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ATTORNEY GENERAL OPINION NO. 91- 14

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

Re: State Boards, Commissions and Authorities--Public Employees Retirement Systems; Kansas Public Employees Retirement System--Election by Elected Officials to Continue Membership After Service Terminates; Constitutionality

Synopsis: Under the provisions of K.S.A. 1990 Supp. 74-4911e, a former elected official may elect to continue to participate in the Kansas public employees retirement system (KPERS) after leaving service as an elected official provided the former elected official: (1) was an elected official on or after January 1, 1985; (2) was a member of KPERS during service as an elected official; (3) does not immediately become an employee of another participating employer; and (4) files the proper notice of election in the office of the executive secretary of KPERS. No other elected officials or employees are permitted to make such an election. Because such a classification does not enable employees to accumulate reserves for themselves and their dependents for old age, death and termination of employment, and insure a fiscally solvent retirement system, the purposes for which KPERS was established, the classification does not advance the objectives of the Kansas public employees retirement act. The

classification does not meet the reasonable basis test and therefore violates the equal protection clauses of the United States and Kansas constitutions. Cited herein: K.S.A. 74-4901; K.S.A. 1990 Supp. 74-4902; K.S.A. 74-4910; K.S.A. 1990 Supp. 74-4911e; 74-4913; 74-4916; K.S.A. 74-4929; 74-4991; K.S.A. 1990 Supp. 74-4992; 74-4998b; Kan. Const., Bill of Rights, §§ 1, 2; U. S. Const., 14th Amend., § 1.

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Dear Mr. Crowther:

As executive secretary of the Kansas public employees retirement system (KPERS), you request our opinion regarding the status of participation in KPERS by former elected officials. Specifically, you ask whether a former state legislator who, pursuant to K.S.A. 1990 Supp. 74-4998b, had elected to become a special member of KPERS may, upon leaving service with the state, elect to continue to participate as a special member in KPERS. Subsequent to your initial request, a question regarding whether the classification established under K.S.A. 1990 Supp. 74-4911e constitutes a violation of the equal protection clauses of the United States or Kansas constitution was added.

The ability of an elected official to continue to participate in KPERS after leaving service with the state is set forth in K.S.A. 1990 Supp. 74-4911e. Under subsection (a) of that statute, a former elected official may elect to continue to participate in KPERS provided the former elected official: (1) was an elected official on or after January 1, 1985; (2) was a member of KPERS during service as an elected official; (3) does not immediately become an employee of another participating employer; and (4) files the proper notice of election in the office of the executive secretary of KPERS. Remittance of the required contributions of the employee and the employer are an obligation of the former elected official. K.S.A. 1990 Supp. 74-4911e(b). As stated in subsection (c), the election of the former elected official to continue to participate in KPERS will remain in effect "until revoked in writing and received by the system or such person becomes an employee of another participating employer or upon failure to remit to the system the employer and employee contributions required under subsection (b)." Former elected officials who elect to continue to participate in

KPERS after leaving service with the state are not eligible to receive the accidental death benefit set forth in K.S.A. 1990 Supp. 74-4916. K.S.A. 1990 Supp. 74-4911e(e).

The United States Constitution, 14th Amend., § 1, states:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

An equivalent to the equal protection clause of the fourteenth amendment is contained in the Kansas Constitution, Bill of Rights, sections 1 and 2. These sections state:

"All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

"All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. . . ."

The protections afforded by sections 1 and 2 being duplicative of those provided by the fourteenth amendment, the test for constitutional transgression should also be identical; if a law does not violate the fourteenth amendment of the United States Constitution, neither does it violate sections 1 and 2 of the bill of rights of the Kansas constitution. Leiker v. Employment Security Board of Review, 8 Kan.App.2d 379, 387 (1983). See also Ferguson v. Garmon, 643 F.Supp. 335 (D. Kan. 1986); Moody v. Board of Shawnee County Commissioners, 237 Kan. 67, 74 (1984).

"Our constitution does not make this court the critic of the legislature; rather, this court is the guardian of the

constitution and every legislative act comes before us with a presumption of constitutionality. A statute will not be declared unconstitutional unless its infringement on the superior law of the constitution is clear, beyond substantial doubt. State ex rel. Crawford v. Robinson, 1 Kan. 17, 27 (1862). The interpretation of constitutional principles is an important responsibility for both state and federal courts. In determining whether a statute is constitutional, courts must guard against substituting their views on economic or social policy for those of the legislature. Courts are only concerned with the legislative power to enact statutes, not the wisdom behind those enactments. When a legislative act is appropriately challenged as not conforming to a constitutional mandate, the function of the court is to lay the constitutional provision invoked beside the challenged statute and decide whether the latter squares with the former -- that is to say, the function of the court is merely to ascertain and declare whether legislation was enacted in accordance with or in contravention of the constitution -- and not to approve or condemn the underlying policy." Samsel v. Wheeler Transport Services, Inc., 246 Kan. 336, 348 (1990).

