Opinion No. 88-66

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OPINION OF: HAL STRATTON, Attorney General

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TO: Carlos A. Gallegos, Executive Secretary, Public Employees' Retirement Association, P.O. Box 2123, Santa Fe, New Mexico 87504-2123

QUESTIONS

May judges who retired before 1987 N.M. Laws, Ch. 241 became effective receive a cost-of-living increase to their retirement annuities pursuant to such law?

CONCLUSIONS

No.

ANALYSIS

In 1987, the Legislature amended the Judicial Retirement Act ("JRA"), Sections 10-12-1 to 10-12-17 NMSA 1978 (Repl. 1987). 1987 N.M. Laws, ch. 241 ("Chapter 241"). Section 1 of Chapter 241 created a new Section 10-12-16, which provides: "Each annuity paid under the Judicial Retirement Act shall be adjusted in the manner provided in Section 10-11-29 NMSA 1978."[1] Section 4 of Chapter 241 amended Subsection 10-12-1(B) to add the following underscored language:

Any former judge or justice who is receiving retirement pay shall continue to receive only the annual amount of retirement pay fixed by the law in force at the date of his retirement; **provided, however, that any former judge or justice shall receive cost-of-living adjustments pursuant to Section 10-12-1 NMSA 1978.**

(Emphasis added). Section 10-12-1 provides no cost-of-living adjustment ("COLA"). The 1987 Legislature, therefore, may have intended by this citation to refer to the entire JRA, including Section 10-12-16. The question is whether Chapter 241 is constitutional to the extent that it purports to grant COLAs to judges or justices who were not in the state's service on the date Chapter 241 became effective.[2]

Article IV, Section 27 of the New Mexico Constitution provides: "No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made...." Article IX, Section 14 of the New Mexico Constitution provides: "Neither the state, nor any county, school district or municipality, except as otherwise provided in this constitution, shall ... make any donation to or in aid of any person...." In State ex rel. Sena v. Trujillo, 46 N.M. 361, 129 P.2d 329 (1942), the

New Mexico Supreme Court refused to apply a 1941 state pension law to Sena, who had retired from the State's service before the Legislature passed the law.[3] Sena met the age and service requirements of the statute, but had not served the State under this pension law. To apply the statute to Sena would amount to "extra compensation," a "donation" or both.[4] The grant of public pension benefits to a public officer violates these sections of the constitution unless the officer renders services while the pension statutes are in effect, so that those pension provisions may be said to be "a part of the contemplated compensation for those services." Id. at 367, 129 P.2d at 332 (quoting O'Dea v. Cook, 176 Cal. 659, 661, 169 P. 366, 367 (1917) (a pension becomes a gratuity when it is granted for service previously rendered)).

This principle applies equally to amendments of public employee pension statutes. The court in State ex rel. Sena quoted with favor from Porter v. Loehr, 332 III. 353, 361, 163 N.E. 689, 691-92 (1928), which held that an amended pension statute could not apply to policemen no longer in the service:

The amendatory acts increasing the pensions of retired policemen do not contemplate the rendition of additional services by pensioners. They were paid when they performed their services and the amounts of their pensions were fixed by law when they retired. The increases are not granted for services to be performed by the pensioners, but have as their sole basis or justification the services which they rendered prior to their retirement.... No obligation, either legal or moral, to pay more than the stipulated compensation arises where no additional services have been or will be rendered.

46 N.M. at 368, 129 P.2d at 333. See also People ex rel. Schmidt v. Yerger, 21 III. 2d 338, 172 N.E.2d 753 (1961) (retired firemen could not receive an increased pension as a result of amendment adopted after retirement).

