

STATE EMPLOYEES:

RETIREMENT:

STATE RETIREMENT SYSTEM:

An amendment to the "Missouri State Employees' Retirement System" (Sections 104.310 to 104.600, RSMo 1959) granting an increase in benefits to retired employees at the time of the amendment on the condition that said retired employees voluntarily pay a reasonable sum certain into said retirement system as a condition precedent to receiving said increased benefits would be valid.

May 12, 1961



Mr. Robert R. Welborn, Chairman
Missouri State Employees' Retirement System
State Capitol Building
Post Office Box 809
Jefferson City, Missouri

Dear Mr. Welborn:

This is in reply to your opinion request of February 13, 1961, wherein you state:

"The Trustees of the State Employees' Retirement System are contemplating recommending and supporting legislation providing for an increase in benefits to be paid to retired employees. The question has arisen whether or not such increased benefits may legally be paid to persons who have retired and are receiving benefits on the effective date of the increase.

"In order that the Board may properly present the matter to the General Assembly, your opinion is requested on this problem."

Basically, the interest of a participant in a municipal or State Employees' Retirement Plan is either an "annuity" or a "pension." The category of this interest is the determining factor in regard to vested rights of participants as well as the right to and validity of legislation increasing benefits to retired individuals under such plans.

In *State v. Public School Retirement System*, 262 S.W. 2d 569, 576, the Missouri Supreme Court set forth the characteristics of a pension as follows:

"... a pension granted by the public authorities is not a contractual obligation but a gratuitous allowance, in the continuance of which the pensioner has no vested right. . . ."

Being gratuitous to the pensioner, an attempted increase by the legislature would be in violation of Article III, Section 39(3) of the 1945 Missouri Constitution, to wit:

"The general assembly shall not have power to grant or 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."

In *Porter v. Loehle et al.*, 332 Ill. 353, 163 N. E. 689, the Illinois legislature amended the retirement statute of Chicago police officers by increasing the benefits paid to existing pensioners at the effective date of the amendment and authorized increased taxation for the purpose of providing additional revenue to pay the larger pensions. Section 19 of Article IV of the Illinois Constitution was identical to Article III, Section 39(3) of the Missouri Constitution. In declaring the amendment null and void, the Illinois Supreme Court stated:

"The amendatory acts increasing the pensions of retired policemen do not contemplate the rendition of additional services by the pensioners. They were paid when they performed their services and the amounts of their pensions were fixed by law when they retired. The increases are not granted for services to be performed by the pensioners, but have as their sole basis or justification the services which they rendered prior to their retirement. The obligations which the performance of those services imposed upon the public have been fully discharged. No obligation, either legal or moral, to pay more than the stipu-

lated compensation arises where no additional services have been or will be rendered. Extra compensation is a payment or allowance in excess of that which was fixed by law or contract when the services were rendered. Since the increase in the pension of retired policemen sought to be effected by the amendatory acts in question are based solely on the services rendered by them prior to their retirement, these increases necessarily constitute an extra allowance for past services. Such an allowance Section 19 of Article 4 of the Constitution expressly forbids, and the amendments . . . increasing the pensions paid to retired policemen, are therefore void. "

From the foregoing, it is abundantly clear that if the interest of those participants in the Missouri State Employees' Retirement Plan is a pension, those retired thereunder are pensioners, and, therefore, cannot be granted any increase by the legislature without being in violation of Article III, Section 39(3) of the Missouri Constitution,

On the other hand, the prime characteristic of an "annuity" is the voluntariness of the participation and contributions to the plan by the participants. For if voluntary, a binding contractual relationship is created between the state and the contributors, which terms may be altered or changed by mutual consent and consideration of the parties thereto.

