

MEMORANDUM

TO: Gary Anderson
Executive Director
Texas Public Employees Association

FROM: Forrest C. Roan

DATE: July 6, 2009

SUBJECT: Attorney General Opinion Request regarding the validity of Supplemental Payments to retired state and public school employees through appropriations in S.B. 1, 81st Legislature, Regular Session, 2009 (RQ-0801-GA)

INTRODUCTION

State Senator Steve Ogden and State Representative Jim Pitts, Chairs, respectively, of the Senate Finance Committee and the House Committee on Appropriations and as Co-Chairs of the Conference Committee on S.B. 1, 81st Legislature, Regular Session, 2009, submitted a request for an Attorney General's Opinion (RQ-0801-GA) to the Honorable Greg Abbott, Attorney General of Texas.

Their request raises issues regarding the validity of appropriations made in Section 17.13, Article IX, of that Act for one-time payments from the General Revenue Fund for distribution by the Employees Retirement System of Texas ("ERS") and the Teacher Retirement System of Texas ("TRS") to certain annuitants of those systems. You requested my review of the Act, the issues raised in the aforementioned request, and the law applicable thereto. The following reflects my findings and discusses the context therefor.

SUMMARY

For the reasons discussed below, the conclusion is inescapable that the appropriations made in Section 17.13, Article IX, of the General Appropriations Act ("GAA") for the 2010-11 biennium are a valid exercise of the Legislature's discretionary appropriation power, are made in a manner that comports with constitutional limitations on the appropriation of funds, violate no other constitutional or statutory provision, and in fact are well within legislative precedent.

DISCUSSION

I. Appropriation of Money Generally

Article VIII, Section 6, of the Texas Constitution states:

No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law; nor shall any appropriation of money be made for a longer term than two years.

This Constitutional requirement is thus satisfied by a clear statement to appropriate (1) a sum certain or an amount estimated under specific criteria (2) from a specific fund or account in the treasury (3) to a specific person or entity (4) for a specific purpose and (5) for a specific period not to exceed two years.

The appropriations in Section 17.13, Article IX, of the GAA meet that test by providing estimated amounts, based on recipient eligibility criteria set forth in the section, from the General Revenue Fund to the Comptroller of Public Accounts for the distribution by ERS and TRS of one-time supplemental annuity payments in amounts not to exceed the lesser of a person's monthly benefit or \$500.

Because the comptroller is the statutory custodian of ERS and TRS assets generally (Tex. Gov't Code §815.207 and §825.207, respectively) and holds accounts for the systems' trust funds, the constitutional provision is satisfied regardless of whether the appropriations were made directly to ERS and TRS or through the comptroller for the benefit of the systems and regardless of whether the appropriations are seen to flow through the trust funds themselves. Additionally, the creation of subaccounts within the General Revenue Fund is authorized in a general appropriations bill by Article III, Section 35, of the Texas Constitution, which limits other bills to a single subject but declares that a general appropriations bill "...may embrace the various subjects and accounts, for and on account of which moneys are appropriated."

II. Article III, Section 51, of the Texas Constitution not a prohibition

Article III, Section 51, of the Texas Constitution states that "the Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever;..." with certain exceptions not pertinent to this situation. This seemingly very restrictive provision has been explained as a 19th century "... reaction principally against giving away the public domain to builders of rail-roads, canals, and other 'internal improvements.'" (1 G. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 232 (1977).) Fairly early in the 20th century, Texas courts began interpreting Section 51 as a prohibition on gifts of public money but not as a prohibition on appropriations for a public purpose or when there was a "quid pro quo." The Braden volume cited above (on page 233) distills the judicial gloss given Section 51 to recast the prohibition as "No grant or loan may be made to any

person, etc., for a private purpose.” The Attorney General has agreed numerous times. “Expenditures for a true public purpose do not violate Article III, Section 51 of the Constitution....” (Tex. Att’y Gen. Letter Advisory No. 6 (1973) and its progeny.)

In the significant early case of Byrd v. City of Dallas, 118 Tex. 28, 6 S.W.2d 738 (1928), the court determined that pension plan payments were not a gift but a form of compensation. In approving the plan at issue, the court said “... if it is a part of the compensation of such employee for services rendered to the city, or if it be for a public purpose, then clearly it is a valid exercise of the legislative power” (Byrd at 740). The court also concluded that service performed before the statute’s effective date could be considered in determining eligibility for and amount of plan payments. Thus, pension payments enjoy a status as having been specifically approved as not violating Article III, Section 51. See also Op.Atty.Gen.1945, No. O-6837.