In State ex rel. Hudgins v. Public Employees Retirement Bd., 58 N.M. 543, 273 P.2d 743 (1954), the New Mexico Supreme Court upheld the constitutionality of 1953 N.M. Laws, ch. 162, § 2.1(6), which allowed persons who retired under an earlier public employees retirement act to obtain Chapter 162's benefits by paying 1 1/2% of their total salary received during the last five years before retirement. The retirement board contended that the provision violated Article IV, Section 27 and Article IX, Section 14. On the basis of Illinois authority,[5] the court distinguished a "pension" from an "annuity." It concluded that the 1953 law merely permitted the State to contract to pay annuities, and that these contracts did not violate a constitutional provision or public policy.

Hudgins does not support the constitutionality of Chapter 241's COLA provision, because it does not require former judges to make additional contributions to receive the COLA. Further, the benefits that the Public Employees Retirement Act ("PERA"), Sections 10-11-1 to 10-11-140 NMSA 1978 (Repl. 1987), provides are "employee compensation." Copeland v. Copeland, 91 N.M. 409, 411, 575 P.2d 99, 101 (1978). Courts usually characterize public retirement benefits as "deferred compensation." See Att'y Gen. Op. 87-62, at 6 (1987). Generally, PERA membership and resulting member contributions are mandatory. See Section 10-11-3. Hudgins' distinction, therefore,

between "pensions," funded by compulsory contributions, and "annuities," contracted with voluntary contributions, may have little relevance today.

On the basis of constitutional provisions similar to Article IV, Section 27, the majority of state courts that have addressed the issue hold unconstitutional, as amounting to "extra compensation", statutes that attempt to increase the pensions of persons to retired before the statute became effective. In Sonnabend v. City of Spokane, 53 Wash. 2d 362, 364, 333 P.2d 918, 919-20 (1958), the court noted that pensions are "deferred compensation" and refused to apply a 1957 law to increase the pensions of pre-1957 retirees: "It is obvious that the raising of the pensions of the three retired police officers is the granting of extra compensation "after services have been rendered." Accord, Smiley v. City of Tacoma, 53 Wash. 2d 562, 335 P.2d 50 (1959) (refusing to apply a retirement law to increase pensions of those retired before the law's enactment date); Aldrich v. State Employees Retirement System, 49 Wash. 2d 831, 307 P.2d 270 (1957) (service must be rendered after the effective date of the retirement act, so that the act will constitute a part of the employment contract; the pensions the act provides are deferred compensation for subsequent service, not gratuities predicated merely on prior service). Cf. Luders v. City of Spokane, 57 Wash. 2d 162, 356 P.2d 331 (1960) (1958 constitutional amendment expressly allowing pension increases after pension grant authorized legislature to enact a law increasing pension benefits retroactive to July 1, 1957).

In Police Retirement System v. Kansas City, 529 S.W.2d 388 (Mo. 1975), the court held unconstitutional a COLA to the pensions of policemen who had retired before the COLA law was enacted. The COLA was unconstitutional under either the anti-donation clause or the "extra compensation" prohibition of Missouri's constitution. The law did not require the policemen to contribute money to qualify for the COLA. The court also rejected the policemen's contention that the COLA only offset inflation and did not increase the pensions' "purchasing power," because "similar claims for adjustments in previously awarded contracts could and would be asserted on the basis that inflation authorized increases in the contract price." Id. at 393. In State ex rel. Cleveland v. Bond, 518 S.W.2d 649 (Mo. 1975), the court held unconstitutional retroactive provisions of a judicial retirement act that conferred benefits on a judge who retired before passage of the act. The court concluded that allowance of benefits would constitute a "gift" and "extra compensation" contrary to the state's constitution. The court stated: "The reasoning of the courts which have considered this question irrefutably demonstrate that under analogous constitutional provisions retroactive retirement laws written to include public officers or employees not in the state's service at the time of enactment are unconstitutional." Id. at 652. Cf. Voght v. Ridgway, 602 S.W.2d 467 (Mo. App. 1980) (pension increase under a fluctuating pension plan was not unconstitutional where the ordinance that was in effect when the officer retired provided fluctuating pension based on the current officer's salary).

