

records shall be open to public inspection and that birth certificates be given to anyone who applies making special provision in cases of illegitimacy.

## WISCONSIN

Wisconsin has provision for a system of registration of vital statistics. Acts of 1943, Chapter 503, found in Chapter 69 Wisconsin Statutes of 1943, provides that records shall be open to the public with some restrictions relative to the registration of illegitimate births.

## WYOMING

Wyoming has a system of registration of vital statistics. Chapter 116 of the Acts of 1941, found in 63-610 of Wyoming Compiled Statutes, adopts in effect provisions of the Uniform Vital Statistics Act relative to limitations on inspection and the confidential nature of records.

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OFFICIAL OPINION NO. 55

August 30, 1948.

Hon. C. E. Ruston,  
State Examiner,  
State Board of Accounts,  
Indianapolis, Indiana.

Dear Sir:

I am in receipt of your letter of recent date requesting an official opinion relating to subsection 3 of Section 48-6403 Burns' Statutes, 1947 Supplement, which subsection refers to the method of retirement of members of the Police Pension Fund. Your specific question is quoted as follows:

"Will you please state whether or not in your opinion, members of the police force who have heretofore retired may make additional applications from time to time as the salary of a first class patrolman may be increased which increase would affect the amount received by the retired policeman."

Subsection 3 of Section 3 of Chapter 188 of the Acts of 1941, same being subsection 3 of Section 48-6403 Burns' Statutes, 1947 Supplement, provides in part as follows:

"Except as hereinafter provided, to the payment of fifty dollars (\$50.00) per month to any member of such police force who shall have been in the service of such city as a member of such police force for twenty (20) years, if such member shall, after such twenty (20) years' service apply in writing to said board of trustees to be retired from such police force, and to the payment to any such retiring member of the sum of five dollars (\$5.00) per month additional for each full year of service on such police force in excess of twenty (20) years' service. Except as hereinafter otherwise provided, no member shall receive more than seventy-five dollars (\$75.00) per month: Provided, however, That the board of trustees of said pension fund of any city may, by majority vote, at any regular meeting, adopt a resolution providing for the payment to any member of such police force who shall ever have been in the service of such city as a member of such police force for a period of twenty (20) years, if such member shall, after such twenty (20) years of service, whether already retired or to be hereinafter retired, apply in writing to said board of trustees to be retired, or state that he has been retired from such police force, the sum of fifty (50) per cent per month of such salary as is at the time of such application paid to a first class patrolman, and to the payment of any such police officer of the sum of two (2) per cent per month additional for each full year of service on such police force in excess of such twenty (20) years' service: Provided, That such additional compensation, in addition to the fifty (50) per cent of such salary of such first class patrolman above provided for, shall not be based or paid upon any service in excess of twenty-five (25) years, to the end that no police officer so retiring, as above provided for shall receive in excess of sixty (60) per cent of the salary received by such first class patrolman at the time of such application."

Before answering your question, I believe it advisable to set out certain principles of law as they pertain to pension systems.

The constitutionality of statutes establishing a pension system has been sustained by the courts on the grounds that the primary object is not a private but a public interest; that the annuities are in the nature of compensation for services previously rendered for which full and adequate compensation was not received at the time of rendition of service. It is in effect pay withheld to induce long continued service. The beneficent purpose is to improve the quality of the public service by holding out to those who adopt it as a career some assurance of a competency upon retirement because of age or disability, in the expectation that more competent persons will be attracted to such positions.

*State ex rel. Clemens v. Kern et al.* (1939), 215 Ind. 515, 20 N. E. 514;

*Sommers v. Patton* (1948), 399 Ill. 540, 78 N. E. (2) 313;

*People ex rel. Kroner v. Abbott* (1916), 274 Ill. 380, 113 N. E. 696.

Our Supreme Court has accordingly held that the law is entitled to a liberal construction in favor of those intended to be benefited thereby.

*State ex rel. Bolden v. Johnstone* (1937), 211 Ind. 281, 6 N. E. (2) 706;

*State ex rel. Clemens v. Kern et al., supra.*

The pension fund is accumulated by taxation, by contributions and awards of various sorts, and by enforced contribution by members of the police force. It is established by the great weight of authority, including the Supreme Court of the United States, that such pensions are gratuities; that they involve no agreements of the parties and create no vested rights, notwithstanding compulsory contributions by the parties in the form of allotted sums retained out of the member's pay. Though called part of the officer's compensation, he never received it or controlled it, nor could he prevent its appropriation to the fund in question. He had

no such power of disposition over it as always accompanies ownership of property.

There is no contract on the part of the state that its disposition should always continue as originally provided. Until the particular event should happen upon which the money or part of it is to be paid, there is no vested right in the officer to such payment.

