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ATTORNEY GENERAL OPINION NO. 92- 82

The Honorable Kenneth R. King
State Representative, Seventy-Seventh District
Route 1
Leon, Kansas 67074

Re: Schools--Miscellaneous Provisions--Early Retirement Incentive Programs; Establishment Authorized; Classification of School Personnel; Constitutionality of Program

Synopsis: The early retirement incentive program developed by the board of education for unified school district no. 490, available only to certified personnel of the district, does not establish a classification which would result in a violation of the equal protection clauses of the United States or Kansas constitutions. Cited herein: K.S.A. 72-5395; Kan. Const., Bill of Rights; §§ 1, 2; U.S. Const., Amend. XIV, § 1.

* * *

Dear Representative King:

As representative for the seventy-seventh district, you request our opinion regarding the constitutionality of an early retirement incentive program established by unified school district no. 490 (U.S.D. No. 490).

Pursuant to K.S.A. 72-5395, the board of education of a unified school district is authorized to:

> "[E]stablish an early retirement incentive program for the benefit of the employees of the district for the purpose of reducing, in whole or in part, the penalty under the federal insurance contributions act or the Kansas public employees retirement system, or both, for retirement prior to the normal retirement age of 65 years."

The authority to establish such programs is permissive, and the legislature did not intend to require that such a program be made available to all employees of a district. See Minutes, Attachment 1, House Committee on Pensions, Investments & Benefits, January 24, 1985. Exercising this authority the board of education for U.S.D. No. 490 has developed an early retirement incentive program available to certified personnel of the district. The program is not available to noncertified personnel of the district.

The United States constitution, Amend. 14, § 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 (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. 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. 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 board of education for U.S.D. No. 490 implemented an early retirement incentive program "in order to facilitate the voluntary retirement of employees of the school district who may find it necessary or desirable to retire from employment with the district prior to normal retirement age." Early Retirement Policy, Teacher Handbook, Unified School District No. 490 (1988). If the classifications established by U.S.D. No. 490 facilitate the voluntary retirement of employees of the school district the classifications will be upheld, and a violation of the equal protection clauses of the United States

and Kansas constitutions will not have occurred. The classifications are subject to judicial revision only to the extent of seeing that the classifications are founded on real distinctions between the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. 16A Am.Jur.2d, supra, § 748.

> "Legislative classifications, however, are presumed to be constitutional, and the burden of showing a statute to be unconstitutional is on the challenging party, not [emphasis in original] on the party defending the statute: 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker. Vance v. Bradley, 440 U.S. 93, 111, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979). In a case such as this, the plaintiff can carry this burden by submitting evidence to show that the asserted grounds for the legislative classification lack any reasonable support in fact, but this burden is nonetheless a considerable one. United States v. Carolene Products Co., 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234 (1938)." New York State Club Ass'n v. City of New York, 487 U.S. 1117, 108 S.Ct. 2225, 2236, 101 L.Ed.2d 1 (1988).

The classification established by U.S.D. No. 490 in its early retirement incentive program is based on readily identifiable distinctions between the parties. The classification permits employees of the district to pursue early retirement while sustaining minimal penalty, the purpose of the program. It is not a function of the court to determine the wisdom of the classification. The early retirement incentive program developed by U.S.D. No. 490, available only to certified personnel of the district, does not establish a classification

which would result in a violation of the equal protection clauses of the United States or Kansas constitutions.

Very truly yours,

ROBERT T. STEPHAN
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Richard D. Smith
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