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ATTORNEY GENERAL OPINION NO. 91- 76

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

Re: Courts--Retirement System for Justices and
Judges--Election to Continue to Participate in
Retirement System by Certain Judges;
Constitutionality

State Boards, Commissions and Authorities--Public
Employees Retirement System; Kansas Public
Employees Retirement System--Retirement Fund;
Payments From Fund, Procedures; Overpayments

Synopsis: Under the provisions of K.S.A. 1990 Supp. 20-2619,
a judge may elect to continue to participate in the
retirement system for justices and judges after
leaving service as a judge in certain
circumstances. Because the classification created
in the statute fails to advance an objective of the
retirement system, the classification fails to meet
the minimum rationality or reasonable basis test.
Also, the benefits conferred pursuant to K.S.A.
1990 Supp. 20-2619 constitute payment of public
funds to a private individual in violation of the
public purpose doctrine. As such, the statute is
unconstitutional. Contributions remitted pursuant
to K.S.A. 1990 Supp. 20-2619 and K.S.A. 1990 Supp.
74-4911e are overpayments to the Kansas public
employees retirement fund and may be reimbursed

pursuant to K.S.A. 1990 Supp. 74-4921. Cited herein: K.S.A. 20-2601; 20-2601a; 20-2602b; K.S.A. 1990 Supp. 20-2603; K.S.A. 20-2606; K.S.A. 1990 Supp. 20-2619; K.S.A. 74-4901; K.S.A. 1990 Supp. 74-4909; 74-4911b; 74-4911e; 74-4911f; 74-4921; K.S.A. 74-4951; K.S.A. 1990 Supp. 74-4998g; 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 constitutionality of K.S.A. 1990 Supp. 20-7619. The statute permits certain judges to continue to participate in the retirement system for judges after leaving service as a judge. Your request occurs because of our opinion expressed in Attorney General Opinion No. 91-14 in which we concluded that a similar statute permitting former elected officials to continue to participate in KPERS is unconstitutional as the classification established by the statute fails to advance a legitimate conceivable purpose for KPERS.

The retirement system for justices and judges is set forth in K.S.A. 20-2601 et seq. K.S.A. 1990 Supp. 20-2619 states in part:

"(a) Any judge who is serving in such capacity on or after January 1, 1989 and whose service as a judge terminates due to such judge being defeated in an election, may elect to continue to participate in the retirement system for judges under the provisions of this act after the date such judge's service as a judge terminates unless such judge immediately becomes an employee of another participating employer. . . .

"(b) Such judge shall remit the required employer and employee contributions to the system quarterly in advance with a report as may be required by the system.

"(c) Any election by such judge under subsection (a) shall remain in effect until revoked in writing and received by the system or such judge becomes an employee of another participating employer or upon such failure of such judge to remit to the system the employer and employee contributions required under subsection (b)."

Section one of the fourteenth amendment to the United States Constitution 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. The Constitution 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 rational 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.

Pursuant to K.S.A. 20-2601a, the powers, duties and functions of the Kansas judges retirement board have been transferred to KPERS. The Kansas retirement fund for judges has been abolished and all moneys and assets transferred to the Kansas public employees retirement fund. The retirement system for judges is presently administered by KPERS.

Unlike other public employee retirement systems administered by KPERS, the retirement system for judges does not set forth an express purpose for the legislation. Compare K.S.A. 74-4901 (KPERS); 74-4951 (Kansas police and firemen's retirement system); K.S.A. 1990 Supp. 74-4998g (elected state officials). However, it is generally conceded that public employee retirement systems are established for the purpose of inducing competent persons to enter and remain in public service and to encourage retirement from service of those who have become incapacitated from performing official duties as well as they might be performed by younger persons. State ex rel Cleaveland v. Bond, 518 S.W.2d 649, 652 (Mo. 1975);

Phillipson v. Board of Administration, Public Employees Retirement System, 473 P.2d 765, 776 (Ca. 1970); State ex rel. Sena v. Trujillo, 129 P.2d 329, 332 (N.M. 1942).

Legislative history of the retirement system for judges fails to indicate any other purpose for establishing the system. Therefore, if the classification created in K.S.A. 1990 Supp. 20-2619 induces competent individuals to enter and remain in public service or encourages retirement from service of those who have become incapacitated from performing official duties as well as they might be performed by younger persons, then the classification will be upheld.

