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ATTORNEY GENERAL OPINION NO. 89- 143

Marshall Crowther
Executive Secretary
Kansas Public Employees Retirement System
Capitol Tower, 2nd Floor
400 W. 8th
Topeka, Kansas 66603-3911

Re: Counties and County Officers--Law Enforcement in
Certain Counties--Death, Disability and Retirement
Benefits for Agency Officers; Officers Transferring
from Police or Sheriff's Department, Rights

Cities of the First Class; Government by Mayor and
Council and General Laws--Fire and Police
Department Retirement Systems--Payments Upon
Retirement or Discharge from Police or Fire
Department

Synopsis: A vested right in a pension retirement plan derives from the fact that an employee participating in such a plan is not fully compensated upon receiving salary payment because, in addition, the employee has then earned certain pension benefits, the payment of which is to be made at a future date. A vested right will normally be lost upon legal termination of employment. However, police officers of the Manhattan police department were given the opportunity to preserve their vested right in the local pension retirement plan by leaving their contributions with the local plan. Those officers choosing to preserve their vested right would then be entitled to receive the pension benefits as the benefits existed on the date that the Manhattan police department was abolished.

Compensation received because of service with the Riley county law enforcement department would not affect the vested right as the officers were no longer receiving compensation from the Manhattan police department or making contributions to the local pension retirement plan. Cited herein: K.S.A. 13-14a01, 13-14a08, 19-4424, 19-4429, 19-4434, 19-4440, 19-4441, 74-4951.

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Dear Mr. Crowther:

As executive secretary of the Kansas public employees retirement system, you request our opinion regarding the computation of retirement benefits for certain employees of the Riley county law enforcement agency. Specifically you ask whether retirement benefits representing service with the police department of the city of Manhattan should be based on salary at the time they ceased being employees of the city or whether subsequent service and salary from the agency under the Kansas police and firemen's retirement system should be used in determining the appropriate salary base.

There are three theories regarding the existence of pension retirement plans for public employees. A number of jurisdictions recognize the pension retirement plan as merely a gratuity or bounty which may be altered or withdrawn at any time. City of Dallas v. Trammell, 101 S.W.2d 1009 (Tex. 1937). A second theory holds that the pension retirement plan is a part of the contemplated compensation for the employee's service and so in a sense is a part of the contract of employment itself. The pension, being an integral portion of contemplated compensation, cannot be destroyed once it has vested without impairing a contractual obligation. Kern v. City of Long Beach, 179 P.2d 799 (Cal. 1947). The final theory rejects labeling the pension as gratuity or contract, choosing instead to consider legislative policy. The theory also rejects the idea of "vested rights", preferring to recognize a "moral obligation". Spina v. Consolidated Police and Firemen's Pension Fund Commission, 197 A.2d 169 (N.J. 1964). Although Kansas initially recognized pension retirement plans for public employees as a "gratuitous allowance" with no possibility of vested rights, State, ex rel., v. Board of Education, 155 Kan. 754 (1942), Kansas has since adopted the second theory, recognizing that the

pension retirement plan creates a contract between the public employee and employer. Shapiro v. Kansas Public Employees Retirement System, 216 Kan. 353 (1975); Singer v. City of Topeka, 227 Kan. 356 (1980).

Among those jurisdictions that recognize a pension retirement plan as creating a contractual relationship, there has been some variation in determining when the public employee gains a vested right in the plan. Some jurisdictions recognize a vested right immediately upon the acceptance of employment while others do not recognize a vested right until the employee meets all of the contingencies for retirement. Kansas has settled for a middle ground, recognizing that "continued employment over a reasonable period of time during which substantial services are furnished to the employer, plan membership is maintained, and regular contributions are made . . . cause the employee to acquire a contract right in the pension plan." Singer, 227 Kan. at 365. Once a public employee gains a vested right in a pension retirement plan, the employee is deemed to have an interest "which it is proper for [the] state to recognize and protect and of which [an] individual cannot be deprived arbitrarily without injustice." Black's Law Dictionary p. 1402 (5th Ed. 1979).

Despite the fact that a public employee has gained a vested right in a pension retirement plan prior to actual retirement, the provisions of the plan are not necessarily set in stone. The ability to modify a pension retirement plan is necessary because "there may be times when changes are necessary to protect the financial integrity of the system or for some other compelling reason which would mandate and justify some unilateral changes." Brazelton v. Kansas Public Employees Retirement System, 227 Kan. 443, 453 (1980). The state or a municipality may make reasonable changes or modifications in pension retirement plans in which employees hold vested contract rights, but changes which result in disadvantages to employees must be accompanied by offsetting or counterbalancing advantages. Singer, 227 Kan. at 367. In effect, the employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable benefit. Kern, 179 P.2d at 803.

