HHS agency employee is required to pay interest to Employees Retirement System (ERS) on the amount of money paid to ERS to restore the reinstated employee's service credit when the employee is reinstated as a result of a grievance process or analogous procedure.

The Legislature has expressly required that interest be paid to ERS in certain specific situations when an agency employee seeks to restore or establish service credit. However, the Legislature has not imposed or permitted such a payment when a wrongfully terminated employee is reinstated. The Legislature simply has not addressed this situation. Therefore, I believe that HHSC is not authorized, nor a reinstated HHSC employee required, either expressly or impliedly, to pay such interest. I have included a legal brief prepared by my staff that directly addresses the legal issues raised by this request.

Please let me know if you have any questions or need additional information. Steve Aragón, Chief Counsel, is serving as the lead staff on this matter and can be reached at 424-6578 or by e-mail at Steve.Aragon@hhsc.state.tx.us.

Sincerely,

Kyle L. Janek, M.D.

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

KYLE L. JANEK, M.D.
EXECUTIVE COMMISSIONER

Brief in Support Of Attorney General Opinion Request

Re: Authority of state agency to pay interest to ERS to restore service credit of reinstated employee

I. Factual background

When a health and human services (HHS) agency discharges an employee, the employee may, depending on the circumstances of the discharge, file a grievance and obtain a hearing.[1] An administrative law judge employed by the Health and Human Services Commission (HHSC) hears the grievance. If the administrative law judge finds in favor of the employee and overturns the HHS agency decision to terminate employment, typically the administrative law judge orders the HHS agency to reinstate the employee with back pay and full benefits. Then the HHS agency pays the employer and employee contributions to Employees Retirement System (ERS) to restore the reinstated employee's service credit in the employee's ERS retirement account from the date of the employment termination to the date of reinstatement.[2]

A Health and Human Services Commission (HHSC) employee's employment was terminated during the past year. The employee filed a grievance, claiming that the employee was wrongfully discharged by the agency. After an administrative hearing, the employee was reinstated by an administrative law judge, who ordered that the employee's job be restored with back pay and full benefits.

HHSC sought to transfer money to ERS to restore the reinstated employee's service credit in the employee's ERS retirement account, but were told by ERS staff that ERS now requires payment of interest on the amount of money paid to restore service credit to a reinstated employee's ERS retirement account. ERS has not done this in the past, yet claims that imposing interest is necessary because ERS loses the opportunity to invest the suspended contribution to the retirement account. ERS characterizes the exaction as interest for the term of the "loan," though it is unclear who receives the "loan."

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[1] For example, according to the Health and Human Services (HHS) Human Resources Manual, an employee who is probationary may not file a grievance.

[2] HHSC provides consolidated payroll services as well as time/labor/leave services to all the HHS agencies. HHSC pays the employer contribution to ERS on behalf of the HHS agency and deducts the employee contribution from the reinstated employee's back pay and then provides it to ERS. The employee contribution is the same amount that would have been deducted from the employee's pay had the employee remained employed by an HHS agency.

HHS agencies reinstated an average of 25 employees each of the last two fiscal years. Employees were off the respective agencies' payrolls an average of six months. The ERS policy would require an average monthly interest payment of approximately $27.00 per reinstated employee. Thus, the application of this policy yields little benefit to the retirement system. Nevertheless, ERS refuses to restore service credit to reinstated HHS agency employees unless the interest payment is made.

The new practice by ERS affects not only state employees who are given property rights in employment by federal or state law. The new practice could affect all state employees. While the vast majority of state employees are employees-at-will whose employment can be terminated for any reason except an unlawful reason and therefore have no right to due process or a grievance hearing, any employee who alleges termination on the basis of an unlawful reason and prevails in court may be subject to this ERS practice and be adversely affected.

We believe that a state agency has no authority to pay interest nor can a reinstated state agency employee be required to pay interest in the situation that we are addressing. We believe that because ERS does not have authority to compel the payment of interest.