This reasoning was adopted in *Raines v. Board of Trustees*, 365 Ill. 610, 7 N.E. 2d 489, wherein the Illinois Legislature had made an amendment to the Teachers' Pension and Retirement Fund Statute entitling teachers serving for 25 years or more, and being 70 years of age, who were retired and receiving an annual annuity of \$400.00 per year to increase said annuity to \$600.00 per year by voluntarily paying \$200.00 with interest into said fund. Under the original plan a teacher could voluntarily participate in the retirement plan or refrain from so participating. In holding such to be an annuity, giving the legislature the right to contract with the annuitants, the court stated:

"There is a wide difference between voluntary contributions to a fund under a statutory elective right and being compelled to suffer deductions without any such right. In the latter case, the officer or employee has no voice in determining whether or not he will suffer such exactions. They are imposed by the statute and deducted even if against his will. In the other case it is wholly a matter of choice with him. He may elect to come within the terms of the act and receive its benefits, or he may forego that privilege at his option, with no other effect than to deprive him of participating in the fund. If he does not elect to contribute, he receives and retains the full amount of his salary or wages. If he elects to contribute, the amounts are deducted by his direction. The effect is the same as if his full salary were paid to him and after it became his private means he in turn contributed to the retirement fund. In such case there is neither reason nor authority to hold that the fund remains public money in which he has no right or interest.

"The relations between voluntary contributors and the sovereign being contractual, it follows that the rights created are not measured by the rights of pensioners. They are similar, and amount, in effect, to insurance contracts providing annuities upon maturity of the contract or policy of insurance. The basis of such annuities is the same as the basis of any other contract. The consideration is the offer of the sovereign, the acceptance of the offer, and performance of its terms. It is a familiar principle that the Legislature possesses all powers not prohibited by the limitations of the Constitution. Among such powers is the power to contract, where the contract is not within

any constitutional inhibition or against public policy. The right of the State to contract for the payment of annuities to its officers and employees under prescribed conditions is not challenged and has been repeatedly upheld. No reason is observed why the parties to such a contract may not make provision for an optional increase of the annuity by providing for additional contributions to the fund. Under contracts based on optional voluntary contributions, the contributors have a substantial interest in the fund by virtue of the amounts paid in under the terms of the contract. The benefits to be derived are not gratuities from public funds for past services, and therefore an increase in such benefits in consideration of further contributions does not violate the constitutional provisions prohibiting extra pay for past services."

In order, however, to determine what the interest of a participant in the Missouri State Employees' System consists of, the language used by the Supreme Court of Missouri in *State v. Public School Retirement System*, 262 S.W. 2d 569, 1. c. 577, becomes pertinent:

"It is clear, however, that the rights of any beneficiary, or member of any retirement system can only be determined by very careful scrutiny of the detailed provisions of the particular statute controlling the creation and operation of the particular retirement system and under the particular facts of the case."

Thus, it becomes necessary to examine the Missouri State Employees' Retirement Plan to determine whether or not the interest of a participant therein is that of an "annuitant" or "pensioner." If such interest is that of a "pensioner," no valid increase at all can be given to said retired employees. But, if that of an "annuitant," a valid contractual agreement can be created whereby increased benefits may be legislated for said individuals.

A review of the Missouri State Employees' Retirement System discloses that under "Definitions" (Section 104.310, RSMo 1959), the word "annuity" is used, and defined as,

"(5) 'Annuity', annual payments, made in equal monthly installments, to a retired member from funds provided for in, or authorized by, sections 104.310 to 104.550;".

Throughout the entire act, the word "annuity" is used, and nowhere is found the word "pension."

In particular, Sections 104.390 and 104.400 state:

"The normal annuity of a member shall equal five-sixths of one per cent of the average compensation of the members multiplied by the number of years of creditable service of such member, except that the minimum annuity of any member who has served eight or more years as a member of the general assembly and who meets the conditions for retirement at or after normal retirement age shall consist of monthly payments made at the rate of ten dollars multiplied by the number of biennial assemblies in which he has served; provided, however, that the annuity of any member shall never exceed two-thirds of his average compensation.

"Any employee, after attaining sixty years of age and having had at least twenty years of creditable service, may retire with the consent of his employer. In such case the member shall receive a retirement annuity which shall equal five-sixths of one per cent of his average compensation multiplied by the number of years of creditable service of such member."

This constant usage of the word "annuity" would indicate that the legislature intended the interests and benefits of participants to amount to more than a "pension."

Section 104.330(1) further states:

"As an incident to his contract of employment or continued employment, each employee of the state shall become a member of the system on the first day of the first month following the effective date of sections 104.310 to 104.550, and every person thereafter becoming an employee shall become a member at the time of employment. Each employee's membership shall continue as long as he shall continue to be an employee;". . .

