



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

August 21, 1981

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 81- 194

Dale W. Bell
City Attorney
519 Commercial
P. O. Box 921
Emporia, Kansas 66801

Re: Insurance -- Fireman's Relief Fund -- Distribution
of Moneys; Vested Pension Rights

Synopsis: K.S.A. 1980 Supp. 40-1707 provides for the payment of pensions to employees of fire departments who are unfit for service after having worked at least 20 years for the department. While such pension plans may be modified in certain respects prior to the actual retirement of a covered member, following such retirement no modification of terms or conditions may be made, except for administrative alterations which do not impair the vested rights of the member. Any attempt to do so would be ineffective as a violation of the contract clause of the United States Constitution, Art. I, §10. Cited herein: K.S.A. 1980 Supp. 12-1675, 40-1703, 40-1706, 40-1707, U.S. Const., Art. I, §10.

*

*

*

Dear Mr. Bell:

As City Attorney for Emporia, Kansas, you have requested the opinion of this office on a question concerning pensions which are granted pursuant to K.S.A. 1980 Supp. 40-1707. Specifically, you inquire whether pensions previously granted to "full-paid" (as opposed to volunteer) members of a city fire department may be reduced or revoked.

The pensions in question are made as a part of the Fireman's Relief Fund Act, K.S.A. 40-1701, et seq. Moneys for the fund

are provided by insurance companies which extend fire protection coverage in Kansas cities, townships, counties or fire districts. An assessment of two dollars on each one hundred dollars of premiums paid for such coverage is imposed by K.S.A. 1980 Supp. 40-1703, with the moneys so collected administered by local firemen's relief associations. Pursuant to K.S.A. 1980 Supp. 40-1706, such associations are composed of members of the fire department of the local governmental unit and are formally incorporated under Kansas law. Investments are approved by the governing body of the governmental unit, and are limited to those prescribed at K.S.A. 1980 Supp. 12-1675, in addition to bonds of the United States government or of a municipality.

Distribution of moneys so collected and invested is governed, as you note, by K.S.A. 1980 Supp. 40-1707, which states in part as follows:

"All moneys collected and received under the provisions of this act . . . shall be held in trust and used as a fund for the relief of any member of the fire department of such city, township, county or fire district when injured or physically disabled in or by reason of the discharge of his or her duties as such, and for the relief of or the payment of gratuities to the widow, widower or those dependent upon any member of such fire department who may be killed in the discharge of his or her duties as fireman, or who may die from the effect of injuries so received or from disease contracted by reason of his or her duties as such, and for the payment of the necessary funeral expenses of any member of such fire department when killed in the discharge of his or her duties as fireman, or in the case of death resulting from injuries so received or disease contracted by reason of his or her duties as such, or for the further purpose of paying a pension to members of full-paid fire departments who are unfit for service after having served for a period of not less than twenty (20) years on the department, such pension not to exceed in amount one-half (1/2) of the monthly salary at the date of retirement."
(Emphasis added.)

In view of the above, you wish to know whether such pensions vest in the individual upon award, and under what circumstances reduction or revocation is possible.

In examining the applicable Kansas law in this area, it appears that Kansas courts initially held that pensions were awarded as a matter of grace, not of right. Gleason v. Board of Commissioners of Sedgwick County, 92 K.n. 632 (1914). However, this holding has since been expressly overruled, with the court now finding that public retirement systems create contracts between a unit of government and its employees who are members of the system. Shapiro v. Kansas Public Employees Retirement System, 216 Kan. 353 (1975). This result was recently reaffirmed, the Court stating:

"A public employee, who over a period of years contributes a portion of his or her salary to a retirement fund created by legislative enactment, who has membership in the plan, and who performs substantial services for the employer, acquires a right or interest in the plan which cannot be whisked away by the stroke of legislative or executive pen, whether the employee's contribution is voluntary or mandatory."

Singer v. City of Topeka, 227 Kan. 356, 363 (1980).

