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ATTORNEY GENERAL OPINION NO. 91- 128A

The Honorable Dale Sprague
State Representative, Seventy-Third District
P.O. Box 119
McPherson, Kansas 67460

Meredith Williams
Executive Director
Kansas Public Employees Retirement System
Capitol Tower, 2nd Floor
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Re: State Boards, Commission and Authorities--Public Employees Retirement Systems; Kansas Police and Firemen's Retirement System--Annual Spouse's Benefit; Post Retirement Benefit Adjustment; Retirant Dividend Payment; Relation to Social Security; Brazelton Class

Synopsis: Annual spouse's benefits, post retirement benefit adjustments and retirant dividend payments applicable to individuals comprising the Brazelton class are based on the amount of benefit received from the Kansas police and firemen's retirement system (KP&F). The benefit received from KP&F does not include that amount equal to one-half of the benefits received from social security by the member which is offset from the amount of benefit due from KP&F. The computations for annual spouse's benefit, post retirement benefit adjustment and retirant dividend payment may not include that amount which is offset from the amount of benefit due from KP&F. To the extent contrary to the principles

stated herein, Attorney General Opinion No. 91-128 is hereby withdrawn. Cited herein: K.S.A. 1977 Supp. 74-4902, as amended by L. 1978, ch. 319, § 1; K.S.A. 1990 Supp. 74-4927; K.S.A. 74-4943; 74-4951; K.S.A. 1990 Supp. 74-4958; K.S.A. 74-4965; 74-4966 (as they existed in 1974); K.S.A. 74-49,109, 74-49,110; 74-49,111; L. 1974, ch. 343, §§ 1, 2; L. 1975, ch. 412, § 1; L. 1980, ch. 233, § 7; L. 1991, ch. 237, § 19.

* * *

Dear Representative Sprague and Mr. Williams:

In your respective roles as representative for the seventy-third district and as executive secretary for the Kansas public employees retirement system (KPERS), you request our opinion regarding whether KPERS has correctly figured the benefits under the Kansas police and firemen's retirement system (KP&F) due individuals comprising the Brazelton class.

Post Retirement Benefit Adjustments

In 1965, the Kansas legislature created the Kansas police and firemen's retirement system (KP&F), K.S.A. 74-4951 et seq., for the purpose of providing an orderly means whereby police and firemen employed by participating employers and who have attained retirement age or who have become disabled may have retired from active service without prejudice and without inflicting a hardship on the employees retired. K.S.A. 74-4951. As originally enacted, payments to and benefits received from KP&F were interlocked with payments to and benefits received from social security.

"K.S.A. 74-4965, before amendment, required each member to pay 7% of his compensation to KP&F but that amount was reduced by the amount the employee paid in social security taxes. . . . In 1975 an employee's contribution to social security amounted to 4.95% of the first \$14,100.00 of gross wages received each year. Instead of paying 7%, the amount actually contributed to KP&F was 2.05% and 4.95% was paid to social security.

"K.S.A. 74-4966, before amendment, required that KP&F retirement benefits be reduced by one-half the amount received in social security benefits. Each time an increase occurred in social security benefits, the state retirement benefit would have a corresponding reduction equal to one-half of the social security increase." Brazelton v. Kansas Public Employees Retirement System, 227 Kan. 443, 444-45 (1980).

During the legislative sessions of 1974 and 1975, the legislature adopted amendments to K.S.A. 74-4965 and 74-4966 in an attempt to eliminate the interlocking of KP&F with social security. See L. 1974, ch. 343, §§ 1, 2; L. 1975, ch. 412, § 1.

"After January 1, 1976, under K.S.A. 74-4965 and 74-4966, as amended, a member's contribution to KP&F is 7% of his salary. His contribution is no longer reduced by the amount of contributions to social security, resulting in a reduction of a member's take-home pay by 4.95%. The benefits that the member received from KP&F are, however, no longer reduced by one-half the amount of social security benefits received; rather, each member receives the full benefit of the KP&F retirement system regardless of benefits received from social security." Brazelton, 227 Kan. at 445.

In addition to severing the linkage between KP&F and social security, the amendments required each member to make up any "contribution shortfall" occurring from the date of membership in KP&F to January 1, 1976. An option permitting members to retain their former rights under the system or to accept the new provisions was not provided. These provisions were challenged by those individuals comprising the Brazelton class.

The court in Brazelton declared:

"The 1975 amendment to K.S.A. 74-4966 clearly requires the members of the class to pay additional contributions to KP&F

for a period of employment already completed and performed and results in a retroactive impairment of the employee's contractual rights which is prohibited by the Constitution and invalid. As a result the 1974 amendment to K.S.A. 74-4965 is also fatally defective in that it mandates increased contributions to KP&F (from 2.05% to 7%), a distinct disadvantage to the employee, with no offsetting or compensating advantage.

