

Opinion No. 67-31

February 22, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Clay Buchanan Director New Mexico Legislative Council Santa Fe, New Mexico. Attention: Representative John M. Eaves

QUESTION

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Would any person who has retired pursuant to Section 5-5-6.1 New Mexico Statutes Annotated, 1953 Compilation, relating to the public employees' retirement plan for lieutenant governors and legislators, have any type of vested right which cannot be affected by a law repealing this section with the return of all contributions made?

CONCLUSION

See analysis.

OPINION

{*37} ANALYSIS

It must be borne in mind that we are not here dealing with a situation such as that presented in **State ex rel., Mechem v. Hannah**, 63 N.M. 110, 314 P.2d 714 and **State ex rel., Callaway v. Axtell, et al**, 74 N.M. 339, 393 P.2d 451. The first of those cases refused to allow the expenditure of illegally appropriated funds -- the illegality arising because the disbursement of the funds violated the antidonation provision of the constitution. Article 9, Section 14. In the **Axtell** case, filed because of the **Hannah** decision, the Court held that public moneys paid out pursuant to a statute which was later declared to be unconstitutional could be recovered by the State.

{*38} What we are now faced with is a situation where certain legislators, having met all the requirements of the legislative retirement provisions of the Public Employees' Retirement Act, have retired and are now drawing an annuity. No Court decision has been rendered declaring the legislative retirement provisions of the Public Employees' Retirement Act unconstitutional. So we do not address ourselves to this at all. The question then is whether legislators who have retired under a **presumably** constitutional Act can henceforth be deprived of their annuity if the retirement provisions under which they retired are repealed.

We must inform you initially that the many court decisions on identical or similar situations are not entirely harmonious (to say the least) even in the same jurisdiction.

We will first discuss the case of **Kern v. City of Long Beach**, 29 Cal. 2d 848, 179 P.2d 799 (1947). That case involved a city fireman who entered upon his duties at a time when the law provided for a pension for such persons upon completion of twenty years' service. Effective as of March 29, 1945, approximately 32 days before petitioner completed the required 20 years' service, a new section was added to the charter purporting to repeal the pension provision and to eliminate pensions as to all persons not then eligible for retirement. The city rejected petitioner's application for retirement filed after he had completed his 20 years service.

The Court said the question to determine:

"is whether petitioner acquired a vested right to a pension which the city could not abrogate by repealing the charter provisions without impairing its obligation of contract."

The Court further said:

"It is settled in this state that pension rights acquired by public employees under statutes similar to the Long Beach charter become vested as to each employee **at least on the happening of the contingency upon which the pension becomes payable.**" (Emphasis added).

The court cited numerous cases to support this view. One such case, quoted with approval as follows, is **Giannettino v. McGoldrick**, 295 N.Y. 208, 66 N.E. 2d 57:

"Pension annuities . . . are in the nature of compensation for the services previously rendered for which full and adequate compensation was not received at the time of the rendition of such services. They are in effect pay withheld to induce long-continued and faithful services."

In the **Long Beach** case the decision stated that:

". . . the employing governmental body not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due. **Clearly, it cannot do so after all the contingencies have happened**, and in our opinion it cannot do so at any time after a contractual duty to make salary payments has arisen, since a part of the compensation which the employee has at that time earned consists of his pension rights." (Emphasis added).

The underlined portion of the above is important since many decisions make a distinction between those persons retired prior to a pension plan repeal and those who have not yet retired prior to the repealer. And, in fact, the California court made this distinction in a case more recent than the **Long Beach** case (**Wallace v. City of Fresno**, Cal., 256 P.2d 1001 (1953)), quoting with approval the following from another California case as follows (**Brophy v. Employees {*39} Retirement System**, 71 Cal. App. 2d 459, 162 P.2d 941):

". . . the determination that a pension right becomes a part of the contract of employment and is a vested right, does not settle the question as to when the right vests and what the extent of this vested right may be. It is now too well settled to require extended discussion that the right to a pension does not become vested until the happening of the contingency upon which the pension becomes payable, usually retirement for disability or length of service."