The equal protection guarantee does not take from the states all power of classification. 16A Am.Jur.2d Constitutional Law § 746, 801 (1979). Classification is an inherent right and power of the legislature, and the constitutional guarantee of equal protection does not dispense with all classification. Id. at 802. It does not prohibit or prevent classification, provided such classification of persons and things is reasonable for the purpose of the legislation, is not clearly arbitrary, is based on proper and justifiable distinctions considering the purpose of the law, and is not a subterfuge to shield one class or unduly to burden another or to oppress unlawfully in its administration. Id. at 803. If the classification has some reasonable basis, it does not offend the Constitution simply

because the classification is not made with mathematical nicety or because in practice it results in some inequality. Duckworth v. City of Kansas City, 243 Kan. 386, 390 (1988). See also Schweiker v. Wilson, 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981).

"Our consideration of the constitutionality of the statute requires us to apply the 'minimum rationality' or 'reasonable basis' test. [Citations omitted.] Under that test, a statute is 'rationally related' to an objective if the statute produces effects that advance, rather than retard or have no bearing on, the attainment of the objective. So long as the regulation is positively related to a conceivable legitimate purpose, it passes scrutiny; it is for the legislature, not the courts, to balance the advantages and disadvantages." Duckworth, supra, 243 Kan. at 390.

The purpose of the Kansas public employees retirement act, K.S.A. 74-4901 to 74-4929, inclusive, and amendments thereto, is set forth in K.S.A. 74-4901.

"The purpose of this act is to provide an orderly means whereby employees of the participating employers who have attained retirement age as herein set forth may be retired from active service without prejudice and without inflicting a hardship upon the employees retired and to enable such employees to accumulate reserves for themselves and their dependents to provide for old age, death and termination of employment, and for the purpose of effective economy and efficiency in the administration of governmental affairs."

It is obvious that the legislative purpose of the statutes creating KPERS was to enable the employees to accumulate reserves for themselves and their dependents on retirement and to insure a fiscally solvent retirement system. Donner v. Kansas Dept. of Human Resources, 236 Kan. 371, 376 (1984). Therefore, if the classification created by the statute in question may enable employees to accumulate

reserves for themselves and their dependents for old age, death and termination of employment, and insure a fiscally solvent retirement system, the classification will be upheld, and a violation of the equal protection clauses of the United States and Kansas constitutions will not have occurred.

Those entities deemed to be eligible employers as defined in K.S.A. 1990 Supp. 74-4902(13) may elect to become a participating employer in KPERS. K.S.A. 74-4910. Pursuant to K.S.A. 74-4910(b), the state of Kansas is a participating employer in KPERS. Each person who serves as a member of the legislature may become an eligible employee, K.S.A. 74-4991, and will become a member of KPERS upon filing with the board the proper election. K.S.A. 1990 Supp. 74-4992. An individual who has left service with the state may continue to be a member of KPERS. Member means "an eligible employee who is in the system and is making the required employee contributions, or any former employee who has made the required contributions to the system and has not received a refund." K.S.A. 1990 Supp. 74-4902(21). A member shall receive credit for participating service with a participating employer in accordance with the rules and regulations established by the board of trustees, except that no more than one calendar quarter of participating service shall be credited for any employment within any one calendar quarter. K.S.A. 1990 Supp. 74-4913(2)(a).

The effect of K.S.A. 1990 Supp. 74-4911e is to permit a class of former elected officials to continue to accumulate years of participating service in KPERS after leaving employment with a participating employer. The statute deems the former elected official to be both a participating employer in KPERS and an employee of a participating employer despite the fact that the former elected official would be such in the private sector. The legislature clearly intended to enact a retirement system available to governmental entities; the retirement system can then be held forth as a benefit of public employment. Except for the former elected official, no employers or employees in the private sector are permitted to participate in KPERS and receive the benefits of the system. Because such a classification fails to advance or has no bearing on the objectives for KPERS i.e., enabling employees of participating employers to accumulate reserves for themselves and their dependents on retirement and to insure a fiscally solvent retirement system, the classification fails to meet the minimum rationality or reasonable basis test. The classification therefore is

considered arbitrary and violates the equal protection clauses of the United States and Kansas constitutions.

Because K.S.A. 1990 Supp. 74-4911e uses an unconstitutional classification in permitting former elected officials the opportunity to elect to continue to participate in KPERS, a former elected official will not be permitted to exercise that option. Under the provisions of K.S.A. 1990 Supp. 74-4998b:

"(a) Any elected state official shall become a special member of [KPERS] upon filing with the board an election to become a special member of the system. . . .
. The election shall remain in effect until the member ceases to serve as an elected state official."

Therefore, the election of the former elected state official to participate as a special member of KPERS ceases when the elected state official leaves service with the state. While the former elected state official will continue to be a member of KPERS after leaving service with the state provided the former elected state official has not withdrawn his contributions to KPERS, the former elected state official will not be permitted to accumulate years of service by participating in KPERS after leaving service as an elected state official.

Very truly yours,



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Attorney General of Kansas



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