Similarly, in State ex rel. Breshears v. Missouri State Employees Retirement System, 362 S.W.2d 571 (Mo. 1962), the court held unconstitutional a statute that increased retirees' benefits, because it impaired the contract rights of current members. The

retirees paid no money for the increased benefits. These increased benefits "would deplete the fund to substantial extent, and do so gratuitously." Id. at 576. Nor could the retirees eliminate that constitutional defect by making a token payment:

[Minor] payments ... could not conceivably be considered to supply equitably any deficiency created in the fund. If, perchance, the legislature should see fit to provide retroactively for an increase upon the payment of such a sum or sums as might constitute the approximate cash value of the proposed increase, upon an actuarial basis, we would have a different question.

Id. at 577.

In Burton v. City of Albany, 40 Misc. 2d 50, 242 N.Y.S.2d 510 (1963), the court held that a 1952 widow's benefit provided by city ordinance did not apply to the widow of a retiree who retired before the ordinance's enactment date. To apply the ordinance to the widow would violate the then-existing state constitutional provisions prohibiting "gifts" and "extra compensation"; the 1959 constitutional amendment allowing increases in widows' benefits had no effect, because the amendment did not have retroactive application. See also People ex rel. Waddy v. Partridge, 172 N.Y. 305, 65 N.E. 164 (1902). (statute providing a widow's pension was not applicable to widow of retiree who retired six years before the statute's enactment; to construe otherwise would amount to an unconstitutional appropriation of public moneys to purely private purposes).

In Koehnlein v. Retirement System for Employees of Allegheny County, 373 Pa. 535, 97 A.2d 88 (1953), the court held unconstitutional, as "extra compensation," an amendment to the retirement system that increased a pre-amendment retiree's pension. The court stated that retirement benefits are "deferred compensation" and rejected the retiree's "purchasing power" argument. See also Jameson v. City of Pittsburg, 381 Pa. 366, 113 A.2d 454 (1955) (statute increasing retirees' pensions unconstitutional; retirees' payment of $200 did not remove constitutional impediment).

In State ex rel. Thomson v. Giessel, 262 Wis. 51, 53 N.W.2d 726 (1952), (Gissell I), the court held that a legislative grant of additional retirement benefits to persons who had retired before the grant amounted to constitutionally prohibited "extra compensation." The additional benefits could not be sustained as restoring the economic value of compensation already granted. The teachers' retirement benefits were "not expressed in purchasing power.... Compensation was expressed in dollars, and additional dollars are extra compensation which the constitution forbids the legislature to grant." Id. at 56, 53 N.W.2d at 728.[6] See also State ex rel. Smith v. Annuity & pension Bd., 241 Wis. 625, 6 N.W.2d 676 (1942) (holding unconstitutional application of amendment that increased pensions to persons who were not employees or members of the system when the amendment became effective).

In State ex rel. Haberlan v. Love, 89 Neb. 149, 156, 131 N.W. 196, 199 (1911), the Nebraska Supreme Court refused to apply a post-retirement law to increase a retired fireman's pension, stating:

[T]he pension forms an inducement to the individual to enter and remain in the service of the fire department ... the pension in a sense is part of the compensation paid for those services.... [I]f no part of the service was rendered subsequent to the enactment of the law, the compensation would be a gratuity forbidden by the fundamental law of the state.... [S]ince he rendered the state no services subsequent to the enactment of that amendment, to increase his pension would violate section 16, art. 3, of the Constitution [forbidding "extra compensation" after services are rendered].

In Wilson v. Marsh, 162 Neb. 237, 252-53, 75 N.W.2d 723, 732-33 (1956), in interpreting a statute involving judicial retirement, the court stated: "If the services are rendered and terminated before the grant is made the benefits awarded are not compensation but are a gratuity.... [R]etirement benefits are either earned compensation for services rendered after the grant ... or that they are a gratuity and not a part of compensation and therefore invalid." In Retired City Civilian Employees Club of Omaha v. City of Omaha Employees' Retirement System, 199 Neb. 507, 260 N.W.2d 472 (1977), the Nebraska Supreme Court relied on Love and Marsh to conclude that a new widow's benefit conferred by ordinance could not apply retroactively to surviving spouses of retirees who retired before the ordinance's enactment data.

