STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

February 19, 1991

ATTORNEY GENERAL OPINION NO. 91-13

The Honorable Lana Oleen
State Senator, Twenty-Second District
State Capitol, Room 143-N
Topeka, Kansas 66612

Re: State Boards, Commissions and Authorities--Public Employees Retirement Systems; Kansas Public Employees Retirement System--Employment After Retirement; Compensation Limit; Exemptions; Constitutionality

Synopsis: Under K.S.A. 1990 Supp. 74-4914(6), a retirant who retired on or after July 1, 1988, and is employed or appointed in or to any position or office for which compensation for service is paid, in an amount equal to $6,000 or more in any one calendar year, by any participating employer for which such retirant was employed or appointed during the final two years of such retirant's participation, may not receive any retirement benefit for any month for which such retirant serves in such position or office. Retirants employed as substitute teachers or officers, employees, appointees or members of the legislature, or any other elected officials are exempt from application of K.S.A. 1990 Supp. 74-4914(6). The classifications set forth in the statute need have only a rational basis to the purpose of the legislation to be deemed valid classifications. Because legislative classifications have a presumption of constitutionality and no evidence which would override such a presumption has been presented, the classifications set forth in K.S.A. 1990 Supp.

74-4914(6) are not deemed to violate the equal protection clauses of the United States constitution and Kansas constitution. Cited herein: K.S.A. 74-4901; K.S.A. 1990 Supp. 74-4914; K.S.A. 74-4929; Kan. Const., Bill of Rights, §§ 1, 2; U.S. Const., 14th Amend., § 1.

* * *

Dear Senator Oleen:

As senator for the twenty-second district, you request our opinion regarding the constitutionality of K.S.A. 1990 Supp. 74-4914. Specifically, you ask whether a provision exempting certain retirants from application of a compensation limit violates the equal protection clauses of the United States constitution or Kansas constitution.

K.S.A. 1990 Supp. 74-4914 states in part:

> "(6) If a retirant who retired on or after July 1, 1988, is employed or appointed in or to any position or office for which compensation for service is paid, in an amount equal to $6,000 or more in any one calendar year, by any participating employer for which such retirant was employed or appointed during the final two years of such retirant's participation, such retirant shall not receive any retirement benefit for any month for which such retirant serves in such position or office. . . . The provisions of this subsection shall not apply to retirants employed as substitute teachers or officers, employees, appointees or members of the legislature or any other elected officials."

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, 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. 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. at 803. 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 purpose of the Kansas public employees retirement act, K.S.A. 74-4901 to 74-4929, inclusive, and amendments thereto, is set forth in K.S.A. 74-4901.

> "The purpose of this act is to provide an orderly means whereby employees of the participating employers who have attained retirement age as herein set forth 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, and for the purpose of effective economy and efficiency in the administration of governmental affairs."

It is obvious that the legislative purpose of the statutes creating KPERS was to enable the employees to accumulate reserves for themselves and their dependents on retirement and to insure a fiscally solvent retirement system. Donner v. Kansas Dept. of Human Resources, 236 Kan. 371, 376 (1984). Therefore, if the classification created by the statute in question may enable employees to accumulate reserves for themselves and their dependents for old age, death and termination of employment and insure a fiscally solvent retirement system, the classification will be upheld, and a violation of the equal protection clauses of the United States and Kansas constitutions will not have occurred.

K.S.A. 1990 Supp. 74-4914 appears to have been enacted in part to insure the fiscal integrity of KPERS. The legislative classifications in K.S.A. 1990 Supp. 74-4914(6) are subject to judicial revision only to the extent of seeing that the classifications are founded on real distinctions in 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, 807. Testimony before the house committee on pensions, investments and benefits indicates that substitute teachers were excluded from the provisions of K.S.A. 1990 Supp. 74-4914(6) as substitute teachers for some school districts could quickly reach the compensation limit and the school district would "lose the retired teacher as a possible substitute, which would take away a valuable resource to the district." Testimony of Craig Grant, House Committee on Pensions, Investments and Benefits, Minutes, March 2, 1989. Legislative history is of little assistance in indicating the purpose of excluding officers, employees, appointees or members of the legislature, or any other elected officials from the provisions of subsection (6).

> "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).

Although the legislative history does not indicate the purpose for excluding officers, employees, appointees or members of the legislature, or any other elected officials from the provisions of K.S.A. 1990 Supp. 74-4914(6), legitimate purposes for such classifications may certainly exist. Because legislative classifications have a presumption of

constitutionality, and no evidence which would override such a presumption has been presented, the classifications set forth in K.S.A. 1990 Supp. 74-4914(6) are deemed to be legitimate. Such classifications will not result in a violation of the equal protection clauses of the United States constitution or the Kansas constitution.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Richard D. Smith

Richard D. Smith
Assistant Attorney General

RTS:JLM:RDS:jm