K.S.A. 1990 Supp. 20-2619 does not encourage competent individuals to enter and remain in public service nor does it encourage retirement from service. In the most favorable light, the statute encourages, competent individuals to seek to remain in public service. The option granted under K.S.A. 1990 Supp. 20-2619 to the individuals may only be exercised after the individual involuntarily leaves service with the state and does not enter into service in a new role with the state. This is contrary to the purposes for establishing the retirement system for judges. The classification established in K.S.A. 1990 Supp. 20-2619 does not advance an objective of the retirement system for judges. The classification does not meet the reasonable basis test and therefore violates the equal protection clauses of the United States and Kansas constitutions.

Consideration should also be given to the public purpose doctrine. Simply stated, the public purpose doctrine permits the spending of public funds only for public purposes. Despite the absence of a constitutional provision recognizing it, the public purpose doctrine has been recognized by the courts of Kansas since 1871. See Leavenworth County v. Miller, 7 Kan. 479 (1871). Because the doctrine has been formulated by the courts and is not bound by a strict formula established under a constitutional provision, the concept of public purpose is able to fluctuate with the population, economy, scientific knowledge and changing conditions of the state. This has enabled the court to determine that certain public expenditures do not constitute a violation of the public purpose doctrine. See Leavenworth County v. Miller, 7 Kan. *479 (1871) (municipal aid to railroads; public purpose of providing access to transportation); Gunkle v. Killingsworth, 118 Kan. 154 (1925) (rural credits exempt from taxation; public purpose of aiding agriculture and enabling farmers to obtain low-rate loans); State, ex rel. Fatzner v. Board of Regents, 167 Kan. 587

(1949) (exemption from taxation of revenue bonds sold to raise funds for acquisition or construction of student dormitories; public purpose of encouraging education); State, ex rel. Fatzer v. Urban Renewal Agency of Kansas City, 179 Kan. 435 (1956) (sale to private persons of property acquired through condemnation; public purpose of eradicating blighted areas); State, ex rel Ferguson v. City of Pittsburg, 188 Kan. 612 (1961) (economic development revenue bond act; public purpose of promoting overall economic welfare of general public); Ullrich v. Board of Thomas County Comm'rs, 234 Kan. 782 (1984) (public funds and assets transferred to private corporation; public purpose of promoting public health through operation of hospital); State, ex rel. Tomasic v. City of Kansas City, 237 Kan. 572 (1985) (tax exemption for GM plant; public purpose of promoting overall economic welfare of general public); Duckworth v. City of Kansas City, 243 Kan. 386 (1988) (developmental loans to private businesses; public purpose of revitalizing central business district).

As a general rule, the state legislature may appropriate public money for private individuals so long as the appropriation promotes the public welfare. Duckworth, supra, 243 Kan. at 387.

"What is for the public good or what are public purposes for which appropriations may be made are questions which the legislature must in the first instance decide? [sic] In determining those questions, a state legislature is vested with a broad discretion, which cannot be controlled by the courts, except when its action is clearly evasive or violative of a constitutional provision." Ullrich, supra, 234 Kan. at 789.

As long as a governmental action is designed to fulfill a public purpose, the wisdom of the governmental action generally is not subject to review by the courts. Duckworth, supra, 243 Kan. at 389.

"Public employment seldom pays as much as a comparable job in the private sector. A pension to be received upon retirement is a prime inducement in securing qualified workers and avoiding the expense of a high turnover rate. Retirement benefits are a

valuable part of the consideration for entering into and continuing a public service. A member of a governmental pension system has certain vested rights in the pension plan because it is a vital part of the consideration for entering into and performing under the employment contract." Brazelton v. Kansas Public Employees Retirement System, 227 Kan. 443, 449 (1980).

The right to receive a pension derives from the fact that an employee participating in a pension retirement 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. Attorney General Opinion No. 89-143; see Spina v. Consolidated Police and Firemen's Pension Fund Commission, 197 A.2d 169, 174 (N.J. 1964); Kern v. City of Long Beach, 179 P.2d 799, 801 (Ca. 1947); State ex rel. Sena v. Trujillo, 129 P.2d 329, 332 (N.M. 1942). Pensions constitute compensation paid for services previously rendered by the employee.

The effect of K.S.A. 1990 Supp. 20-2619 is to provide compensation through increased retirement benefits to judges exercising the option granted in the statute. The state receives no benefit for the additional compensation conferred upon the judges exercising the option. Although the public purpose doctrine is able to fluctuate with changing conditions, the doctrine has not expanded to such a degree as to permit continued compensation of former employees of the state when no benefit is conferred upon the public. K.S.A. 1990 Supp. 20-2619 violates the public purpose doctrine.