California subscribes to the rule that retired public employees may benefit from laws that increase pension benefits. A "pensionable status includes the right not only to pensions as they exist at the time retirement is granted but also to increases...." Nelson v. City of Los Angeles, 21 Cal. App. 3d 916, 918, 98 Cal. Rptr. 892, 894 (1971) (grant of pension increase to persons in a pensionable status before amendment allowing such increase not "extra compensation"). See also Jorgensen v. Cranston, 211 Cal. App. 2d 292, 27 Cal. Rptr. 297 (1962) (spouse of deceased member constitutionally may receive surviving spouse annuity benefit provided by law enacted after the member's death); Sweesy v. Los Angeles County Peace Officers' Retirement Bd., 17 Cal. 2d 356, 110 P.2d 37 (1941) (applying a pension statute amendment to a retiree's spouse). These California authorities are not persuasive. They do not explain how a "pensionable status" overcomes constitutional objections to applying laws that authorize pension increases to persons who retired before the law's enactment date. If the pension increase is compensation, it violates Article IV, Section 27, because it is additional compensation for past services; if it is not compensation, it is a gratuity contrary to Article IX, Section 14.

The Sweesy court cited Board of Trustees v. Schupp, 223 Ky. 269, 3 S.W.2d 606 (1928), and People ex rel. Albright v. Board of Trustees, 103 Colo. 1, 82 P.2d 765 (1938), for the proposition that other states have upheld the constitutionality of increased benefits to persons having a "pensionable status." Id. at 363, 110 P.2d at 40. Schupp did not raise constitutional questions about "extra compensation" or "donations."[7] Albright permitted pension increases to persons having a "pensionable status." However, in McNichols v. Walton, 120 Colo. 269, 208 P.2d 1156 (1949), the Colorado Supreme Court recognized that Colorado's rule is "contrary to the weight of authority." The court also observed: "There seems to be no distinction in principle as to

the use of public funds whether in providing a new pension or increasing an existing pension." Id. at 273, 208 P.2d at 1158.

In Fraternal Order of Firemen v. Shaw, 41 Del. Ch. 399, 196 A.2d 734 (1963), the court upheld the constitutionality of increased benefits to retired firemen concluding that the legislation had a valid public purpose and, therefore was not a prohibited gratuity. The court was able to distinguish cases from other jurisdiction on the ground that Delaware's constitution does not contain a provision analogous to Article IV, Section 27: "An examination of these decisions indicates that those Courts were bound by an express constitutional provision preventing the payment of extra compensation to former public employees who had retired prior to the effective date of the act." Id. at 402, 196 A.2d at 736.

In State ex rel. Sena v. Trujillo, supra, the Supreme Court of New Mexico declined to follow the Colorado Supreme Court's decision in Bedford v. White, 106 Colo. 439, 106 P.2d 469 (1940), which upheld the constitutionality of Colorado's pension law as applied to justices of Colorado's Supreme Court who were not serving the state on the date of the act's passage. The Delaware authority is not applicable, because that state's constitution had no provision similar to Article IV, Section 27; the absence of such provision was critical to the decision in Shaw. Moreover, State ex rel. Sena expressly rejected Delaware's "public purpose" rationale to sanction donations of public funds.