II. Discussion

A. Relevant federal law governing defined benefit plans

ERS staff appears to believe that federal law requires and perhaps even authorizes state agencies to impose and collect interest from a state agency or a reinstated employee. In correspondence addressed to the Executive Commissioner of HHSC from the Executive Director of ERS, the Executive Director of ERS, without citing specific federal law, suggested that federal law requires ERS to impose and collect interest from both a state agency and a reinstated state agency employee when the reinstated state agency employee seeks to establish service credit:

> For some time now, when ERS has been made aware of circumstances where reinstatement service credit was being requested, ERS has required both the state agency employer and the member to pay interest as part of the contributions for services not yet established. This applies to <u>all</u> state agencies. . . .
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> The ERS trust fund is a defined benefit plan required to maintain its qualified status under Section 401(a) of the Internal Revenue Code (IRC). Provisions of the IRC and applicable federal regulations have strict requirements that fiduciaries of trust funds must comply with in order to maintain their preferential tax status as qualified plans. *Two of these requirements are prohibiting the diversion of trust funds and self-dealing with the creator of the trust.*
>
> The state of Texas created the ERS trust fund via the Texas Constitution (currently found in Article XVI, Section 67). State agencies, as agencies of the state of Texas, must not be given preferential financial treatment by the trust. *To this end, the IRC prohibits the lending of any part of the trust's income or corpus*

> *without the receipt of adequate security and a reasonable rate of interest.* (Emphasis added.)[3]

In correspondence addressed to HHSC, the chief financial officer of ERS suggested that Internal Revenue Code provisions and rules adopted under them not only require ERS to impose interest when a reinstated employee seeks to restore service credit, but actually confer authority on ERS to do so:

> In accordance with authority given to ERS in the Internal Revenue Code, the Texas Constitution, and specifically the Tex. Gov't Code §§ 813.104-813.202, ERS has internal procedures to collect the interest payments for establishing service credit.[4]

Imposing interest payments on either the state agency or the reinstated employee are unauthorized and unjustified, because terminated employees who are later reinstated to agency employment have obtained no benefit from ERS between the date of employment termination and the date of reinstatement. Such employees have not been unjustly enriched to the detriment of other ERS members. And certainly, the state agency has not engaged in self-dealing and has not been enriched in any way.

The focus of ERS concern is ERS's obligation to pay benefits to a reinstated employee when ERS has not been able to generate income from the investment of the state agency contribution and the employee contribution during the period during which the reinstated employee was not employed by the agency:

> With regard to reinstatement service credit [which is not a statutory phrase, but rather one coined by ERS staff], the ERS trust fund has not had the use and benefit of employer and employee contributions for the months of service credit being sought, but will nonetheless be obligated to pay benefits to the member upon retirement for those same months of service. Therefore, if ERS is going to permit this service to be established by the member, then we must be made whole by accounting for the loss of use of funds once the reinstatement service credit is attributed to the member.[5]

ERS staff apparently believes that paying a member for service credit for a period during which ERS had no use of the contributions for investment purposes constitutes "diversion," "self-dealing," or both. We disagree.

Subchapter D of Chapter 1 of Subtitle A of the Internal Revenue Code sets out the requirements with which pension plans and trust funds that are part of pension plans must comply in order to

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[3] Letter to the Honorable Tom Suehs, Executive Commissioner, Health and Human Services Commission, from Ms. Ann S. Bishop, Executive Director, Employees Retirement System of Texas, dated March 19, 2012 (March letter).
[4] Letter to Ms. Tracy Henderson, Chief Financial Officer, Health and Human Services Commission from Mr. Michael C. Wheeler, Chief Financial Officer, Employees Retirement System of Texas, dated July 18, 2012.
[5] March letter.

be deemed "a qualified plan" or "a qualified trust" for purposes of the code. Subchapter D has no provision addressing "self-dealing" and the provision addressing "diversion" would not apply in the situation on which we are focusing. Nor do any guidance letters or orders issued by the Department of the Treasury construing Subchapter D – revenue rulings, private letter rulings, exemption rulings, information letters, Treasury decisions, Treasury Department orders, or publications – even address "self-dealing" or diversion, much less require interest payments, in a situation involving a wrongfully terminated employee or the employee's employer.

First, federal rule requires that, in order for a trust to be deemed a qualified trust, the trust instrument must make it impossible for money to be diverted.[6] Federal rule prohibits use of trust funds for "purposes other than for the exclusive benefits of his [sic] employees or their beneficiaries," which includes "all objects or aims not solely designed for the proper satisfaction of all liabilities to employees or their beneficiaries covered by the trust."[7] ERS complains that paying a member for that period during which ERS did not have use of the contributions for investment purposes constitutes a "diversion." In fact, this is nothing more than paying for the "proper satisfaction of all liabilities to employees or their beneficiaries covered by the trust." This squarely falls within what the rule permits. Whatever this sort of payment is, it is not a "diversion" for purposes of the Internal Revenue Code.