"Therefore, we hold that the 1974 amendment to K.S.A. 74-4965 and the 1975 amendment to 74-4966 are invalid as to the plaintiffs and the members of the plaintiffs' class as an unconstitutional violation of the contract clause of the United States Constitution and as being contrary to the express provisions of K.S.A. 1979 Supp. 74-4923. . . . Defendant is directed to restore plaintiffs and the other members of the class to their rights as they existed prior to January 1, 1976, including such monetary adjustments and payments as may be required." Brazelton, 227 Kan. at 455.

Therefore, those individuals comprising the Brazelton class continue to have their contributions to KP&F interlocked with social security and are not required to make up the "contribution shortfall." (An amendment to K.S.A. 74-4966 adopted in L. 1974, ch. 343, § 2, and to become applicable January 1, 1976, stating in part that benefits due from KP&F will no longer be reduced by benefits received from social security, was deemed by the court to constitute part of the 1975 amendment to K.S.A. 74-4966.)

The legislature has periodically granted increases in the amount of retirement benefit, pension, or annuity payment due retirants under KPERS, KP&F, the state school retirement system and the retirement system for judges. See K.S.A. 74-4943 et seq. The latest increase is established in L. 1991, ch. 237, § 19. The language of the statutes setting forth the increases has remained consistent over the years.

"(a) The retirement benefit, pension or annuity payments accruing after June 30, 1991, to each retirant and each local school retirant, shall be increased by an amount equal to \$10 or 1.0% of the retirement benefit, pension or annuity payment in effect on July 1, 1991, from the retirant's retirement system or the local school annuitant's separate retirement system maintained by a local school district, whichever is greater, and shall be paid by such retirement system to the retirant or by such separate retirement system maintained by a local school district to the local school annuitant during such period." L. 1991, ch. 237, § 19. (Emphasis added.)

As used in the statute, retirement system means KPERS, KP&F the state school retirement system and the retirement system for judges. L. 1991, ch. 237, § 19(b)(2).

The interpretation of a statute is a question of law and it is the court's function to interpret the statute to give it the intended effect. Unified School District No. 279 v. Secretary of Kansas Department of Human Resources, 247 Kan. 519, 524 (1990). The fundamental rule of statutory construction is that the purpose and intent of the legislature govern when that intent can be ascertained from the statute. Id. at 527.

L. 1991, ch. 237, § 19 clearly requires that increases in retirement benefits, pensions and annuity payments be based on a percentage of the retirement benefit, pension, or annuity payment received from the appropriate retirement system by the retirant. (If the amount of increase determined through this calculation is less than \$10, the increase in the retirement benefit, pension, or annuity payment will be \$10.) Because the court has determined that L. 1974, ch. 343, §§ 1, 2 and L. 1975, ch. 412, § 1 are inapplicable to members of the Brazelton class, those members continue to have their benefits received from KP&F reduced by one-half of the their benefits received from social security. The post retirement benefit adjustment may be figured only on the amount of benefit actually due from KP&F; that amount equal to one-half of the social security benefit which is deducted from the benefit due from KP&F may not be included in the formula for figuring the amount of post retirement benefit

adjustment due a member. Such an interpretation of those statutes authorizing increases in retirement benefits, pensions and annuity payments has consistently been followed by KPERS. Ordinarily, a court will give deference to the agency's interpretation of the law. State ex rel. Stephan, 246 Kan. at 720. KPERS correctly determines the amount of increase in retirement benefit, pension, or annuity payment to which individuals comprising the Brazelton class are entitled when it offsets the amount equal to one-half of the benefit received from social security prior to determining the amount of increase to which each retirant is entitled.

Retirant Dividend Payments

Pursuant to K.S.A. 74-49,110, the retirant dividend payment reserve in the Kansas public employees retirement fund was created in 1980. Retirant dividend payments are payable to: (a) those retirants as defined in K.S.A. 74-49,109(a) who are entitled to receive a benefit from KPERS, KP&F, the state school retirement system, the Kansas highway patrol pension fund, the Kansas bureau of investigation pension fund, the Kansas retirement fund for judges, or the Kansas retirement fund for official court reporters; (b) those individuals who retired prior to July 2, 1987 and are local school annuitants; and (c) those person who prior to July 2, 1987, were receiving an insured disability benefit under K.S.A. 1990 Supp. 74-4927. K.S.A. 74-49,111; see K.S.A. 74-49,109.

"(b) Each such retirement dividend payment shall be payable to the retirant in an amount equal to the amount determined by (1) multiplying the total amount credited to the retirant dividend payment reserve under K.S.A. 74-49,110 by the monthly payment amount of the annual retirement benefit, pension or annuity or insured disability benefit payable to such retirant at the rate in effect on July 1 and (2) dividing the product obtained by the total amount of all monthly payment amounts of annual retirement benefits, pensions or annuities or insured disability benefits payable to all retirants at the rate in effect on July 1. The amount so determined for each retirant shall be the retirant

dividend payment for such retirant."
K.S.A. 74-49,111. (Emphasis added.)

