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ATTORNEY GENERAL OPINION NO. 80-26

The Honorable Patrick B. Augustine
State Representative, 110th District
Room 273-W, State Capitol
Topeka, Kansas 66612

Re: State Boards, Commissions and Authorities--Public Employees Retirment Systems--Eligible Employees

Synopsis: Under the statutes establishing the Kansas Public Employees Retirement System (KPERS) and the regulations promulgated thereunder, for a person to become a member of KPERS there must exist an employer-employee relationship to the extent that such person is compensated by an eligible governmental employer. This relationship exists between a district attorney and the county comprising the judicial district from which the district attorney is elected. However, no such employer-employee relationship existed between justices of the peace, and the townships from which they were elected.

Considering the district attorney an employee of the county for KPERS purposes is not in conflict with the provisions of K.S.A. 22a-101, which declares the district attorney is to be considered an officer of the judicial district and not of the county. Because a judicial district is by definition a delineation of the boundaries of the district attorney's territorial jurisdiction, and not a separate juristic entity, the legislative declaration of 22a-101 is equivalent to a statutory expression of jurisdiction.

> Absent specific statutory authorization, the KPERS Board of Trustees is without power to adopt rules and regulations providing prior service credit for a person's service as justice of the peace.

* * *

Dear Representative Augustine:

You have asked us to consider two issues pertaining to the Kansas Public Employees Retirement System (KPERS) as it relates to the offices of district attorney and justice of the peace. Specifically, you have asked if KPERS can adopt a regulation making the justice of the peace an "employee" of the city comprising his judicial district. As a collateral matter, you have requested a review of a letter written on August 24, 1972, by First Assistant Attorney General John Martin which explained that, for the purpose of determining qualification for membership in the KPERS program, a district attorney should be considered an employee of the county comprising his judicial district. When considered together, these issues concern the legal distinctions which permit district attorneys to become members of KPERS, yet deny prior service credit for KPERS purposes to persons who have served as justice of the peace.

It is important to note at the outset that both Kansas statutory provisions and KPERS regulations automatically include a district attorney in the KPERS system. The purpose of the Act which created KPERS was

> "to provide an orderly means whereby employees of the participating employers who have attained retirement age . . . 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." (K.S.A. 74-4901.)

From this it is apparent the legislature presumed the existence of an employer-employee relationship for those to be benefited by KPERS. This intent is further shown by statutory provisions of the KPERS Act: K.S.A. 1979 Supp. 74-4902(14), in pertinent part, defines "employee" for the purposes of KPERS as "[a]ny appointed or elective officer or employee of a participating employer whose employment is not seasonal or temporary and whose employment requires at least one thousand hours of work per year." A "participating employer" is defined at K.S.A. 1979 Supp. 74-4902(24) as "an eligible employer who has agreed to make contributions to the system on behalf of its employees." And the definition of "eligible employer" at K.S.A. 1979 Supp. 74-4902(13), provides in pertinent part thus:

> "'Eligible employer,' the state of Kansas, and any county, city, township, special district or any instrumentality of any one or several of the aforementioned <u>whose employees are covered by social security</u> and are not covered by or eligible for and will not become eligible for another retirement plan authorized under the laws of the state of Kansas which is in operation on the entry date." (Emphasis added.)

KPERS regulations further demonstrate the employment relationship prerequisite to membership in the system. K.A.R. 80-1-7 explains how determinations of membership in KPERS are made:

> "For the purpose of determining membership in the system under K.S.A. 1965 Supp. 74-4902(13) and 74-4902(14) of the act, the term 'employee' shall be construed to mean <u>an individual who is covered by social security, who is employed by an employer</u> in an office or position, which position or office requires a period of at least 1,000 hours per year and for which compensation is actually paid." (Emphasis added.)

Clearly, the legislature intended those employees covered by social security to be included in the KPERS program. It also is apparent that for an employer to be eligible to participate in the system, the employees thereof must be covered by social security [K.S.A. 1979 Supp. 74-4902(13)]. As will be explained in succeeding paragraphs, to enable participation in the social security program, every holder of an office or position must be classified as an employee of either the state or a political subdivision thereof. Obviously, therefore, if an employee is classified one way for the purposes of the social security act, that classification will be the same for KPERS purposes, as participation in the former is prerequisite to participation in the latter.

