PENSIONS:
RETIREMENT:
COMPENSATION:
CONSTITUTIONAL LAW:
MISSOURI EMPLOYEES' RETIREMENT SYSTEM:

1. An individual who is presently retired and receiving retirement benefits which were calculated by multiplying one percent (1%) of his average pay (not to exceed $7,500 per year) during the five consecutive years of his work when his pay was the greatest, times his years of creditable service, is entitled to have his benefits recalculated under subsection 1 of Section 104.610, Senate Bill No. 5, 78th General Assembly, First Regular Session, in order that the individual may receive additional compensation from the state for services as a special consultant.
2. If an individual's benefits are to be recalculated under the provisions of subsection 1 of Section 104.610, Senate Bill No. 5, 78th General Assembly, First Regular Session, then said individual is also eligible for the increase in compensation under the provisions of Section 104.090, RSMo Supp. 1973.

OPINION NO. 235

December 31, 1975

FILED
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Mr. Edwin M. Bode, Executive Secretary
Missouri State Employees' Retirement System
P. O. Box 209
Jefferson City, Missouri 65101

Dear Mr. Bode:

This is to acknowledge receipt of your request for an opinion from this office which reads as follows:

> "Advice is requested as to whether or not an individual who is presently retired and receiving retirement benefits which were calculated by multiplying 1% of his average pay (not to exceed $7500.00 per year) during the five consecutive years of his work when his pay was the greatest, times his years of creditable service, is entitled to have his benefits recalculated under Senate Bill No. 5, as a result of the removal on the $7500 limitation in the definition of average compensation in 1967.
>
> "If benefits are to be recalculated for the above individual under Senate Bill No. 5, is the individual also eligible for the .25% increase in compensation?"

We will first consider your question relating to recalculation of benefits. Senate Bill No. 5, which was passed by the 78th General Assembly and signed by the Governor, repealed Section 104.610, RSMo Supp. 1973, and enacts in lieu thereof one new section relating to the same subject matter. Previously, subsection 1 of Section 104.610, RSMo Supp. 1973, provided as follows:

> "Any person, other than a person receiving retirement benefits because of service in the general assembly, who, on August 13, 1972, is receiving state retirement benefits from the Missouri state employees' retirement system or the highway employees' and highway patrol retirement system, upon application to the board of trustees of the system from which he is receiving retirement benefits, shall be made, constituted, appointed and employed by the board as a special consultant on the problems of retirement, aging, and other state matters, for the remainder of his life, and upon request of the board, or other state agencies where such person was employed prior to retirement, give opinions, and be available to give opinions in writing, or orally, in response to such requests, as may be required, and for such services shall be compensated monthly, in an amount, which, when added to any monthly state retirement benefits being received, shall be equal to the state retirement benefits such person would have received if he had retired on January 1, 1972."

As you are aware, it was held in Attorney General's Opinion No. 293, Bode, 12-13-72 (copy attached), that there was to be no recalculation of benefits under the above statute. However, subsection 1 of Senate Bill No. 5, as recently enacted into law, now provides as follows:

> "Any person, other than a person receiving retirement benefits because of service in the general assembly, who, is receiving or hereafter may receive state retirement benefits from the Missouri state employees' retirement system, or the highway employees' and highway patrol retirement system, upon application to the board of trustees of the system from which he is receiving retirement benefits, shall be

> made, constituted, appointed and employed by the board as a special consultant on the problems of retirement, aging, and other state matters, for the remainder of his life, and upon request of the board, or other state agencies where such person was employed prior to retirement, give opinions, and be available to give opinions in writing, or orally, in response to such requests, as may be required, and for such services shall be compensated monthly, in an amount, which, when added to any monthly state retirement benefits being received, shall be equal to the state retirement benefits such person would have received if his employment had terminated and he had retired under the provisions of the then applicable current retirement act or acts, and as thereafter may be provided by law, and shall be equal to and not less than the maximum monthly state retirement benefits being received under the provisions of section 104.390 of the Missouri state employees' retirement system, or section 104.090 of the highway employees' and highway patrol retirement system, whichever is greater, and regardless of the system where such person was employed at the time of his termination of employment and retirement." (Emphasis ours)

In Attorney General's Opinion No. 293, it was held that an individual who was presently retired and receiving retirement benefits which were calculated by multiplying one percent (1%) of his average pay (not to exceed $7,500 per year) during the five consecutive years of work when pay was the greatest, times his years of creditable service, was not entitled to receive additional compensation under House Bill No. 1178, as a result of the change of the definition of average compensation in October of 1967. In the opinion, it was pointed out that the question involved the interpretation of the date of January 1, 1972, as appeared in the previous statute. In this regard, it was indicated that the one percent (1%) formula as set forth in Section 104.390, RSMo 1969, and the definition of "average compensation" as set forth in subsection 6 of Section 104.310, RSMo 1969, which are necessarily involved in the calculation of benefits, was the law in effect on January 1, 1972, before Section 104.610, RSMo Supp. 1973, was enacted into law on August 13, 1972. It was further pointed out that subsection 6 of Section 104.310, RSMo 1969, in defining "average compensation" and which was the law in effect on January 1, 1972, provided that any compensation paid which entered into total compensation

should not then exceed seven thousand five hundred dollars ($7,500) if paid prior to October 13, 1967. Therefore, since the statute was plain and unambiguous, it was concluded that the maximum compensation to be considered in determining such an individual's "average compensation" would be seven thousand five hundred dollars ($7,500) if paid prior to October 13, 1967, and that retired individuals were not entitled to receive additional compensation under House Bill No. 1178.

