STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#93047

NO.
STATE OF NEBRASKA
OFFICIAL
JUN 11 1993
DEPT. OF JUSTICE

DATE: June 8, 1993

SUBJECT: Legislative Bill 292; Operative Date and Retrospective Application of Plan Provisions

REQUESTED BY: James S. Cashin, Acting Director
Public Employees Retirement Systems

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

This is in response to your request for an opinion of the Attorney General regarding application of certain provisions of Legislative Bill 292 which you indicate "was signed by the Governor on June 4, 1993 with the emergency clause". Briefly summarized, the bill amends certain provisions of the statutory retirement plan for public school employees of the State of Nebraska (School Retirement System) Neb. Rev. Stat. §§ 79-1501 to 79-1557 (1987 and Cum. Supp. 1992). The amendatory provisions of the bill increase the formula factor for the annuity retirement allowance, change eligibility provisions, and provide cost of living increases for retired members. The emergency clause is set forth in section 9 of the bill.

Your specific question is whether the date, June 1, 1993, may be used "to determine the eligibility of plan members for the provisions of LB 292?" With respect to this question you have referenced the new provisions in lines 3 through 8, page 4 of the bill which state:

> . . . A member shall be actively employed as a public school employee under the retirement system or under contract with an employer on June 1, 1993, to be

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Laurie Smith Camp
Elaine A. Chapman
Delores N. Coe-Barbee
Dale A. Comer
James A. Elworth
Lynne R. Fritz
Royce N. Harper
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Joseph P. Loudon
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Harold I. Mosher
Fredrick F. Neid
Marie C. Pawol
Kenneth W. Payne
Paul N. Potadle
Jan E. Rempe
James H. Spears
Mark D. Starr
John R. Thompson
Barry Wald
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

printed on recycled paper

> eligible for compensation of his or her formula annuity using one and seventy-three hundredths percent of his or her final average compensation as one of the factors.

It is our opinion that the Public Employees Retirement Board cannot use the date June 1, 1993 for determining eligibility of plan members for increased benefits which result from the increased formula factor. Rather, the Board is required to apply the increased annuity factor for determining benefits for members who are employees as of the effective date of passage of the bill, June 5, 1993. By the emergency clause of Section 9 of the bill, the act was made effective the date of its passage and approval June 5, 1993. *See* Opinion of the Attorney General No. 87049 (April 15, 1987). The prohibition of Article III, Section 19 of the Nebraska Constitution precludes application of increased formula annuity retirement benefits for services rendered and terminated prior to the enactment of the law.

The question you ask raises the issue whether the increased formula factor of one and seventy-three hundredths may be applied retroactively to employees whose services were rendered and terminated prior to the date of enactment. If the increased benefits would be applied retroactively for members who are no longer employees as of June 5, 1993, a strong legal argument may be made that the increased retirements are a gratuity prohibited by the Nebraska Constitution. Article III, Section 19, in relevant part states "<u>[T]he Legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered.</u> . . " (Emphasis supplied).

It is established that the constitutional provisions regarding compensation of public officers are applicable to employees of both the state and all political subdivisions. The prohibition regarding extra compensation has been applied by the Nebraska Supreme Court to preclude retroactive benefits or expanding retirement benefits in cases involving the construction of statutes which would retroactively increase retirement benefits or amounts. In ***Wilson v. Marsh***, 162, Neb. 237, 75 N.W.2d 723 (1956), an action was brought challenging the validity of a retirement act established for state judges. In upholding the validity of the act, the Nebraska Supreme Court concluded that retirement benefits are either earned compensation for services rendered after the grant of them and therefore valid or a mere gratuity, not a part of compensation, and therefore invalid. In arriving at this conclusion, the Court stated "<u>[I]f the services rendered and terminated before the grant is made the benefits awarded are not compensation but a gratuity. . . .</u>" *Id.* at 252. (Emphasis added).

The Court interpreted provisions of the Act consistent with the Constitutional limitation so as to uphold the validity of the Act.

In a case challenging the constitutionality of the state employees retirement system, it was decided that a retirement act is not invalid because it does not require that there be any particular length of qualifying service as long as it is required that a member under the act be an employee on the effective date of the act. ***Gossman v. State Employees Retirement System***, 177 Neb. 326, 129 N.W.2d 97 (1964). In arriving at this determination, the Court concluded that benefits granted, no matter how short the duration of service, must be construed as compensation currently earned. The state employees retirement system was established in 1963 Neb. Laws, LB 512 (codified at Neb. Rev. Stat. §§ 84-1301 to 84-1331) which was passed into law on July 15, 1963. Section 2 of the bill provided for an effective date of January 1, 1964 subsequent to the date of passage. Accordingly, the Court in this case did not consider the constitutional question of an effective or operative date prior to the date of passage of the legislative act.

In another case involving the constitutional validity of retroactive benefits, the Nebraska Supreme Court held that an award of pension benefits retroactive from the enactment of the law was improper. In ***Retired City Civ. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys.***, 199 Neb. 507, 260 N.W.2d 472 (1977), an action was brought to determine whether surviving spouses of civil employees who retired prior to 1972 were entitled to pension benefits under the retirement act for city employees. Title 7 of the Omaha Municipal Code was amended in 1972 to add a new section to make pension benefits available to widows, widowers, and children of retired civil employees. The Court determined that the amendment did not permit pensionable status to survivors prior to 1972. It was further concluded that there could be no recovery because no part of the services were rendered subsequent to the enactment of the law and therefore, a gratuity forbidden by Article III, Section 19 of the Constitution of the State of Nebraska.

While we have concluded that increased annuity formula factor provisions may be applied to determine benefits for members who are employees as of the date of passage of the law, June 5, 1993, rather than June 1, 1993, this does not render the act or its provisions constitutionally invalid. As the Court reasoned in ***Wilson v. Marsh, supra.***, it is assumed that the Legislature intended a valid result rather than one in conflict with the Constitution and that the Legislature intended that the act should be operational as soon as the limitations of the Constitution

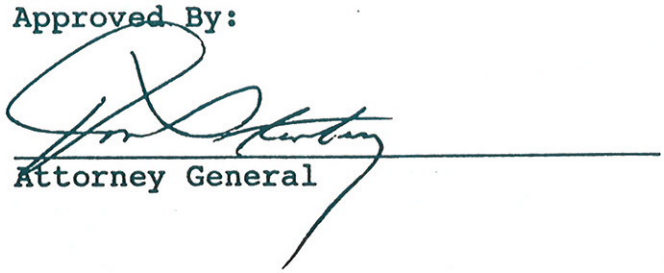
permit. We also point out that if constitutional limitations are not offended, a bill may have retrospective application from its date of passage. *See State v. Von Dorn*, 234 Neb. 93, 449 N.W.2d 530 (1989); *Larson v. Jensen*, 228 Neb. 799, 424 N.W.2d 352 (1988).

Sincerely,

DON STENBERG
Attorney General

Fredrick F. Neid
Assistant Attorney General

Approved By:



Attorney General

21-444-6.93c