

STATE RETIREMENT ACT:  
STATE EMPLOYEES:  
MUNICIPAL EMPLOYEES:  
UTILITIES:  
CONSTITUTIONAL LAW:

The General Assembly may constitutionally amend the Missouri State Employees' Retirement System (Sections 104.310 to 104.600, RSMo 1959) by granting prior service credit to a city employee for service rendered by him as an employee of a private utility prior to the date said private utility became municipally owned, when said city properly elects to place its employees under the provisions of the Missouri State Employees' Retirement System.

May 19, 1961

Honorable Jack Curtis  
Senator 30th District  
Landers Building  
Springfield, Missouri



Dear Senator Curtis:

This is in reply to your opinion request of May 3, 1961, wherein you advise that Senate Bill No. 182 proposes to bring city and county employees under the state retirement system, by said city or county electing to do so by resolution or ordinance adopted or passed by its legislative body.

You further advise that, in some instances, private utilities have been taken over by the city or county and said employees of these utilities have been retained by the city and county with their seniority rights.

In addition, said Senate Bill No. 182 makes no provision giving city or county employees credit for prior service, but you state that it may be amended to add such a provision.

Your inquiry then is:

"Can the general assembly legally grant prior service credit for service rendered by an employee to a private utility prior to the date it became municipally owned?"

If there are any limitations on the power of the General Assembly in this regard, they are to be found in Article III, Section 39(3) and Article VI, Sections 23 and 25 of the Missouri Constitution.

Honorable Jack Curtis

Article III, Section 39(3), provides as follows:

"The general assembly shall not have power:  
(3) To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part."

Article VI, Section 23, provides:

"No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this Constitution."

Article VI, Section 25, provides:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of the deceased members, and may authorize any city of more than 40,000 inhabitants to provide for the pensioning of other employees, and the widows and minor children of deceased employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

Honorable Jack Curtis

In *Gubler v. Utah State Teachers' Retirement Bd.*, 192 P. 2d 580, 2 A.L.R. 2d 1022, fifty former parochial teachers sought to have a 1945 amendment to the "Teachers' Retirement Act" declared valid and constitutional, and interpreted so as to permit them to receive credit in computing retirement benefits for prior services performed as teachers in parochial schools.

Said amendment stated:

"(3) 'Teacher' shall mean any person who is serving under a legal certificate as a legally qualified teacher in a public day or evening school or as a superintendent, or supervising executive, or educational administrator of public schools, or librarian or persons who taught in schools of this state whose credits were approved by the university of Utah or the Utah state agricultural college or the state board of education and who became contributing members of the state teachers retirement system prior to July 31, 1938 . . ." Emphasis supplied.

Article VI, Section 30 of the Utah Constitution contained the same prohibitions as found in Article III, Section 39(3) of the Missouri Constitution.

In refuting the argument that the 1945 amendment was a payment for services which had been previously rendered within the meaning of Article VI, Section 30 of the Utah Constitution, and thus unconstitutional, the court stated:

"Having previously indicated an acceptance of the principle that the purpose of the Teachers' Retirement Act is to attract to and retain in our public school systems, qualified and experienced teachers, we affirm that principle. Our constitutional provision contemplates that to make the payment of additional compensation illegal the services must have been fully performed prior to the