These pension plan repealer enactments have frequently been the subject of litigation. See for example the following decisions (which vary **widely** in result): **Rafferty v. United States**, 210 F.2d 934; **Hunter v. Sparling**, 87 Cal. App. 711; 197 P.2d 807; **Bender v. Anglin**, 207 Ga. 108, 60 S.E. 2d 756; **Keegan v. Board of Trustees of Illinois Municipal Experiment Fund**, 412 Ill. 430, 107 N.E. 2d 702; **Klamm v. State ex rel. Carlson**, Ind., 126 N.E. 2d 487; **Rockenfield v. Kuhl**, Iowa, 46 N.W. 2d 17; **Fisher v. New York State Employees' Retirement System**, 110 N.Y.S. 2d 16; **Cunat v. Trustees of Cleveland Police Relief and Pension Fund**, 149 Ohio 477, 79 N.E. 2d 316, supplemented by 82 N.E. 2d 743; **Baker v. Retirement Board of Allegheny**, 374 Pa. 165, 97 A. 2d 231; **Bowen v. Board of Trustees of Police Pension Fund**; La. App., 76 So. 2d 430; **Brown v. City of Highland Park**, 320 Mich. 108, 30 N.W. 2d 798; **State ex rel, Police Retirement System of City of St. Louis v. Murphy**, Mo., 224 S.W. 2d 68; **McFeely v. Pension Commission of City of Hoboken**, N.J. Super. 73 A. 2d 757; **Newcomb v. Ogden City Public School Teachers' Retirement Commission**, Utah 243 P.2d 941; **State ex rel., Stringer v. Lee**, Fla., 2 So. 2d 127; **Cawley v. Board of Trustees of Firemen's Pension or Relief Fund of City of Beckley**, W. Va., 76 S.E. 2d 683; **City of Birmingham v. Penuel**, Ala. 5 So. 2d 723; **Bedford v. White**, Colo., 106 P.2d 469; **Miller v. Price**, Ky., 139 S.W. 2d 450; **Board of Education of Louisville v. City of Louisville**, Ky., 157 S.W. 2d 337; **Leslie v. Minneapolis Teachers Retirement Fund Association**, Minn., 16 N.W. 2d 313; **State ex rel., Casey v. Brewer**, Mont., 88 P.2d 49; **City of Dallas v. Trammel**, Tex., 101 S.W. 2d 1009; **State ex rel., McCarty v. Gantter**, Wis., 4 N.W. 2d 153.

Based on the cited cases, as well as a number of others, C.J.S., **Constitutional Law**, Section 252 concludes as follows:

"Persons entitled to receive pension payments which have actually accrued and become due and owing have a vested right thereto, regardless of whether or not the pension is considered a gratuity or a form of deferred compensation; but as a general rule, the right to receive a pension which is a mere bounty or gratuity is not a vested right with respect to amounts payable in the future. Where, however, a pension or retirement allowance to public officers or employees, or their widows or beneficiaries is involved, there is a wide divergence of opinion on the question of whether or not the right thereto is a vested right. A public employee who has not complied with the eligibility requirements to participation in a pension or retirement plan has no vested right therein.

* * *

Vested rights in pension or retirement allowances have been held to arise in favor of the participants by reason of their payment of a voluntary consideration into the fund; but the fact that participation by public officers or employees in a pension or retirement system is compulsory, as where mandatory deductions are taken from their salaries for the fund, confers no vested right on the participants, except, {**40*} however, that a right given by the pension system to contributors to a refund of a specified portion of the amount paid in if they cease their employment before retirement is a vested right which the legislature cannot destroy."

Our analysis of your question, **assuming that the legislative retirement provisions are constitutional**, leads us to two conclusions as to the **majority rules** in the various jurisdictions:

(1) If a person has completed the various conditions precedent to retirement and the receiving of an annuity, he has a vested right to such annuity and cannot be deprived thereof by a subsequent repeal of the pension provisions;

(2) If a person has not yet completed the various conditions precedent to retirement and the receiving of an annuity, he can, under certain circumstances, be deprived thereof by a subsequent repeal of the pension provisions.

We cannot be more specific because the views of the various courts which have rendered decisions on these questions are too divergent.

By: Oliver E. Payne

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