III. Constitutional Authority for State Contributions to ERS and TRS and Legislative Precedents

Prior to 1975, the Texas Constitution contained two provisions (Article III, Sections 48-a and 48-b) governing TRS, one provision (Article XVI, Section 62) governing ERS, and one provision (Article XVI, Section 63) governing transfer of credit between the two systems. Article III, Section 48-a, and Article XVI, Section 62, restricted state contributions to TRS and ERS, respectively, to six percent of aggregate annual employee compensation. Those and one other constitutional provision (for the Texas Municipal Retirement System) were repealed with the adoption by the voters on April 22, 1975, of Article XVI, Section 67. Section 67 was a product of the Constitutional Convention of 1974 and consolidated and simplified constitutional pension provisions. Subsection (b)(3) created a range of permissible state contributions to ERS and TRS of not less than six or more than 10 percent of aggregate annual employee compensation and authorized the Governor to declare an emergency for appropriations above the 10 percent limit.

The Legislature wasted no time in exercising the new authority for state contributions to ERS and TRS. Chapter 8, Acts of the 64th Legislature, Regular Session, 1975 (S.B. 56), authorized a 12 percent increase in ERS annuities and appropriated \$21.8 million from the General Revenue Fund to finance the increase, contingent on adoption of Article XVI, Section 67. (The bill took effect February 25, 1975.) Similarly, Chapter 6, Acts of the 64th Legislature, Regular Session, 1975 (S.B. 62), authorized an increase in TRS annuities and appropriated \$98 million from the General Revenue Fund to finance the increase, also contingent on adoption of the constitutional amendment. It is well settled that statutory actions by the Legislature that enable a proposed constitutional amendment are entitled to great weight in interpreting the meaning of the provision, and thus there can be no doubt that the Legislature intended Section 67 to be an appropriate authority for increases in annuities already being paid by ERS and TRS.

The Legislature continued to finance annuity increases from the General Revenue Fund in 1977. Chapter 364, Acts of the 65th Legislature, Regular Session, 1977 (S.B. 754), increased ERS annuities in payment before August 31, 1976, and appropriated \$19,489,267 from the General Revenue Fund to finance the increase. Chapter 367, Acts of the 65th Legislature, Regular Session, 1977 (S.B. 859), directed ERS to recalculate annuities based on a 36-month highest average salary during the last 60 months of service and based on a change in the multiplier for certain years of service. The Comptroller was directed to "transfer from the General Revenue Fund" the amount estimated to finance the recalculation. Chapter 377, Acts of the 65th Legislature, Regular Session, 1977 (H.B. 612), authorized TRS annuity increases and appropriated \$60,851,000 from the General Revenue Fund to finance the increase.

Chapter 831, Acts of the 66th Legislature, Regular Session, 1979 (H.B. 306), authorized a 12 percent increase in ERS annuities for retirements and deaths occurring before September 1, 1976, and an eight percent increase in annuities for retirements and deaths occurring on or after September 1, 1976, and before September 1, 1978. The bill authorized an appropriation in the GAA and made the increase contingent on the appropriation. Chapter 843, Acts of the 66th Legislature, Regular Session, 1979 (the GAA), appropriated \$29,200,000 from the General Revenue Fund to finance the increase. That Act also appropriated \$76,600,000 from the General Revenue Fund to finance an increase in TRS annuities generally and \$11,727,000 from the same fund to finance an increase in TRS monthly survivor benefits.

The Legislature continued the practice in 1981 by increasing ERS annuities by 5.1 percent and appropriating \$17,580,000 from the General Revenue Fund to finance the increase. (Chapter 3, Acts of the 67th Legislature, Regular Session, 1981 (S.B. 58).) Thus, it seems clear that the Legislature's intent was and since adoption has continuously viewed Article XVI, Section 67, as authorizing post-retirement pension increases from appropriated amounts as long as those amounts, together with regular state contributions and other specific appropriations (historically, for membership fees and lump-sum death benefits) do not exceed 10 percent of aggregate annual employee compensation.

Beginning in 1987, the ERS and TRS trust funds produced investment income sufficient to finance benefit payment increases, and periodic increases were made payable from trust fund earnings. That pattern held until 2007, when the GAA increased the state contribution rate for TRS and directed the system to make a one-time supplemental benefit payment.

In addition to the general increases in annuities described above, the Legislature on several occasions has increased annuities after retirement to reflect later changes in benefit calculations. See for example, Section 49, Chapter 850, Acts of the 72nd Legislature, Regular Session, 1991 (S.B. 1331), which increased elected class ERS annuities being paid to reflect a change in the maximum salary used in annuity calculations. See also Section 59, Chapter 1541, Acts of the 76th Legislature, Regular Session, 1999 (S.B. 1130), which recalculated annuities under the Judicial Retirement System Plan Two to reflect a change in annuity calculations.