Kern, Mayor v. State *ex rel.* Bess (1937), 212 Ind. 611, 10 N. E. (2) 915;

Pennie v. Reis (1889), 132 U. S. 464, 470;

Roddy v. Valentine (1935), 268 N. Y. 228, 197 N. E. 260;

Stiles v. Board of Trustees of Police Pension Fund of W. Chicago Parks Commissioners (1917), 281 Ill. 636, 118 N. E. 202;

54 A.L.R. Annotated 943;

98 A. L. R. 505.

Where, however, statutory conditions for retirement existing when application is made have been met and the award of the pension or benefit has been made, or as of right should have been made, the interest becomes vested and takes on the attributes of a contract, which, in the absence of statutory reservations, may not legally be diminished or otherwise adversely affected by subsequent legislation.

Pennie v. Reis, *supra*;

Klench v. Board of Pension Fund Com'rs. of City of Stockton (1926), 79 Cal. App. 171, 249 P. 46;

Roddy v. Valentine, *supra*;

Freyermuth, *et al.* v. State *ex rel.* Pinter, *et al.* (1939), 215 Ind. 693, 697, 21 N. E. 707;

State *ex rel.* Cunat v. Trustees of Cleveland Police Relief & Pension Fund, *et al.* (1948), — Ohio —, 79 N. E. (2) 316.

In construing the statute herein in question, it is likewise to be particularly noted that the question of whether or not pensions granted to retired public officers or employees may

be increased after their periods of service have ended is distinct and different from the question of the power to provide pensions for public officers and employees in active service.

In the case of *Porter v. Loehr* (1928), 332 Ill. 353, 163 N. E. 689 at 691, it was said that the consideration or grounds for sustaining the constitutionality of statutes establishing pension systems have no application to public officers or employees who are not in the public service at the time the pension system is established or when increases in pensions are granted. Therein it was held that a statute purporting to authorize paying of pensions to former policemen in excess of the amounts allotted them by the laws in force at the time of their respective retirements was unconstitutional. The court stated that such increases in pensions to retired public officers would nullify appreciably the public benefits derived from general pension laws by depleting the funds rightfully applicable to the payment of benefits of officers and employees in the active service when they ultimately retire; that such increases served no real public purpose; that the additional payments attempted to be authorized are but mere gifts and gratuities to individuals; that it is well settled that taxes can be levied for public purposes only and that the exercise of the taxing power for merely private purposes is beyond the authority of the State. *Savings and Loan Ass'n. v. Topeka* (1874), 87 U. S. 665, 22 L. Ed. 455, 1 Cooley on Taxation (4th Ed.) Section 174.

Judge Dillion, in his work on *Municipal Corporations* (5th Ed.) Section 430, says:

“But to be valid under constitutional requirements, the pensions must be conferred upon persons *who at the time* of receiving the right to them are officers or employees of the municipality. They cannot be conferred upon persons who had, previously to the grant, retired from the service of the city. A pension to such persons is an appropriation of public funds for the benefit of individuals and a gift or gratuity.”

The Supreme Court of Illinois in the case of *O'Neil v. Harding et al.* (1924), 314 Ill. 516, 145 N. E. 593, and in the case of *Sup v. Cervenka, et al.* (1928), 331 Ill. 459, 163

N. E. 396, said that although they could see no sound reason for doing so, nevertheless, the Legislature could provide that one's pension shall vary as the salary of those on active duty vary.

And in the case of *Klench v. Board of Pension Fund Com'rs. of City of Stockton* (1926), 79 Cal. App. 171 (petition to have cause heard by Supreme Court denied by Supreme Court), such a statute was upheld. Therein the statute then in question was held to mean that the amount of pension is subject to increase or decrease, as the salary paid to police officers of that rank is increased or decreased. This case likewise held that while no public officer or employee of the government is entitled as his right to a pension, still when once the government establishes a retirement pension system for its officers and employees and provides the funds and means for administering it according to its design, any such officer or employee when the conditions arise or occur upon which, under the rules and regulations of the system, he becomes eligible to be retired and placed upon the pension roll, and having met all the requirements entitling him to be so retired, has in fact been retired and enrolled upon the pension list, he has then acquired a vested right to draw his pension and to receive as such whatever sum or sums of money may be provided for such purpose for officers and employees of the class to which he belongs.

In the disposition of the fund it is of prime importance that the benefits paid shall be restricted to those persons lawfully entitled thereto to the end that the funds shall not be dissipated to the injury of those who in good faith contributed to their accumulation.

*State ex rel. Clemens v. Kern, et al. supra.*

It was stated in the case of *People ex rel. Albright v. Firemen's Pension Fund* (1938), 103 Colo. 1, 118 A. L. R. 984, 82 P. (2) 765, that the Legislature may provide for the disposition of the funds which are public funds as it sees fit, provided it does not so deal with them as to impair the vested rights, if any, of others.