In construing statutes, the legislative intent must be determined from a general consideration of the entire act. State ex rel. Stephan, 246 Kan. at 719. If possible, effect must be given to all provisions of the act, and different provisions must be reconciled in a way that makes them consistent, harmonious and sensible. Id. In determining legislative intent, courts are not limited to a mere consideration of the language employed but may properly look into historical background of the enactment, the circumstances attending and subsequent to its passage, the purposes to be accomplished and the effect the statute may have under the various constructions suggested. Joe Self Chevrolet Inc. v. Board of County Commissioners of Sedgwick County, 247 Kan. 625, 633 (1990).

K.S.A. 74-49,109 was approved by the legislature on May 16, 1980, and took effect July 1, 1980 (L. 1980, ch. 233, § 7), following issuance of the court's decision in Brazelton on March 1, 1980. Prior to enactment of the statute, the legislature had terminated the interlocking of KP&F benefits with social security, except for those individuals comprising the Brazelton class. At the time of enactment of K.S.A. 74-49,109 et seq., retirement benefit was defined under KPERS as:

"[A] monthly income or the actuarial equivalent thereof paid in such manner as specified by the member pursuant to this act or as otherwise allowed to be paid at the discretion of the board, with benefits accruing from the first day of the month coinciding with or following retirement and ending on the first day of the month in which death occurs, unless the retirant is survived by the retirant's spouse, in which case the surviving spouse shall be paid the retirement benefit which would have been payable had the retirant lived until the end of the month, and upon proper identification such surviving spouse may negotiate the warrant issued in the name of the retirant, but if there is no surviving spouse no benefit will be payable for the month in which the death of the retirant occurred." K.S.A. 1977

Supp. 74-4902, as amended by L. 1978,
ch. 319, § 1.

Retirement benefit includes those monthly payments made pursuant to the act or as otherwise allowed to be paid at the discretion of the board of trustees for KPERS. There is no indication that the legislature intended to deviate from that definition in its enactment of KP&F. Therefore, the amount of retirant dividend payment to which a retirant is entitled is based in part on the retirement benefit received from KP&F. The retirant dividend payment does not include that amount equal to one-half of the social security benefit received by the member which is deducted from the amount of benefit due from KP&F. KPERS correctly figures the amount of retirant dividend payment to which eligible members of the Brazelton class are entitled when it offsets benefits received from social security in the formula set forth in K.S.A. 74-49,111.

Annual Spouse's Benefit

Pursuant to K.S.A. 1990 Supp. 74-4958, spouses of designated members of KP&F may be eligible to receive a lump-sum benefit and an annual spouse's benefit. K.S.A. 1990 Supp. 74-4958(3) states in part:

"[T]he member's spouse, if such spouse was the member's lawfully wedded spouse for a period of not less than one year at the time of the member's retirement or if such spouse had been the member's lawfully wedded spouse for at least three years after the time of the members' retirement, shall receive a lump-sum benefit equal to 1/2 the member's final average salary at the time of the member's retirement and shall receive an annual spouse's benefit equal to 75% of the member's retirement benefit payable in monthly installments, to accrue from the first day of the month following the member's date of death and ending on the first day of the month in which the spouse dies or remarries. . . ." (Emphasis added.)

As stated above, the fundamental rule of statutory construction is that the purpose and intent of the legislature govern when that intent can be ascertained from the statute.

Unified School District No. 279, 247 Kan. at 527. Words and phrases used in a statute should be construed according to context and the approved usage of the language, which means that words in common use are to be given their natural and ordinary meaning. State ex rel. Stephan, 246 Kan. at 719.

K.S.A. 1990 Supp. 74-4958 clearly requires that the annual spouse's benefit be equivalent to 75% of the member's retirement benefit. As stated above, the retirement benefit of a member of the Brazelton class does not include that amount equivalent to one-half of the social security benefits received by the member which is offset from the amount of benefit due from KP&F. The annual spouse's benefit also does not take into consideration benefits received from social security by the spouse. The annual spouse's benefit is based only on the amount of retirement benefit actually due the member from KP&F.

In conclusion, annual spouse's benefits, post retirement benefit adjustments and retirant dividend payments applicable to individuals comprising the Brazelton class are based on the amount of benefit received from the Kansas police and firemen's retirement system (KP&F). The benefit received from KP&F does not include that amount equal to one-half of the benefits received from social security by the member which is offset from the amount of benefit due from KP&F. The computations for annual spouse's benefit, post retirement benefit adjustment and retirant dividend payment may not include that amount which is offset from the amount of benefit due from KP&F.

Very truly yours,



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