Individuals who have attempted to exercise the options set forth in K.S.A. 1990 Supp. 20-2618 and K.S.A. 1990 Supp. 74-4911e have remitted to KPERS the contributions designated in each statute. You ask whether such contributions may be refunded to those individuals.

K.S.A. 1990 Supp. 20-2619 and K.S.A. 1990 Supp. 74-4911e require the designated individuals to "remit the required employer and employee contributions to the system quarterly in advance with a report as may be required by the system." The funds remitted pursuant to the statutes are deposited in the Kansas public employees retirement fund created under K.S.A. 1990 Supp. 74-4991.

"(1) All employees [sic] and employer contributions shall be deposited in a fund in the state treasury which is hereby created and shall be known as the Kansas public employees retirement fund. Investment income of the fund shall be added or credited to the fund as hereinafter provided. All benefits payable under the system, refund of contributions and overpayments, purchases or investments under the law and all expenses in connection with the system shall be paid from the fund. . . ."
K.S.A. 1990 Supp. 74-4921.

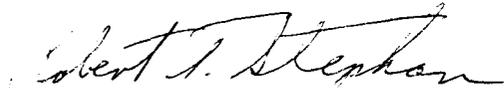
The cardinal rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature govern when the intent can be ascertained from the statute. State ex rel. Stephan v. Kansas Racing Commission, 246 Kan. 708, 719 (1990). It is clear that contributions and overpayments may be refunded. However, in order to receive a refund of contributions, the individual must file a revocation with the board of trustees of KPERS and forfeit all prior service credit and participating service credit. K.S.A. 20-2606; K.S.A. 1990 Supp. 74-4911b. Neither the retirement system for judges nor KPERS authorizes a partial refund of accumulated contributions. Because it is assumed that the effected individuals do not wish to forfeit all rights to benefits under the systems, it is necessary to determine whether the employee and employer contributions remitted pursuant to K.S.A. 1990 Supp. 20-2619 and K.S.A. 1990 Supp. 74-4911e constitute overpayments.

Neither system provides a definition for overpayment. The term therefore is to be given its natural and ordinary meaning. See State ex rel Stephan v. Kansas Racing Commission, 246 Kan. at 719. An overpayment is a "payment in excess of what is due; also the amount of such excess." Webster's Third New International Dictionary 1609 (1986). A payment is due if the payment is:

"Owing; payable; justly owed. That which one contracts to pay or perform to another; that which law or justice requires to be paid or done." Black's Law Dictionary 448 (1979).

Participating members of the systems are required to contribute each payroll period a portion of their salary to the Kansas public employees retirement fund. See K.S.A. 1990 Supp. 20-2603; K.S.A. 1990 Supp. 74-4909; K.S.A. 1990 Supp. 74-4911f. Once an individual leaves service with a participating employer, the individual is no longer accumulating years of participating service and no further contributions on behalf of the individual are required. Because K.S.A. 1990 Supp. 20-2619 and K.S.A. 1990 Supp. 74-4911e are unconstitutional, the options set forth in the statutes cannot be exercised, and there is no obligation to make further contributions to the Kansas public employees retirement fund. Any contributions submitted after an individual leaves service with a participating employer are in excess of contributions due the Kansas public employees retirement fund. Contributions remitted pursuant to K.S.A. 1990 Supp. 20-2619 and K.S.A. 1990 Supp. 74-4911e constitute overpayments to the Kansas public employees retirement fund and may be reimbursed as authorized by K.S.A. 1990 Supp. 74-4921.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



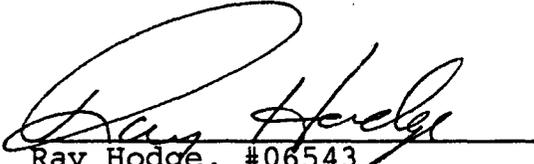
Richard D. Smith *by JLM*
Assistant Attorney General

3. That K.S.A. 1990 Supp. 20-2619 is found to be constitutional and that defendant is permanently restrained and enjoined from terminating plaintiff's past and continuing interest in the Kansas Retirement System for Judges and Justices pursuant to the above statute including but not limited to longevity enhancements and insurance benefits.

IT IS BY THE COURT SO ORDERED.

Judge of the District Court

PREPARED AND APPROVED BY:


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Plaintiff Pro Se


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