The statute herein involved must be interpreted in the light of the principles herein stated, but before doing so, I believe it advisable and well to point out that the original act, that is, the Acts of 1925, Chapter 51, did not provide for

the alternative method of payment (50%) by the adoption of the resolution by the board of trustees, nor did it include cities of the fifth class. Said act was amended by the Acts of 1931, Chapter 58, page 139, and again by the Acts of 1941, Chapter 188, page 565. The 1931 amendment provided for the "alternative" and called for a unanimous vote of the board. The 1941 amendment changed the vote from unanimous to a majority and made the provisions applicable to all cities.

The first part of the section of the statute herein involved is clear and unambiguous. If there be no resolution passed by the board of trustees, as provided by said section, then it is apparent that all on retirement and having acquired a pension status shall receive a payment of \$50.00 per month and those on retirement and having acquired a pension status who rendered more than twenty years' service shall receive an additional \$5.00 per month for each full year of service in excess of twenty years. In no case, however, shall any member receive more than \$75.00 per month.

The problem herein presents itself only after the resolution has been passed by the board. As pointed out herein, the rights or benefits of those who acquired a pension statute are vested and those rights or benefits cannot be changed, modified, diminished or increased by later legislative action and, as pointed out above, any attempt to do so would be declared invalid. Therefore, those having acquired a pension status prior to the going into effect of the 1931 amendment will in no way be affected by the amendment. As for those acquiring a pension status after the effective date of the amendment and before the adoption by the board of an alternative method of pay, they have, after the adoption of the resolution by the board, in my opinion, the right of an election.

They may continue to receive their then benefits or they may apply in writing to the board stating that they are on retirement as pursuant to the alternative provision. I say "election" for the reason that the board is presumed to know all who are on retirement and who have acquired pension status prior to the resolution and, therefore, a statement in writing by one on retirement to the board can be interpreted to mean only that it is an expression on the part of the applicant that he now wants to come under the resolution.

Perhaps here it is well to state that the board of trustees in considering the resolution, as provided by the section herein, should always keep uppermost in their minds that they are the watchdogs of the treasury and they are not permitted to impair any vested rights of those having a pensionable status. The passing of the resolution would, of course, in no way impair the vested rights of those who have not acquired a pensionable status for they have none. As for those not having a pensionable status when the law was amended, their rights under any future pensionable status they may acquire must be determined by the law as amended.

You specifically ask whether or not members of the police force who have heretofore retired may make additional applications from time to time as the salary of a first class patrolman may be increased, which increase would affect the amount received by the retired policeman. As for those who retired prior to 1931, as previously pointed out, their status was fixed by the law then applicable. As for those who retired subsequent to 1931, the Legislature provided for but one application for those desiring to participate under the resolution.

The statute, in so far as it pertains to those then on retirement, provides:

“\* \* \* That the board of trustees of said pension fund of any city may, by majority vote, at any regular meeting, adopt a resolution providing for the payment to any member of such police force who shall ever have been in the service of such city as a member of such police force for a period of twenty (20) years, if such member shall, after such twenty (20) years of service, whether already retired, \* \* \* apply in writing to said board of trustees \* \* \*, or state that he has been retired from such police force, the sum of fifty (50) per cent per month of such salary as is *at the time of such application paid to a first class patrolman*, and to the payment of any such police officer of the sum of two (2) per cent per month additional for each full year of service on such police force in excess of such twenty (20) years' service: Provided, That such additional compensation, in addition to the fifty (50) per cent of such salary of such first class patrolman

above provided for, shall not be based or paid upon any service in excess of twenty-five (25) years, \* \* \*." (Our emphasis.)

The statute specifically provides that one, after making his application stating in writing to the board that he has been retired from such police force, shall receive the sum of 50 per cent per month of such salary as is *at the time of such application paid to a first class patrolman*. The statute does not provide that one's pension shall vary as the salary of those on active duty vary. This section of the statute contains no language that would permit an interpretation that it was the intent of the Legislature that the amount paid was to fluctuate. Such an interpretation would likewise call for a decrease in payment when the salary of patrolmen was decreased.

The language "is at the time of such application paid to a first class patrolman," refers, in my opinion, in so far as one already on retirement is concerned, to the application of "election" filed with the board and not to the time he originally made his application to retire. As heretofore pointed out, a liberal construction must be rendered on pension laws. Furthermore, it is a rule of statutory construction that a proviso must be read and considered in connection with the section of which it is a part.

Hasse v. Bielefeld, Treasurer (1925), 197 Ind. 498.

It is, therefore, my opinion that but one application may be made by one on retirement and who had acquired a pension status prior to the passage of the resolution. No doubt the Legislature had in mind at the time of the passage of the amendment the economic conditions of the hour. In 1931 we were in the midst of a depression. Men then on pension had been asked and did accept decreases in payment and men then on the Police Department then were asked and did accept decreases in salary.

Freyermuth, *et al.* v. State *ex rel.* Pinter (1939), 215 Ind. 693.