This statutory foundation facilitates consideration of the issues with which you are concerned. To begin with, you have asked whether a letter issued from this office on August 24, 1972, which advised KPERS that, for the purpose of determining qualification for membership in the KPERS program, a district attorney should be considered an employee of the county comprising his judicial district, is in conflict with K.S.A. 22a-101, which specifically states that a district attorney is an executive officer of the judicial district in which he is elected and should in no event be deemed an officer of any county. We can appreciate your confusion as to the conclusions reached in that letter because of its summary nature. However, we agree with the opinion expressed therein insofar as it deems that for KPERS purposes the county is to be considered the employer of the district attorney and his or her staff. It is consistent with and apparently predicated on an opinion issued June 16, 1972, in which Attorney General Vern Miller advised Mr. James R. Cobler, now Director of Accounts and Reports for the Department of Administration, that for the purposes of the administration of the old age and survivors insurance system embodied in the social security act, each county comprising the respective judicial districts involved must be deemed the employer of the district attorney serving the judicial district.
Under the Old Age and Survivors Insurance for Public Employees Act (K.S.A. 40-2301 *et seq.*), one is either employed by the state or by one of its political subdivisions, including any instrumentality thereof which has a separate juristic existence [K.S.A. 1979 Supp. 40-2302(b), (c), (f)]. Therefore, for the purposes of determining participation under that act, it was necessary to determine what entity was to be deemed the "employer" of the district attorney.

As noted in that prior opinion, a judicial district is not a political subdivision of the state. Black's Law Dictionary defines a judicial district as follows:

> "One of the circuits or precincts into which a state is commonly divided for judicial purposes, a court of general original jurisdiction being usually provided in each of such districts, and the boundaries of the district marking the territorial limits of its authority." Black's Law Dictionary, 985 [4th ed., (1951)].

Judicial districts operate to define the territorial reach of the district courts of the State of Kansas pursuant to Article 3, Section 2(b) of the Kansas Constitution. A judicial district is not a juristic entity "legally separate and distinct from the state or subdivision" thereof that is capable of having employees in the sense contemplated by the Old Age and Survivors Insurance Act. Therefore, Attorney General Vern Miller found it necessary to determine whether the district attorney was an employee of the state or the county for the sole purpose of identifying which entity was responsible for complying with the social security regulations.

Attorney General Miller concluded that in those judicial districts in which a district attorney is elected, the county comprising each such judicial district must be deemed the employer of such district attorney for purposes of the old age and survivors insurance system. This conclusion was based on legislative declarations--still in effect--included in the act which created the office of district attorney. For example, K.S.A. 1979 Supp. 22a-105 provides in pertinent part, thus:

> "The salary of each district attorney shall be paid by the county comprising the judicial district in which he or she is elected in equal monthly installments and in the manner county officers and employees are paid."

Subsection (a) of K.S.A. 22a-106 concerns the relationship of the board of county commissioners to the office of district attorney, and provides in part:

> "The county commissioners shall determine and allow such reasonable sums from funds of the county for other stenographic, investigative and clerical hire and for other expenses of such office as may be necessary to carry out the function of such office."

Because the county obviously exercises significant control over the office of district attorney through the budgetary and administrative processes, and there is no similar connection between the office of district attorney and state government, it is only logical that for the purposes of compliance with social security requirements it was the county that was deemed the employer of the district attorney. This finding makes it easier to conclude that the district attorney also is employed by the county for the purposes of KPERS. As previously noted, the collective consideration of K.S.A. 1979 Supp. 74-4902(13) and (24), together with K.A.R. 80-1-7, clearly indicates that the legislature intended those employees covered by social security, and who are otherwise qualified, to be included in KPERS. As to the employer of such individuals, K.S.A. 1979 Supp. 74-4920(4) creates a strong presumption that the entity which compensates an individual is to be considered such individual's employer under KPERS. This presumption is supported by KPERS regulations which explain that:

> "For the purpose of determining membership in the system, an employee will be considered to be the employee of the employer from whom his compensation is or was received." K.A.R. 80-1-13.

The clear implication of the regulations, statutory provisions and prior opinions, therefore, is that for KPERS purposes, one holding the office of district attorney is an employee of the county.

We find no conflict between this conclusion and the legislative declaration of K.S.A. 22a-101 that a district attorney is an executive officer of the judicial district from which elected and not an officer of the county. As previously explained, a judicial district delineates the boundaries of a district attorney's territorial jurisdiction, and is not a separate juristic entity. Thus, the statutory declaration that a district attorney is an officer of the judicial district can only have meaning within this context. It is, in effect, a declaration that the district attorney's jurisdiction extends throughout the judicial district. In our judgment, it cannot be construed as precluding a district attorney from being considered a county employee for KPERS purposes.