Therefore, as a condition precedent to employment, one may be deemed to have voluntarily submitted himself to this retirement plan.

This reasoning was adopted in *State v. Public School Retirement System*, 262 S. W. 2d 569, l.c. 578, wherein the court determined that the interest of participants in the Missouri Public School Teachers' and Employees' Retirement Plan was vested and an annuity due to participation in said plan being voluntary:

". . . it was optional with the employees of the Board of Education of the City of St. Louis, when the plan was put into effect, to elect to come under the provisions of the Retirement System or to elect to stay out. Clearly, participation in the Retirement System was voluntary and not compulsory as to those who were employed at the time the Retirement System went into effect. Those employed since have consented to become members of the system as a condition to their employment."

Therefore, one accepting and retaining state employment voluntarily submits to the State Employees' Retirement System and has a vested interest therein, creating a contractual relationship between the state and the participant, which can reasonably be amended by the legislature.

This conclusion is buttressed by Section 104.540(1), RSMo 1959, wherein these rights and benefits are, by statute, declared to be vested:

"1. All payroll deductions and deferred compensation provided for under sections 104.310 to 104.550 are hereby made obligations of the state of Missouri. No alteration, amendment, or repeal of sections 104.310 to 104.550 shall affect the then existing rights of members and beneficiaries, but shall be effective only as to rights which would otherwise accrue hereunder as a result of services rendered by an employee after such alteration, amendment, or repeal."

By creating this vested right, the legislature has removed the benefits from the realm of gratuities, which may be terminable at will, either in whole or in part, by the state.

In addition, the language employed in Section 104.370(4) of the System clearly indicates that the legislature intended the contributions made by the State and participants to be funds of the Retirement System and not state funds.

"4. Such contributions and contributions by members are the funds of the system, and shall not be commingled with any funds in the state treasury . . ."

Because the annuity is created by a contractual relationship, the issue of consideration now arises in regard to an increase in benefits to those presently retired under the System.

There can be no question that a valid increase in benefits to retired individuals would lack the necessary mutual consideration and thus constitute a mere gratuity. As a result, such an increase would be in contravention of Article III, Section 39(3) of the Missouri Constitution, to wit:

"The general assembly shall not have power to grant or 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."

The unconstitutionality of a naked increase in benefits to retired individuals would be particularly true in light of Section 104.370 which provides for contribution by the state to the fund.

Since the naked increase in benefits would be derived from a fund consisting in part of monies paid by the state into said fund, said increase would unquestionably be in violation of Article III, Section 39(3) of the Missouri Constitution.

Conversely, an increase in benefits to retired individuals predicated upon said individuals voluntarily paying a reasonable sum of money to the fund in order to receive the increased benefits would contain the necessary mutual consideration necessary to create a binding contractual relationship between the parties. The benefits under this Retirement System being an annuity, the right of the legislature to enter into such a contract would not be within any constitutional inhibition or against public policy.

As stated in *Raines v. Board of Trustees, supra*,

"The right of the state to contract for the payment of annuities to its officers and employees under prescribed conditions is not challenged and has been repeatedly upheld. No reason is observed why the parties to such a contract may not make provision for an optional increase of the annuity by providing for additional contributions to the fund. Under contracts based on optional voluntary contributions, the contributors have a substantial interest in the fund by virtue of the amounts

Mr. Robert R. Welborn

10

paid in under the terms of the contract. The benefits to be derived are not gratuities from public funds for past services, and therefore an increase in such benefits in consideration of further contributions does not violate the constitutional provisions prohibiting extra pay for past services."

CONCLUSION

It is, therefore, on the basis of the foregoing, the conclusion of this office that:

1. An amendment to the "Missouri State Employees' Retirement System" (Sections 104.310 to 104.600, RSMo 1959) granting an increase in benefits to retired employees at the time of the amendment without said employees voluntarily contributing a reasonable sum to the fund therefor, would be in violation of Article III, Section 39(3) of the Missouri Constitution.

2. An amendment to the "Missouri State Employees' Retirement System" (Sections 104.310 to 104.600, RSMo 1959) granting an increase in benefits to retired employees at the time of the amendment on the condition that said retired employees voluntarily pay a reasonable sum certain into said retirement system as a condition precedent to receiving said increased benefits would be valid.

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