Accordingly, as it is now settled that a contractual relationship exists, what remains to be determined is the point during employment at which a vested right accrues which cannot be unilaterally altered by the employer. As noted in Singer, courts in other states are widely split on this question. In some states (e.g. Arizona), all elements of the contract vest upon the commencement of employment and may not be altered thereafter without the employee's consent. In others (e.g. South Dakota), no vesting occurs until retirement itself, while a third, more intermediate line (e.g. California) holds that while vesting occurs upon membership in the plan and the furnishing of services, changes prior to retirement can be made for the purposes of keeping the system flexible and accommodating changing conditions.

Singer adopts the California rule, holding that:

"Continued employment over a reasonable period of time during which substantial services are furnished to the employer, plan membership is maintained, and regular contributions into the fund are made, however, cause the employee to acquire a contract right in the pension plan. Here all plaintiffs have been employed and have served the City for many years; all are members of the local plan; and all have contributed to the fund the required percentage

from their salaries over the period of employment. Their rights are substantial and are vested and subject to the protection afforded by the contract clause of the United States Constitution, art. I, §10, which provides:

"No State shall . . . pass any . . . Law impairing the Obligation of Contracts"
227 Kan. at 365-66.

Regarding permissible adjustments in pension plans prior to retirement, the Court stated:

"We hold that the state or a municipality may make reasonable changes or modifications in pension plans in which employees hold vested contract rights, but changes which result in disadvantages to employees must be accompanied by offsetting or counterbalancing advantages."
227 Kan. at 367.

As the changes proposed in Singer constituted a modification of vital elements of the original plan, disadvantageous to the employees and with no offsetting advantages, they were found to be unconstitutional impairments of contract rights.

In our opinion, the cases cited above, culminating in Singer, while providing some guidance in this situation, are not wholly on point. Here, unlike Singer, the individual employees paid nothing into the fund, which was totally collected from payments made by fire insurance companies. As this is the case, the definition of public employees used in Singer and quoted hereinabove is not completely applicable, i.e., while services have been rendered, no portion of anyone's salary has been invested.

However, in view of the 20-year service requirement contained at K.S.A. 1980 Supp. 40-1707, it appears clear that other, recent authority may be applied, so that even non-contributory pensions may become contractual once the requisite time has been served. Moore v. Adkins, 2 Kan.App.2d 139 (1978) and cases cited therein at 144-145. As the individuals described in your letter have served the required years and have subsequently retired, they have a contractual right to benefits which cannot be reduced or eliminated.

Furthermore, even if they had not retired, the relief association could not condition the grant of their pensions upon a showing of "need," for the only requirements for receiving a pension under K.S.A. 1980 Supp. 40-1707 are: 1) member of full-paid fire department; 2) unfit for service; and 3) 20

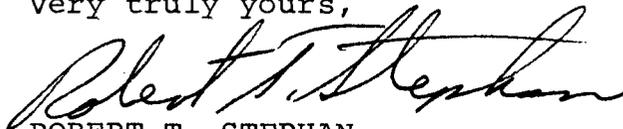
Dale W. Bell
Page Five

years or more with the department. There is no intent either expressed or implied in this statute which would require any demonstration of need. As was noted in the case of Denton v. West, 156 Kan. 186, 190 (1942):

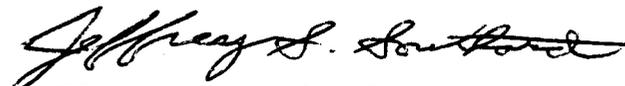
"Acts which provide pensions for firemen, like other acts, should be construed to give force and effect to the legislative intent as embodied therein. It is the purpose of pension acts to be beneficial and they should be liberally construed in favor of those intended to be benefited thereby."

In conclusion, K.S.A. 1980 Supp. 40-1707 provides for the payment of pensions to employees of fire departments who are unfit for service after having worked at least 20 years for the department. While such pension plans may be modified in certain respects prior to the actual retirement of a covered member, following such retirement no modification of terms or conditions may be made, except for administrative alterations which do not impair the vested rights of the member. Any attempt to do so would be ineffective as a violation of the contract clause of the United States Constitution, Art. I, §10.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle