



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II  
Attorney General

November 12, 2010

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

Bradley C. Ratliff, Esquire  
Town Attorney, Town of Richlands  
Bolling, Hearl, Ratliff  
401 Railroad Avenue  
P.O. Box 1250  
Richlands, Virginia 24641

Dear Mr. Ratliff:

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

## Issue Presented

You inquire whether the former town attorney is eligible for benefits under the Virginia Retirement System.

## Response

It is my opinion that because the former town attorney served as an independent contractor rather than as an employee, he is ineligible to participate in the Virginia Retirement System ("VRS").

## Background

You relate that an esteemed attorney, who served the Town of Richlands for over thirty years under a contract with the Town, was not reappointed to the position at a recent town council meeting and that the town council would like to honor his service by including him in its VRS plan. The Town adopted the VRS plan in June 2010. You report that, pursuant to his contract with the town, this attorney received an annual "fee" or "salary" and corresponding 1099 tax forms, and that he accepted other clients. You note that the Town viewed him as an "officer."

## Applicable Law and Discussion

The Virginia Retirement Service is governed by §§ 15.1-100 through 51.1-168 of the *Code of Virginia*. Section 51.1-130 authorizes political subdivisions to permit their eligible employees to participate in the state system. Section 51.1-132 defines eligibility. It provides that eligible employees are those "[o]fficers and employees of the political subdivision who are regularly employed full time on a salaried basis and whose tenure is not restricted as to temporary or provisional appointment . . . ."

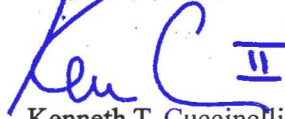
Under the facts presented, the attorney was not an employee or officer of the Town. The fact that the Town was just one of the attorney's clients, that the attorney served under a specific contract of employment, and that he received 1099 tax forms, signals that the attorney served as an independent contractor rather than as an employee or an officer. The eligibility statute does not include independent contractors. Therefore, although the ultimate determination of eligibility rests with VRS, I conclude that the former town attorney is not eligible to participate in the Virginia Retirement System.

#### Conclusion

Accordingly, it is my opinion that, because the former town attorney served as an independent contractor rather than as an employee, he is ineligible to participate in the Virginia Retirement System.

With warmest regards, I am

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ken C II", is written over the typed name.

Kenneth T. Cuccinelli, II  
Attorney General