Honorable Jack Curtis

payment. Such is not the case in this situation. In the present controversy the contracts were still being performed at the time the amendment was made. The teachers' services were still of value to the school system, and the Legislature was entitled to place its value on those services. If a teacher has become experienced through years of teaching, this is a factor which may be given consideration by the Legislature in setting the amount of remuneration that can be paid in the future. If in the judgment of the Legislature the retirement plan will induce experienced and competent teachers to remain in the state school system by receiving additional pay in the form of an assured income upon retirement, then the fact that prior service is included as one of the factors in arriving at the amount of the increase in payments after retirement, does not necessarily taint the act with illegality because this factor tends to grant additional compensation. It can reasonably be established that this factor together with others used by the system has a tendency to carry out the legislative desire to retain competent help active in the teaching vocation. Prior service credit may have a tendency to increase the payments made to the teacher during the time he or she teaches, between the passage of the act and the time of retirement, but this does not contravene the constitutional provision. It may be considered in the nature of an inducement to have experienced teachers remain part of the public school system. If so construed, the act is still valid. The act (not the amendment) can only be invalid in the event we were required to hold that the prior service credit was in effect a gratuity for services previously performed. We are not impressed that the act should be so construed. If there is reasonable doubt about the validity or invalidity of this act, then the duty of this court is to resolve the doubt in favor of constitutionality.

Honorable Jack Curtis

We believe the legislative purpose was to maintain or better the standards of the teaching vocation in this state, not by attempting to illegally pay teachers for what they had done, but to legally offer them additional compensation if they would continue to devote their energies to instructing the school children of this state. . . ."

In *Hammitt v. Gaynor*, 144 N.Y.S. 123, the court was asked to determine if a statute authorizing the retirement and pension of New York City employees with at least 30 years' service was unconstitutional in that it authorized and granted extra compensation to "a public officer, servant, agent or contractor" within the meaning of the prohibition of Article 3, Section 38 of the New York Constitution.

The court, in determining that the statute was constitutional stated:

"The phrase 'extra compensation to a public servant', as used in the Constitution, evidently refers to an additional payment for services performed. It cannot well refer to a promise of compensation for future service, since the amount of that compensation is within the power of the Legislature to fix. The rendering of services by persons of the class affected by the statute now examined is voluntary on their part, and they are under contract of service for no fixed time; hence any promise of reward in addition to a daily, monthly or yearly compensation which looks to the future and depends upon the continued performance of service after the promise is made enters into the consideration for services to be rendered and is not 'extra compensation' nor is it a 'gift.' This element of a prospective benefit to the employee for future services is in no sense lacking from the statute in question. The future period may be short, depending upon the postponement of the employee's condition of incapacity, or, in many cases, of

Honorable Jack Curtis

his attaining to the full period of service under the act; but the relation of the compensation to the value of the future services is a matter of legislative discretion. Under this statute employees 'who shall have been' in the employment for a certain period may receive pensions upon 'retirement from active service.' The retirement is necessarily to be at some time after the passage of the act, and applies only to persons who until retired shall remain in 'active service' from which by virtue of the statute they are to be retired. Thus the statute makes the promise, not of 'extra compensation', but of a prospective reward under certain conditions to an employee who remains in service for some period thereafter, which, as I have noted, may be short, but none the less involves futurity of performance sufficient to take from the pension, when awarded, the character of a gift or extra compensation, and to bestow upon it the quality of compensation for services; the quantum being within the unrestricted power of the Legislature."

Thus, it may be stated that the General Assembly may by statute grant prior service credit to an employee for service rendered by him to the private utility prior to the date it became municipally owned, when he comes under the State Retirement Act, without being in violation of Article III, Section 39(3), and Article VI, Sections 23 and 25, of the Missouri Constitution.

We find no basis for distinguishing between prior service rendered while the utility was privately owned and service rendered after the utility was acquired by the city.

The rationale is that the General Assembly may do so if such action would be deemed to benefit the public by inducing competent people to enter and remain in public employment, and that such a credit or increase to the annuity of one under the State Retirement Act is merely an additional compensation for performance in the future and not for services previously fully performed.

Honorable Jack Curtis

CONCLUSION

The General Assembly may constitutionally amend the Missouri State Employees' Retirement System (Sections 104.310 to 104.600, RSMo 1959) by granting prior service credit to a city employee for service rendered by him as an employee of a private utility prior to the date said private utility became municipally owned, when said city properly elects to place its employees under the provisions of the Missouri State Employees' Retirement System.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON  
Attorney General

GWD lc