

CONSERVATION COMMISSION: The Missouri Conservation Commission not authorized under present Constitution and laws to adopt a retirement program for employees.



April 27, 1956

Missouri Conservation Commission
Jefferson City, Missouri

Attention: Mr. I. T. Bode

Gentlemen:

This will acknowledge receipt of your request which reads in part:

"Does the Conservation Commission have power or authority to set up a retirement program for its employees, with contributions by employer and employees."

Subsequent to receipt of your request you informed the writer that you desired to know if such a retirement program can be adopted by said Conservation Commission, without the necessity of further constitutional amendments or act of the Legislature.

The Conservation Commission of this state is a creature of the Constitution being vested with certain authority by virtue of said Constitution.

Under Section 40(a), Article IV, Constitution of Missouri, the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state and administration of all laws pertaining thereto is vested in the Conservation Commission.

Section 42, Article IV of the Constitution of Missouri, 1945, authorized the Director, appointed by the Commission, with approval of said Commission, to appoint assistants and employees for said Conservation Commission and said Commission shall fix the qualifications and salaries of said employees.

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Section 43 of the same Article restricts the use of all fees, money or funds arising from the operation and transactions of said Commission and from the application and administration of laws and regulations pertaining to wildlife and its resources. It shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of such wildlife, forestry and wildlife resources of the state, purchase of property, and for the administration of laws pertaining thereto.

Section 44 of said amendment merely provides that the aforesaid articles 40 to 43, inclusive, shall be self-enforcing and laws not inconsistent therewith may be enacted in aid thereof.

It is quite apparent from reading the foregoing constitutional amendments that if said Commission can adopt such a retirement program for its employees, without the aid of further constitutional amendments, or an act of the Legislature, it is by reason of the power vested in the said Commission therein, to fix salaries of its employees and by reason of Section 44 providing that said Article shall be self-enforcing.

The word "salary" has been defined in many different ways, to a large extent upon its use in a particular law in which it appears. In some instances it has been construed very broadly and all-inclusive, in others it has been defined in a restricted or limited manner. We find no Missouri decision defining the word "salary" to include a so-called retirement pay; however, in some states the courts have construed the word "salary" to include so-called deferred payments. However, such construction by foreign courts is not binding on the State of Missouri but merely persuasive. In re Rosing's Estate, 85 S.W. 2d. 495, 337 Mo. 544.

In Matthews vs. Board of Education of Town of Irvington, Essex County, 102 Atl. 2d. 110, 111, 29 N.J. Super, 232, the Superior Court of New Jersey held honorarium payments made to a school teacher in addition to a contract salary, while no matter how described were, in essence, an addition to salary but were not a part of his salary within the pension statute which allowed a pension of one-half of his compensation being received at the time of retirement, and that the teacher was entitled to only one-half of the contract salary.

In Bridges vs. City of Charlotte, 20 S.E. 2d. 825, the Supreme Court of North Carolina held benefits from retirement fund established by The Teachers and State Employees' Retirement Act constituted deferred payments of salary.

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In *Casey v. Trecker*, 66 N.W. 2d. 724, 728, 268 Wis. 87, the Supreme Court of Wisconsin held that wages and salary are synonymous although salary usually refers to a superior grade of services, and compensation for services may include salary and expenses for personal services rendered.

In *Treu vs. Kirkwood*, 268 Pac. 2d. 482, 486, 42 C(2d.) 602, the Supreme Court of California held that generally, usage of words "salary" and "compensation" are interchangeable and are synonymous. While salary has been in some instances broadly construed we are inclined to be of the opinion that it was never the intent, as used in the Conservation Commission amendment, to authorize the Conservation Commission to adopt a retirement pay program for its employees.

The Constitution of the State of Missouri is not a grant but a limitation on legislative power, so that the Legislature may enact any law not expressly or inferentially prohibited by the Constitution of the State or United States. *State ex rel. Creamer vs. Blair*, 270 S.W.(2d) 1; *Hickey vs. Board of Education of City of St. Louis*, 256 S.W.(2d) 775, 363 Mo. 1039. In other words, the people may, by constitutional amendment, reserve to themselves, or some other designated agency, authority that otherwise the General Assembly could normally control by legislation.

Section 39(a) Article III, Constitution of Missouri, provides that the General Assembly shall have no power to grant public money, or property, or lend, or authorize the lending, of public credit to private persons, associations or corporations except in certain specified examples not related to your case.