Although not a direct retirement payment, a treasury payment was authorized by the 78th Legislature (2003) in H.B. 3208 in the amount of 25 percent of a person's annual salary, so as to encourage those persons eligible to retire from ERS to effect their retirement during the 2004-05 biennium.

IV. Article III, Section 44, of the Texas Constitution is not a bar

Article III, Section 44, of the Texas Constitution literally prohibits the Legislature from granting "extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into, for the performance of the same" and from granting "by appropriation or otherwise, any amount of money out of the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law...."

Article III, Section 44, was characterized in the Braden volume (on page 232) as a reaction analogous to the post-Reconstruction language the courts have wrestled with in Article III, Section 51, and courts have generally treated the "extra compensation" portion of Section 44, as well as its counterpart language in Article III, Section 53 (applicable to counties and municipalities), gingerly and have occasionally borrowed the "public purpose" interpretation developed for Article III, Section 51, to justify payments. Courts have approved a payment of compensation for which no amount was determined until after services were rendered (Dallas County v. Lively, 167 S.W. 219 (Tex. Sup. 1914)) and a statutory minimum wage for public safety officers that rewarded past service (City of San Antonio v. Baird, 209 S.W.2d 224 (Tex.Civ.App.—San Antonio 1948, error refused)).

In any case, both ERS law and TRS law (Tex. Gov't Code §814.601 and §824.701, respectively) contemplate potential annuity increases after retirement, and Tex. Gov't Code §814.603 contemplates one-time supplemental ERS benefit payments. As such, these provisions provide a possibility (if not guarantee) of post-retirement benefit enhancements that is a term of employment in the same way that the benefit structure of the ERS elected class of membership provides for annuity increases after retirement, as district judge salaries rise. (The same can be said for the statutory cost-of-living adjustments common to local public pension plans in Texas, which are subject to the almost-identical language of Article III, Section 53, of the Texas Constitution.)

It is also very arguable that post-retirement benefit enhancements do not meet the threshold of "extra compensation" prohibited by Section 44 because they are designed to restore a portion of lost purchasing power due to inflation (a concept foreign to the drafters of the 1876 Constitution, since deferred compensation programs such as pension plans had not been formulated). They are not designed to provide a "reward" or "gift" but an adjustment for the "quid pro quo" of previously performed service.

The second requirement of Article III, Section 44—that a claim be supported by “pre-existing law”—is satisfied in this situation by Section 42, H.B. 2559, 81st Legislature, Regular Session, 2009 (for ERS) and by Section 5, H.B. 3347, 81st Legislature, Regular Session, 2009 (for TRS).

In any event, Article XVI, Section 67, provides an exception to a literal reading of Section 44. The meanings of these two Sections should be harmonized, but if harmony cannot be achieved the latest provision adopted would prevail. In this comparison, Section 67 is the later-adopted provision and would prevail in any conflict with Section 44.

V. Article III, Section 52-a, of the Texas Constitution adds authority

Article III, Section 52-a, of the Texas Constitution provides further justification for the appropriations made in Section 17.13, Article IX, of the GAA for the 2010-11 biennium. Article III, Section 52-a, states in pertinent part that “...the legislature “may provide for the... making of ... grants of public money... for the public purposes of development and diversification of the economy of the state...” Because ERS annuitants and especially TRS annuitants are spread throughout the state, a partial restoration of lost purchasing power through the supplemental payments will have an effect on economic activity and development. The Legislature made a tacit recognition of this by including the following language in the section appropriating the funds:

(d) It is the intent of the Legislature that the one-time appropriations made above are due to the availability of American Recovery and Reinvestment Act (ARRA) funds.

CONCLUSION

Having reviewed S.B. 1 as enacted, the request for Attorney General's Opinion, and the applicable provisions of the Texas Constitution, my conclusion is that the amounts appropriated and expenditures authorized by Section 17.13 of the Act comply with all applicable laws and Constitutional provisions. In addition, it is clear that the Legislature's actions are valid exercises of its authority and do not overstep its bounds. As well, this type of action is solidly founded on similar actions taken over a number of years, as supported by court decisions and Attorney General interpretations.

The only Constitutional provision that possibly raises any question – Article III, Section 44 – is superseded in this instance by the authorizing language of Article XVI, Section 67. The one-time payment to annuitants of ERS and TRS is clearly authorized and valid.