Second, ERS claims that failure to pay interest on the contribution for the period during which ERS does not have use of the money constitutes "self-dealing." Subchapter D does not address "self-dealing." The only provision that does, Section 4941 of Title 26 governs foundations, not pension plans and trusts.[8]

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[6] 26 C.F.R. § 1.401–2 is entitled "Impossibility of diversion under the trust instrument" and provides:

(a) In general. (1) Under section 401(a)(2) a trust is not qualified unless under the trust instrument it is impossible (in the taxable year and at any time thereafter before the satisfaction of all liabilities to employees or their beneficiaries covered by the trust) for any part of the trust corpus or income to be used for, or diverted to, purposes other than for the exclusive benefit of such employees or their beneficiaries. This section does not apply to funds of the trust which are allocated to provide medical benefits described in section 401(h) as defined in paragraph (a) of § 1.401–14. For the rules prohibiting diversion of such funds and the requirement of reversion to the employer after satisfaction of all liabilities under the medical benefits account, see paragraph (c)(4) and (5) of § 1.401–14. For rules permitting reversion to the employer of amounts held in a section 415 suspense account, see § 1.401(a)–2(b).

(2) As used in section 401(a)(2), the phrase "if under the trust instrument it is impossible" means that the trust instrument must definitely and affirmatively make it impossible for the nonexempt diversion or use to occur, whether by operation or natural termination of the trust, by power of revocation or amendment, by the happening of a contingency, by collateral arrangement, or by any other means. Although it is not essential that the employer relinquish all power to modify or terminate the rights of certain employees covered by the trust, it must be impossible for the trust funds to be used or diverted for purposes other than for the exclusive benefit of his employees or their beneficiaries.

(3) As used in section 401(a)(2), the phrase "purposes other than for the exclusive benefit of his employees or their beneficiaries" includes all objects or aims not solely designed for the proper satisfaction of all liabilities to employees or their beneficiaries covered by the trust.

[7] *Id.*

[8] Section 4941 (d) of Title 26 of the United States Code defines "self-dealing":

(d) Self-dealing.--

(1) In general.--For purposes of this section, the term "self-dealing" means any direct or indirect--

We will address the authority conferred on ERS by state law in the next section. As to the authority conferred on ERS by federal law, simply put, there is none. The Internal Revenue Code and regulations adopted under it set out the requirements with which pension plans and trust funds comprising parts of pension plans must comply in order to be deemed a "defined benefit plan" for purposes the Internal Revenue Code.[9] The Internal Revenue Code does not purport to confer authority on any state or any state agency. Moreover, the Internal Revenue Code cannot confer authority on a state or state agency to do anything; only a state constitution or statutes duly enacted by a state's legislature can do that. It is to state law that we now turn.

B. Relevant state law governing restoring or establishing membership service in the employee class

Chapter 813 of the Government Code governs restoring or establishing membership service in the retirement system. There are three types of creditable service in the employee class of the retirement system – membership service, military service, and equivalent membership service.[10] Membership service is credited for each month in which a member holds a position and for which the required contributions are made by the member and the employing state agency.[11]

The Legislature does not require a state agency to pay interest in any fact situation when an employee is seeking to restore or establish service credit in the employee class of the retirement system. However, the Legislature does require employees to pay interest in three specific fact situations when an employee is seeking to restore or establish service credit in the employee class of the retirement system:[12]

1. A member who has withdrawn contributions and canceled service credit may reestablish the canceled service credit by depositing with the retirement system the amount withdrawn in a lump sum plus interest in an amount computed at an annual rate of 10 percent.[13]

(A) sale or exchange, or leasing, of property between a private foundation and a disqualified person;

(B) lending of money or other extension of credit between a private foundation and a disqualified person;

(C) furnishing of goods, services, or facilities between a private foundation and a disqualified person;

(D) payment of compensation (or payment or reimbursement of expenses) by a private foundation to a disqualified person;

(E) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation; and

(F) agreement by a private foundation to make any payment of money or other property to a government official (as defined in section 4946(c)), other than an agreement to employ such individual for any period after the termination of his government service if such individual is terminating his government service within a 90-day period.