"The fact that a pension right is vested will not, of course, prevent its loss upon the occurrence of a condition subsequent such as lawful termination of employment before completion of the period of service designated in the pension plan." Kern, 179 P.2d at 802. Legal termination for cause is a

condition which may result in a loss of vested rights.
Miller v. State, 557 P.2d 970, 975 (Cal. 1977).

The city of Manhattan developed a local pension retirement fund (local plan) in 1945 to cover its police and fire departments. The local plan was established pursuant to the provisions of K.S.A. 13-14a01 et seq. A police officer who served with the department for 22 years or more and reached the age of 50 years was entitled to make application to be retired. Upon retirement by the board of trustees, the police officer was to receive monthly benefits in an amount equal to 50% of the officer's monthly salary at the date of retirement. K.S.A. 13-14a08. Although K.S.A. 13-14a08 has been amended, the service and age requirements and the amount of benefits have remained consistent since the original act. The police officers whose benefits are in question here were hired after the establishment of the local plan.

The local plan was one of the inducements held forth to encourage individuals to enter and remain in public service. As pointed out in Singer, the local plan was an integral portion of compensation for service and a contractual relationship between the officers and city developed. Therefore, once the officers gained a vested right in the local plan, the city could not arbitrarily change the provisions of the local plan.

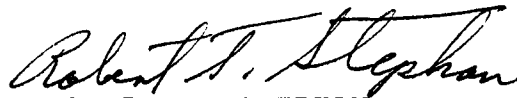
In 1974, the Manhattan police department and the Riley county sheriff's department ceased to exist as, pursuant to the provisions of K.S.A. 19-4424 et seq., the Riley county law enforcement agency was created. The agency was granted broad authority under K.S.A. 19-4429, including the authority to appoint a law enforcement director, provide for the appointment of law enforcement officers and other personnel, establish job classifications and salaries, and acquire and dispose of vehicles, equipment and supplies as necessary for the operation of the agency and department. Enforcement of city ordinances became the responsibility of the county department. K.S.A. 19-4434. The city marshal or chief of police and police officers of the city of Manhattan were relieved of all power, authority and responsibility for the enforcement of laws of the state and ordinances of the city. K.S.A. 19-4440. Because the Manhattan police department ceased to exist, those police officers serving with the Manhattan police department were legally terminated and, as noted in Miller, lost their vested right in the local pension plan.

However, under K.S.A. 19-4441(e), "if any officer shall elect to leave his or her contributions for credited service, under the provisions of K.S.A. 13-14a01 et seq., and amendments thereto, . . . on deposit with such system, he or she shall be granted a vested retirement benefit in such system. . . ." Those officers leaving contributions with the local plan would therefore remain entitled to receive benefits as they existed on the date the Manhattan police department ceased to exist.

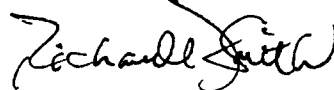
The vested benefit granted in K.S.A. 19-4441 is limited to the service of the police officer as an employee of the Manhattan police department. The right derives from the fact that the employee is not fully compensated upon receiving salary payments because, in addition, the employee has then earned certain pension benefits, the payment of which is to be made at a future date. Kern, 179 P.2d at 803. If the employee is no longer providing service to the employer for which the employee would be entitled to compensation, the employee cannot gain further pension benefits.

Also, those officers that had served with the Manhattan police department were no longer accumulating benefits under the local plan. Upon appointment to the county department, the officers became members of the Kansas police and firemen's retirement system (KP & F), K.S.A. 74-4951 et seq. K.S.A. 19-4441(b). Years of service under the local plan were counted with years of service under the county department to determine when the officer had achieved twenty-two years of service, entitling the officer to payment of the officer's vested right in the local plan. K.S.A. 19-4441(e). Therefore, though the local plan continued to exist until 1980, the vested right granted by the legislature in the local plan entitled those officers only to pension benefits accrued through their service with the Manhattan police department. Compensation received because of service with the county department would not affect the vested right.

Very truly yours,



ROBERT T. STEPHAN
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Richard D. Smith
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