Section 39 of the same Article places another inhibition on the Legislature, by providing that it shall have no power to give or lend, or to authorize the giving or lending, of the credit of the State in aid or to any person or association, municipality or other corporation or to pledge the credit of the state for the payment of liabilities, present or prospective of any individual, association or municipality.

In all instances heretofore to our knowledge, before pensions or retirement programs became effective, some constitutional authority was granted followed by enabling legislation to carry same into effect. Examples of a few are as follows: Until the 1945 Constitution of Missouri was adopted there was no mention of a retirement program for state highway employees in the Missouri Constitution. Neither had the Legislature enacted any legislation for same. Under section 30,

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Article IV, Constitution of Missouri, 1945, it specifically allocated all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including license fees, taxes on motor vehicles, fuels, etc. to a special fund which stands appropriated without legislative action for certain specific purposes. However, there are exceptions thereto, one of which is that such revenue so appropriated shall be less the cost of the share of the Highway Department in any retirement program for state employees as may be prescribed by law. Supplementing said constitutional provisions, the 68th General Assembly of the State of Missouri enacted what is now known as Chapter 104, Mo.RS Cum. Supp. 1955, which is a very comprehensive retirement program for such highway employees.

There is also a so-called retirement program for school teachers, employees and officials of educational institutions of the state by reason of Section 25, Article VI, authorizing payments of benefits for retirement and pension to persons employed and paid out of any public fund for educational services. The General Assembly of the State of Missouri passed enabling legislation in Chapter 169, MoRS Cum. Supp. 1955.

Section 27 of Article V of the Constitution provides for retirement of judges and magistrates under certain conditions and circumstances and further provides that they shall receive one-half of their regular compensation until the end of their term of office, and that the Supreme Court shall prescribe the rules and procedure for same.

The 68th General Assembly of Missouri did pass legislation, Chapter 476, MoRS Cum. Supp. 1955, which has been commonly referred to as a retirement act for judges, however, it is more in the nature of legislation authorizing certain judges, who have reached the age of 65, and who have served an aggregate of twelve years as such judge, and other stipulated conditions, may, if constituted and appointed a special commissioner or referee, be entitled to receive an annual compensation or retirement compensation equal to one-third of the salary or compensation then or thereafter provided by law for the office from which he has retired. Such legislation is merely creating a position for such judges and if they accept it then they shall be entitled to compensation mentioned therein for services which they are subject to render when they are requested to do so.

Under Section 38(a), Article III, and Section 38(b), Article III, exceptions are made for aid in case of public calamity and general laws for pensions for the blind, old age assistance, aid to dependent children, crippled children or the blind, direct relief, for adjusted

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compensation, bonus or rehabilitation for discharged members of the armed services and the rehabilitation of other persons.

Section 25, Article VI, vests authority in the General Assembly to authorize municipalities to provide for pensioning of salaried members of the police and fire forces, widows and minor children.

In view of the foregoing, it is difficult to conceive why the voters of this state and the members of the Constitutional Convention of 1945, would frame and adopt conservation amendments to the Constitution that failed to specifically authorize your Commission to adopt such a retirement program for your employees as was done for the Missouri State Highway Commission if it was the intent to permit it to be done.

In *Hickey vs. Board of Education of the City of St. Louis*, 256 S.W.(2d) 775, i.e. 777, the Court held that by the weight of authority expenditures of public money for workmen's compensation for public employees are for public purposes and are not grants of public money. In the foregoing decision the Supreme Court points out that the statutory law of Missouri authorizes in clear and unambiguous terms that a school teacher may elect to become an employee under the Workmen's Compensation Law of Missouri. The Legislature has unmistakably recognized workmen's compensation as a benefit upon disability or death under the teacher's pension provision, and recognized its own power to either require or permit the district to pay workmen's compensation for its employees. The teacher's provision referred to herein is Section 25 of Article VI, Constitution of Missouri, specifically authorizing payments from any public fund for benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services and to their beneficiaries or estate. It is apparent from the foregoing decision that the validity of such payments was by reason of said constitutional amendment empowering the Legislature to authorize such payments.

Another recent instance may be cited which we think further supports the conclusion that the Commission may not adopt such a retirement program is when the State of Missouri entered into an agreement with the Federal Government for old age and survivors insurance for its employees.