[9] See 26 U.S.C. Subt. A, Ch. 1, Subch. D.; 26 C.F.R.
[10] TEX. GOV'T CODE § 813.001.
[11] TEX. GOV'T CODE § 813.201.
[12] *See* 34 TEX. ADMIN. CODE § 71.13.
[13] TEX. GOV'T CODE § 813.102.

2. A member may establish credit for service not previously established by depositing with the retirement system a lump sum in an amount calculated by Section 813.505 of the Government Code, plus interest in an amount computed at an annual rate of 10 percent.[14]
3. A member may establish credit for military service not previously established by depositing with the retirement system a lump sum in an amount calculated by Section 813.404 or Section 813.505, plus interest calculated at an annual rate of 10 percent.[15]

1. The Legislature has not conferred express authority on state agencies to pay interest or required state employees to pay interest when a reinstated employee seeks to restore or establish service credit with ERS.

A state agency has only those powers that the Legislature expressly confers upon it.[16] In this instance, the Legislature requires ERS to impose a stated rate of interest on the amount of money paid to ERS in the specific situations described above in which a former or current state agency employee seeks to restore or establish service credit in ERS. The rate of interest is imposed on state employees, but not on the state agency.

But the Legislature has not conferred authority on ERS to impose interest on the amount of money paid to ERS when a reinstated employee and the state agency for whom the employee works seek to pay ERS to restore the employee's service credit in ERS. The Legislature simply has not addressed this situation.

None of the three fact situations described above expressly apply when a wrongfully-terminated employee is reinstated and seeks to establish service credit. Clearly, the first and third situations could not apply. Only the second situation governing establishing credit for service not previously established even arguably could apply. Section 813.102 provides the following in pertinent part:

> A member may establish credit under this section by depositing with the retirement system in a lump sum a contribution computed as provided by Section 8131404 or 813.505, plus interest computed on the basis of the state fiscal year at an annual rate of 10 percent *from the date the service was performed to the date of deposit*. (Emphasis added.)[17]

For two reasons, we believe that Section 813.202(b) could not apply to reinstate state employees.

First, the interest amount required under Section 813.106 is calculated "from the date the service was performed to the date of deposit."[18] When a wrongfully-terminated employee is reinstated,

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[14] TEX. GOV'T CODE § 813.202. The employing state agency is required to make contributions for service not previously established in an amount provided by statute. TEX. GOV'T CODE § 813.106.
[15] TEX. GOV'T CODE § 813.302. The employing state agency is required to make contributions for service not previously established in an amount provided by statute. TEX. GOV'T CODE § 813.106.
[16] *Texas Municipal Power Agency v. Public Util. Comm'n of Texas*, 253 S.W.3d 184 (Tex. 2008); *Public Util. Comm'n v. City Public Serv. Bd. of San Antonio*, 53 S.W.3d 310 (Tex. 2001).
[17] TEX. GOV'T CODE § 813.202(b).
[18] *Id.*

no service was performed between the date of the termination and the date of reinstatement or the date of deposit. If the Legislature had intended that Section 813.106 apply in an instance in which no service is performed, it certainly could have done so. But it did not. Reliance on Section 813.106 is inapposite; the section, by its clear terms, could not apply.

Apparently, the executive director of ERS agrees with this construction. In a letter to Executive Commission Tom Suehs in March 2012, the executive director of ERS describes correctly the fact situation prompting this request and the current governing reestablishing service credit:

> The service credit that HHSC and these employees are asking ERS to establish is not for months the employees actually worked, as contemplated by our statutes, but rather for months that they did not work at all because they had been terminated from employment by HHSC and subsequently reinstated retroactively by an Administrative Law Judge employed by HHSC.[19]

Second, as will be discussed later, there is no support for the proposition that the Legislature intended to penalize a reinstated state employee by imposing interest for exercising the employee's legal rights. A state agency is not authorized to pay interest, nor is a reinstated state agency employee required to pay interest under these facts. And ERS has no express authority to impose interest, on either a state agency or a reinstated employee, when that employee seeks to establish service credit for the period of wrongful termination.

A state agency may also have implied powers that are reasonably necessary to carry out the express responsibilities given to it by the Legislature.[20] In this instance, however, ERS clearly has no implied authority to impose interest and a state agency has no implied authority to pay it; if implied authority were there, then the Legislature would not have conferred such express authority in the first instance in the situations described above. Such a conferral would have been unnecessary, and the Legislature is not deemed to do an unnecessary or unreasonable thing.[21] Thus, the Legislature could not have intended that ERS have implied authority to impose interest on money paid to ERS to restore the service credit of a reinstated employee, nor could it have intended that state agencies have implied authority to pay it.