On the other hand, we cannot conclude that a justice of the peace is an employee entitled to prior service credit under KPERS. One of the essential elements prerequisite to eligibility for prior service credit is an employer-employee relationship between an eligible governmental entity and the person seeking prior service credit. Although an elected township officer, a justice of the peace was not an employee of any governmental entity. In some instances, the legislature provided that certain cities were to be deemed "townships" for the purpose of electing justices of the peace. However, as far as the justice of the peace was concerned, the "township" provided nothing more than a delineation of the territorial boundaries to be used in electing these township officers as was constitutionally required. Neither the townships nor the cities comprising the township compensated justices of the peace, and no other state or local governmental entity provided compensation. Rather, justices of the peace retained as compensation the statutorily prescribed fees for the rendering of their services. This is the most important distinction to be considered when determining the eligibility of the district attorney for membership in the KPERS program, and the non-eligibility of the justice of the peace for membership in the KPERS program. Absent compensation by an eligible employer, the requisite employer-employee relationship under KPERS cannot exist.

Turning now to the subject of whether the KPERS Board can adopt a regulation making a justice of the peace who served in a "city township" an employee of such city, it is our opinion that such action would exceed the rulemaking authority of the KPERS Board. This conclusion is based on well-recognized principles of administrative law. In 1 Am.Jur.2d, Administrative Law, §70, is the following general explanation of the source of administrative powers:

> "Administrative agencies are creatures of statute and their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." (Footnotes omitted.)

The Kansas Supreme Court has commented on the power of administrative agencies to adopt rules and regulations. In State ex rel. v. Columbia Pictures Corporation, 197 Kan. 448 (1966), the Court held that certain rules and regulations adopted by the Kansas State Board of Review were unauthorized because they were in direct contravention of provisions of the Kansas Motion Picture Censureship Act, which had created the Board of Review. Id. at 455. The Court said:

> "Generally speaking, the power of an administrative board to adopt rules and regulations is limited by the statute granting it such power. The extent of the power must be determined by the purpose of the act and difficulties its execution might encounter. The power to adopt rules and regulations is administrative in nature, not legislative, and to be valid, must be within the authority conferred. An administrative rule and regulation which goes beyond that which the legislature has authorized, which is out of harmony with or violates the statute, or which alters, extends, limits or attempts to breathe life into the source of its legislative power, is said to be void. Likewise, the power to adopt rules and regulations is not the power to 'legislate' in the true sense, and under the guise of a rule and regulation, legislation may not be enacted. (42 Am. Jur., Public Administrative Law, §§ 53, 99, 102, pp. 359, 360, 428, 429, 432, 433; 1 Am. Jur. 2d Administrative Law, §300, pp. 126, 127, 128; 73 C.J.S., Public Administrative Bodies and Procedure, §94, pp. 413, 414.)" Id. at 454.

This interpretation of administrative power has been reiterated in subsequent Kansas cases. See Willcott v. Murphy, 204 Kan. 640 (1970); and Kansas Commission on Civil Rights v. City of Topeka Street Department, 212 Kan. 398 (1973).

The rulemaking powers granted to the KPERS Board of Trustees in K.S.A. 1979 Supp. 74-4902(2) are administrative in nature. Any regulation promulgated by virtue of this legislative authority must be one "necessary or proper to enable . . . [KPERS] to carry out fully and effectively the purposes and intent of the KPERS legislation." K.S.A. 74-4903. That legislation clearly requires the existence of an employer-employee relationship in which the employee is compensated by an eligible governmental employer. Therefore, it is our opinion that should the KPERS Board adopt a regulation making a justice of the peace an "employee" of the city comprising his or her "township" the regulation would be one which would "alter, extend, limit or attempt to breathe life into the source of its legislative power"--as set out in K.S.A. 74-4901 et seq.--and as such would be void.

In conclusion, it is our opinion that neither statutory enactments nor regulatory provisions permit a justice of the peace to receive prior service credit under KPERS. The KPERS statutes clearly require an employer-employee relationship between one seeking to become a member of the system and the state or a political subdivision thereof. The office of justice of the peace was not one in which there was an "employer-employee" relationship to the extent required by KPERS: that is, a person who was paid compensation by a governmental entity. The justice of the peace received no compensation from the state or any political subdivision thereof. Thus, in order for a justice of the peace to now receive prior service credit, either the legislature must provide a statutory allowance for such credit, or specifically authorize KPERS to adopt a regulation to that effect.

Very truly yours,

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