In 1950 Congress amended the Social Security Act in several particulars, however, the one we desire to call to your attention is the addition of a new section to said law providing for voluntary agreement between states and Federal Government for coverage of state and local employees under said old age and survivors insurance

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provisions of said Act.

An opinion was requested by the then Governor of the State inquiring if the State under our Constitution could enter into such an agreement with the Federal Government for coverage of its government employees and if the answer was in the affirmative what legislation would have to be enacted to enable the State to enter into such an agreement?

The Department rendered an opinion holding that the State could enter into such an agreement by virtue of said amendment to the Social Security Act and under Sections 37 and 39 of Article IV of the Constitution of Missouri relating to public welfare. Again we find it was necessary to have constitutional and legislative authority to participate in Old Age and Survivors Insurance Program.

We might further add that in 1941 this Department rendered another opinion holding that the Board of Regents of the Southeast Missouri State College cannot, in the absence of an enabling act of the General Assembly, plan for pensioning of teachers.

There are a number of states that now have in full force and effect retirement programs for all state employees. None of these programs were adopted prior to the legislation setting up the proper procedure for creating the board or trustees, placing them under bond, providing for the matching of funds by the State, and other procedural matters, all of which consist of a very complete and comprehensive program. It is difficult to conceive how this can otherwise be done.

So far as we know it has never been officially determined whether or not the Conservation Commission of this State is authorized to expend any fees or money derived from Conservation practices in the absence of an appropriation by the General Assembly. However, the Constitution itself does not specifically read that such money shall stand appropriated as it does in the case of the Highway Commission of the State of Missouri. Furthermore, heretofore all Conservation Commissions have seen fit to seek an appropriation from the Legislature and the Legislature has always appropriated for that agency. While such action on the part of the Commission is not conclusive on the question of whether it is necessary to obtain an appropriation, it does carry some weight and is at least persuasive. Williams v. Williams, 30 S.W.(2d) 69, 325 Mo. 963; State vs. Freeland, 300 S.W. 675, 318 Mo. 560.

While the following decisions deal more particularly with pensions

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what is said is rather pertinent and we quote, in part, from State v. Kimmell, 256 Mo. 611, 1.e. 630 and 631, 165 S.W. 1067:

"* * * True it is that old age pensions have their advocates; school teachers, theirs; public service employees, engaged in hazardous employments for the benefit of the public theirs; judicial pensions, theirs; and police pensions, theirs. But neither the one class nor the other can attain their desires through lawmaker in his statute or through court in its decision so long as the Constitution of 1875 remains as it now stands an insurmountable stumbling block in the way. It goes without saying that we are not speaking of aid to dependent and aged worthy poor, whose sustenance by state aid may be referable to an exercise of the police power called into play perhaps by patriotic gratitude for services rendered. The remedy is in a change in the Constitution and it is vain to seek it elsewhere. * * * *"

In State v. Ziegenheim, 144 Mo. 283, the Court in holding a statute providing persons serving as policemen for twenty years may be retired on one-half pay for the remainder of life, unconstitutional as a grant of public money in aid of individuals in violation of the Constitution, said in part:

"* * * They are officers of the State, however, and the Constitution has declared, that, like all others holding official stations, they must rest content with the remuneration fixed by law, and after their services have been performed, no matter how valuable they may have been, the city can not, as a gratuity or pension, 'grant public money to or in aid of any individual,' and the courts have no power to require it to be done. * * * *"

Notwithstanding the fact that Section 44 of Article IV of the Constitution of Missouri provides that Article IV shall be self-enforcing, it further provides laws not inconsistent therewith may be enacted by the General Assembly. We believe it was the intent in adopting that amendment, that for most purposes such as control, management, restoration, conservation and regulation of wildlife and forestry in this State it should be selfenforcing. Furthermore, that fees, monies or funds for the operation and transactions of said Commission and from application of administrative laws and regulations pertaining to such administration shall be used for

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such purposes and shall be expended only by the Commission for those purposes, however, that it was not the intent or the purpose of such amendments to create a retirement program for the Conservation Commission employees or it would have clearly declared such intent as in the case of the Highway Commission.

CONCLUSION

Therefore, it is the opinion of this department that the Missouri Conservation Commission cannot legally adopt a retirement program for its employees in the absence of some constitutional authority to do so and an enabling act of the Legislature.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett.

Yours very truly,

John M. Dalton
Attorney General

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