ERS claims that imposing interest in the situation at issue is necessary in order to ensure that ERS can obtain income from the investment of such funds. Specifically and without providing any discussion of or citation to federal law, ERS staff have claimed that ERS is required by federal law to charge interest on what it claims is a "loan" in order for the ERS pension fund to remain compliant with federal law.

We know that no state or federal law confers authority on ERS to do that. Even if we assumed that federal law required a qualified plan or trust to impose and collect interest in the situation we

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[19] Letter from Ms. Ann S. Bishop, Executive Director, Employees Retirement System, to the Honorable Tom Suehs, Executive Commissioner, Health and Human Services Commission, dated March 19, 2012.
[20] *Id.*
[21] *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 68 (Tex. 191); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245, 249 (Tex. 1991).

are addressing, the Legislature has not enacted any statute authorizing ERS to implement any rule or policy necessary to remain compliant with federal law. The Legislature has conferred broad authority on state agencies in the past to empower an agency to take action to comply with federal law.[22] It has conferred no such authority on ERS. Moreover, a state agency may not exercise what is effectively a new power, or a power contradictory to the agency's organic statute, on the theory that such a power is expedient for administrative purposes.[23] While the new policy of ERS may be expedient, it is not authorized by law, express or implied.

2. The Legislature has not appropriated money to state agencies to pay interest to ERS when restoring service credit to wrongfully discharged employees

It is a truism that a state agency cannot expend appropriated money for a purpose not authorized by the Legislature. Article VIII, section 6, of the Texas Constitution provides that "[n]o money shall be drawn from the Treasury but in pursuance of specific appropriations made by law; nor shall any appropriation of money be made for a longer term than two years."[24] This section has been construed by courts and by the attorney general to require that money may be expended only from funds appropriated for that specific purpose.[25]

In this instance, the Legislature has not appropriated money to any state agency for the purpose of paying interest to ERS on money paid to ERS by a state agency to restore ERS service credit to a wrongfully-discharged and reinstated employee. Therefore, no state agency is authorized to make such payments. Moreover, neither the Legislature nor the Comptroller of Public Accounts has put in place any administrative mechanism to provide for the disbursement of such interest payments. If such payments were authorized by law, it is reasonable to assume that the Comptroller would have provided a means for their payment.

3. Imposing a requirement that a wrongfully discharged employee pay interest to ERS when restoring service credit effectively penalizes an employee for exercising his due process rights to protect his statutorily-created property interest in his employment

Two HHS agencies, the Department of State Health Services and the Department of Aging and Disability Services, are required by statute to discharge employees upon a finding by the

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[22] The Legislature has conferred broad authority on the state agency administering federal welfare programs:

> If the department determines that a provision of state welfare law conflicts with a provision of federal law, the department may promulgate policies and rules necessary to allow the state to receive and expend federal matching funds to the fullest extent possible in accordance with the federal statutes and the provisions of this title and the state constitution and within the limits of appropriated funds.

TEX. HUMAN RESOURCES CODE, § 22.02(d).

[23] *Texas Municipal Power Agency v. Public Util. Comm'n of Texas*, 253 S.W.3d 184 (Tex. 2008); *Public Util. Comm'n v. City Public Serv. Bd. of San Antonio*, 53 S.W.3d 310 (Tex. 2001).

[24] TEX. CONST. art. III, § 6.

[25] *State v. Angelina County*, 150 S.W.2d 379 (Tex. 1941); *In Interest of R.M.H.*, 843 S.W.2d 740 (Tex. App. – Corpus Christi, 1992, no pet.); *In the Matter of D.H.*, 556 S.W.2d 628 (Tex. Civ. App. – Waco 1977, writ ref'd n.r.e.); *Tex. Dept. of Public Safety v. Morris*, 426 S.W.2d 290, (Tex. Civ. App. – Houston [1st Dist.] 1968), *rev'd on other grounds*, 436 S.W.2d 124 (Tex. 1968); Tex. Att'y Gen. Op. Nos. V-412 (1947); O-4222-A (1942).