We are reluctant to opine that any statute is unconstitutional. See State ex rel. Whittier v. Safford, 28 N.M. 531, 534, 214 P. 759, 760 (1923) (In doubtful cases, statute's constitutionality is favored; only when a statute clearly violates the constitution do courts so construe it). Nevertheless, the New Mexico Supreme Court's decision and rationale in State ex rel. Sena and the weight of authority from other jurisdictions[8] persuade us that Chapter 241's COLA may not be applied constitutionally to increase the pensions of judges who had ceased serving as judges before Chapter 241 became effective. The law in effect when they retired fixed their pensions; that law expressly prohibited any later increases to their annuities. See Subsection 10-12-1(B) NMSA 1978 (Repl. 1983) (amended by Chapter 241). To apply retroactively Chapter 241's COLA to increase such former judges' pensions would offend either Article IV, Section 27 or Article IX, Section 14 of the New Mexico Constitution. Notwithstanding Chapter 241, Section 4's apparent application of the COLA statute to former judges, we construe this COLA statute to operate prospectively only, i.e., to apply only to judges in the State's service on or after Chapter 241's effective date. See Phelps Dodge Corp. v. Dept. of Taxation & Rev., 103 N.M. 20, 24, 702 P.2d 10, 14, (Ct. App.), cert. denied, 103 N.M. 62, 702 P.2d 1007 (1985) (notwithstanding) legislative language directing retroactive application of statutory amendment, the statute constitutionally must apply prospectively only). Accordingly, we conclude that judges who retired before Chapter 241's effective date may not receive an increase to their retirement annuities pursuant to that law.

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GENERAL FOOTNOTES

n1 Section 10-11-29 was repealed by 1987 N.M. Laws, ch. 253, § 140. Section 10-11-118 NMSA 1978 is the current cost-of-living adjustment provision for Public Employees Retirement Association retirees.

n2 Chapter 241 became effective on June 19, 1987. See Ch. 241, § 6, making the act effective on the same day as House Bill 87 (1987 N.M. Laws, Ch. 123). Chapter 123 became effective ninety days after the Legislature adjourned on March 21, 1987. N.M. Const., art. IV, § 23.

n3 The statute provided: "[E]very person or persons, who has served the Territory and the State of New Mexico, for a period of thirty consecutive years, and who has passed the age of sixty-five (65) years, shall be entitled to receive a [$125 per month] pension...." The court did not question the statute's constitutionality, except as it applied to one not in the state's service when the Legislature enacted the statute.

n4 The Court stated that Article IV, Section 31 (prohibiting appropriations to persons not under the state's absolute control) also prohibited Sena from receiving the pension.

n5 See Krebs v. Board of Trustees 410 III. 435, 102 N.E.2d 321 (1951) (retirees could increase their annuities by voluntary payment of $300 plus interest; increase in "pensions" is "extra compensation," but voluntary contributions create a permissible contract for an annuity increase); Raines v. Board of Trustees, 365 III. 610, 7 N.E.2d 489 (1937) (retirees could pay $200 plus interest to receive an annuity increase; retirees from whom compulsory contributions have been exacted may not receive an increase under a post-retirement amendment).

n6 After Gissel l, the legislature enacted a statute to grant an additional $25 each month to retired teachers if they remained available as substitute teachers. In State ex rel. Thomson v. Gissel, 265 Wis. 558, 61 N.W.2d 903 (1953) (Gissell ll), the Wisconsin Supreme Court held the new statute constitutional, because the payments represented an inducement to secure substitute teachers and not compensation for past services. In State, Department of Administration v. Wisconsin Employment Relations Commission, 90 Wis.2d 426, 431-32, 280 N.W.2d 150, 153 (1979), the court discussed the Gissel decisions and noted that Wisconsin's constitution has since been modified as it relates to retirement benefits.

n7 In Hyde v. Haunost, 530 S.W.2d 374 (ky. App. 1975), the court described Schupp as holding that COLA legislation that adjusted the pensions of pre-statute retirees satisfied a valid public purpose. Hyde upheld the constitutionality of a 1970 ordinance that increased the pensions of pre-July 1, 1964 pensioners. The only constitutional challenge to the ordinance, however, was based on its asserted discriminatory provisions.

n8 Our research, set forth above, reveals that decisions by courts in Nebraska, New York, Missouri, Pennsylvania, Washington, and Wisconsin support our conclusion. Courts in California and Colorado have reached an opposite result. The Delaware and Kentucky courts never address the "extra compensation" question.