However, in line with the above comment, it should first of all be noted that the definition of "average compensation" in subsection 6 of Section 104.310, RSMo Supp. 1973, has been changed since the rendering of the 1972 opinion and now provides as follows:

> "(6) 'Average compensation', the average annual compensation paid to a member for the five consecutive years of service prior to retirement when his compensation was greatest; or if the member had less than five consecutive years of service, the average annual compensation paid to the member during the entire period of service;"

Thus, under the above statute, there is no longer any limitation on "average compensation." In addition, the date of January 1, 1972, as found in the previous statute, has now been eliminated in subsection 1 of Senate Bill No. 5. In general, the statute now provides any person other than an individual receiving retirement benefits because of service in the General Assembly who is receiving retirement benefits from the Missouri State Employees' Retirement System may be employed as a special consultant. A special consultant is to be compensated in an amount which, when added to any monthly state retirement benefits being received, shall be equal to the state retirement benefits this person would have received if his employment terminated and he had retired under the provisions of the then applicable current retirement act or acts and as thereafter may be provided by law, and shall be equal to and not less than the maximum monthly state retirement benefits being received under the provisions of Section 104.390 of the Missouri State Employees' Retirement System or Section 104.090 of the Highway Employees' and Highway Patrol Retirement System, whichever is greater. With the foregoing background in mind, there is much authority to support the proposition that the primary rule in statutory construction is to ascertain and give effect to legislative intention. Missouri Pacific Railroad Co. v. Kuehle, 482 S.W.2d 505 (Mo. 1972). In determining legislative intent, it has been pointed out that since the legislature is presumed to know the prior construction of the original act, an amendment substituting a new phrase for one previously construed generally indicates that the different interpretation be given the new phrase as

the old phrase as interpreted no longer expresses the legislative will. Salitan v. Carter, Ealey and Dinwiddie, 332 S.W.2d 11 (K.C. Mo.App. 1960). In addition, there is authority for the proposition that in construing a statute repealing one statute and substituting another, a court must assume that the General Assembly intended something by the repeal of the old and the enactment of a new statute in lieu of the old statute. As a result, it is our view that the legislature intended that individuals in this category should have their benefits recalculated and consequently the previous interpretation under the old statute is no longer to be followed. Therefore, in response to your first question, it is our view that an individual who is presently retired and receiving retirement benefits which were calculated by multiplying one percent (1%) of his average pay (not to exceed $7,500 per year) during the five consecutive years of his work when his pay was the greatest, times his years of creditable service, is entitled to have his benefits recalculated under Senate Bill No. 5 in order that the individual may receive additional compensation from the state for services as a special consultant.

We next consider your question that if benefits are to be recalculated for the above individual under Senate Bill No. 5, then is the individual also eligible for the .25% increase in compensation? In this regard, it is our understanding that by the phrase ".25% increase in compensation," you are referring to the normal annuity of a regular member of the Highway Employees' Retirement System which shall equal one and one-fourth percent of the average final compensation of said member multiplied by the number of years of creditable service of such member, under the provisions of Section 104.090, RSMo Supp. 1973. In this regard, as previously indicated, subsection 1 of Senate Bill No. 5 provides in part that a special consultant is to be compensated in an amount which shall be equal to the maximum benefits being received under Section 104.390 of the State Retirement System or Section 104.090 of the Highway System, whichever is greater, and regardless of the system where such person was employed at the time of his termination of employment and retirement. As a result, since the statute is plain and unambiguous, it is our view that if benefits are to be recalculated for an individual under Senate Bill No. 5, then the individual is also eligible for the increase in compensation paid to regular highway employees under the provisions of Section 104.090, RSMo Supp. 1973.

CONCLUSION

The opinion of this office is as follows:

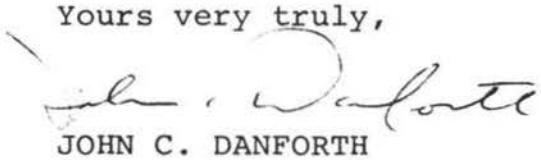
1. An individual who is presently retired and receiving retirement benefits which were calculated by multiplying one percent (1%) of his average pay (not to exceed $7,500 per year) during the

five consecutive years of his work when his pay was the greatest, times his years of creditable service, is entitled to have his benefits recalculated under subsection 1 of Section 104.610, Senate Bill No. 5, 78th General Assembly, First Regular Session, in order that the individual may receive additional compensation from the state for services as a special consultant.

2. If an individual's benefits are to be recalculated under the provisions of subsection 1 of Section 104.610, Senate Bill No. 5, 78th General Assembly, First Regular Session, then said individual is also eligible for the increase in compensation under the provisions of Section 104.090, RSMo Supp. 1973.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 293
Bode, 12-13-72