Department of Family and Protective Services that certain misconduct occurred involving program clients or patients. These employees enjoy a statutorily-created property interest in continued employment.[26] The new ERS policy effectively punishes (1) employees of these agencies for pursuing lawful remedies for their discharges and (2) agencies for complying with statutory requirements. The new ERS policy appears to conflict with the clear legislative intent creating the misconduct registries and the purpose of the constitutional due process protections afforded these employees.[27]

Additionally, federal law requires HHS agencies receiving certain federal funding to treat employees in accordance with federal merit system principles. The Social Security Act and related federal regulations act as an overlay to employment policies for HHS agencies. The federal Medicaid laws require assurances in each state's State Plan that the State Medicaid agency will establish and maintain personnel standards on a merit basis.[28] These federal laws apply, because HHSC is the State Medicaid agency and DADS and DSHS administer portions of the Medicaid program. Other federal laws applicable to HHS agencies require the same merit based system of personnel administration.[29]

The standards for merit-based personnel administration require an agency to ensure fair treatment and adopt merit system principles, including procedures to: (1) retain employees on the basis of adequate performance; (2) provide for the correction of inadequate performance; and (3) terminate only employees whose performance cannot be corrected. Federal regulations allow for flexibility and diversity among state governments in the design, execution, and management of their required systems of personnel administration.[30] The HHS Human Resources Manual incorporates this federal requirement and affords discharged HHS employees an appeal process that includes a grievance.

An ERS demand for interest on employee contributions punishes the reinstated employee and the employing HHS agency for the employee's successful pursuit of the grievance process. And it should be noted that, while state employees generally are employees at will who may be discharged for any reason except an unlawful reason, the fact that an employee at will may prevail in a lawsuit involving a discharge for an unlawful reason means that this new ERS policy reaches all state employees and state agencies, not just HHS agencies.

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[26] Employees at state hospitals and state supported living centers, other than the superintendents and directors, respectively, of those facilities, have a property interest in continued employment. That property interest was created by statute, namely Health & Safety Code §551.022(d)(3) and §551.0225(d)(3). The statutes provide that a superintendent or director may dismiss an employee "for good cause." A 1995 Attorney General Opinion (Letter Opinion No. 95-063) found that the "for good cause" language created a property interest in continued employment for affected employees.

[27] *See, e.g.*, TEX. HEALTH & SAFETY CODE, chs. 242, 253.

[28] *See* 42 U.S.C. § 1396a(a)(4); 42 C.F.R. § 432.10; 5 C.F.R. Part 900, Subpart F, Administration of the Standards for Merit System of Personnel Administration.

[29] 5 C.F.R. § 900.601(a).

[30] For example, Federal Payments for Foster Care and Adoption Assistance (Title IV-E of the Social Security Act, 42 U.S.C. § 671(a)(5) and certain programs for older Americans in 42 U.S.C. § 3027(a)(4) require the establishment and maintenance of personnel standards on a merit basis.

4. ERS has not adopted any rules requiring interest payments in this situation

The Administrative Procedure Act sets out the procedure that state agencies must follow when engaging in rulemaking. The act provides that:

> "Rule":
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> (A) means a state agency statement of general applicability that:
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> (i) implements, interprets, or prescribes law or policy; or
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> (ii) describes the procedure or practice requirements of a state agency;
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> (B) includes the amendment or repeal of a prior rule; and
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> (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.[31]

ERS has adopted rules governing the payment of interest by an agency employee to restore or purchase service credit in that employee's ERS retirement account.[32] However, ERS has not adopted any rules requiring a state agency or a wrongfully-discharged reinstated employee to pay interest on money paid to ERS to restore service credit to the ERS retirement account of the employee. If ERS believes that it has the authority, whether express or implied, to require a state agency or a wrongfully-discharged reinstated employee to pay interest on money paid to ERS to restore service credit to the ERS retirement account of the employee, it would have adopted rules governing such payments. In the absence of such rules, ERS would not have the authority to impose and collect interest. And state agencies would have no authority to pay it, nor could reinstated state agency employees be required to pay it.

III. Conclusion

The Employment Retirement System of Texas has no express or implied authority to require either a state agency or a reinstated employee to pay interest on the money paid to the employee's ERS retirement account to restore that employee's service credit. State agencies have no authority to pay such interest. And reinstated state agency employees cannot be required to pay it.

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[31] TEX. GOV'T CODE, § 2001.003(a)(6).

[32] *See generally*, 34 TEX. ADMIN. CODE, ch. 71.