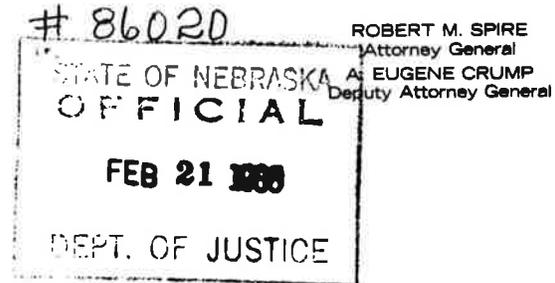


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



DATE: February 19, 1986

SUBJECT: Retirement System for Nebraska Legislators

REQUESTED BY: Senator John W. DeCamp
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested us to reconsider the question of whether it would be constitutionally permissible for the Legislature to establish a state-funded pension plan for state senators. In addition, you have asked us to reexamine the issue of whether there are constitutional difficulties presented by the participation of members of the Legislature in the State Employees Retirement System. Your request for reconsideration of these issues refers to a previous opinion from our office on this subject, in which we concluded that the provision of retirement benefits to state senators under either circumstance would constitute "pay" or "perquisite" other than the salary limited by the Constitution, and therefore would violate the provisions of Article III, section 7 of the Nebraska Constitution. Report of Attorney General 1971-72, Opinion No. 85, p. 199.

Article III, section 7, provides, in pertinent part:

Each member of the Legislature shall receive a salary of not to exceed four hundred dollars per month during the term of his office. In addition to his salary, each member shall receive an amount equal to his actual expenses in traveling by the most usual route once to and returning from each regular or special session of the Legislature. Members of the Legislature shall receive no pay nor perquisites other than said salary and expenses, and employees of the Legislature shall receive no compensation other than their salary or per diem. (Emphasis added).

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Neb.Rev.Stat. §50-123.01 (Reissue 1984) fixes the actual salary of the members of the Legislature at the maximum authorized by the Constitution.

Recently, in State ex rel. Douglas v. Beermann, 216 Neb. 849, 347 N.W.2d 297 (1984), the Nebraska Supreme Court held that the limitation contained in Article III, section 7, providing "Members of the Legislature shall receive no pay nor perquisites other than said salary and expenses," did not prohibit reimbursement to legislators for their actual expenses incurred in connection with the performance of their duties. While the decision in Beermann focused on the issue of the allowance of expenses incurred by members of the Legislature, the Court also discussed the meaning of the language providing "Members of the Legislature shall receive no pay nor perquisites other than said salary. . . ." In this regard, the Court stated:

. . . [T]he first 14 words of the third sentence of the constitutional provision in question, "Members of the Legislature shall receive no pay nor perquisites other than said salary," given their most natural and obvious meaning, say that Nebraska's legislators shall receive no wages, remuneration, compensation, fees, profit, or gain incidental to their office other than the salary mandated in the first sentence of the section. (Emphasis added).

Id. at 855-56, 347 N.W.2d at 302.

On numerous occasions, the Nebraska Supreme Court has held that public employee retirement benefits or pensions constitute deferred compensation for services rendered. Halpin v. State Patrolmen's Retirement System, 211 Neb. 892, 320 N.W.2d 910 (1982); Gossman v. State Employees Retirement System, 177 Neb. 326, 129 N.W.2d 97 (1964); Wilson v. Marsh, 162 Neb. 237, 75 N.W.2d 723 (1956). As the Court stated in Wilson, supra, "The benefit of a retirement system is a form of compensation additional to the regular salary of a member of the system with payment deferred to a later time." 162 Neb. at 251, 75 N.W.2d at 732.

Based on the characterization by our Supreme Court of public retirement or pension benefits as a form of deferred compensation, and the broad language contained in Beermann, supra, interpreting the pertinent portion of Article III, section 7 to prohibit legislators from receiving any "wages, remuneration, compensation, fees, profit, or gain incidental to their office" other than the maximum salary provided for by the Constitution, we must conclude that the providing of retirement or pension benefits to state senators would very likely be held

pay or perquisite in addition to their salary, prohibited by this provision of our Constitution.

We recognize that courts from other jurisdictions have upheld the validity of the provision of pension benefits to state legislators against various constitutional challenges. Upon reviewing these cases, however, it is apparent that the language of the constitutional provisions construed in these decisions is, in each instance, distinguishable from the relevant language in Article III, section 7, of the Nebraska Constitution. For example, in Knight v. Board of Administration, 32 Cal.2d 400, 196 P.2d 547 (1948), the court examined several constitutional provisions in rejecting an attack on the validity of legislation establishing a retirement system for members of the California State Legislature. Article IV, sec. 23 of the California Constitution provided, in part: "The members of the Legislature shall receive for their services the sum of one hundred dollars each for each month of the term for which they are elected. . . ." In addition, Article IV, sec. 23b provided, in part: "Members of the Legislature shall receive no compensation for their services other than that fixed by the Constitution but each member shall be allowed and reimbursed expenses necessarily incurred. . . ." Id. at _____, 196 P.2d at 547-48.

In upholding the constitutionality of the legislative retirement system, the court in Knight determined these two constitutional provisions limiting legislative compensation were modified by a third constitutional provision, Article IV, sec. 22a, which provided, in part: "The Legislature shall have power to provide for the payment of retirement salaries to employees of the State. . . ." Id. at _____, 196 P.2d at 548. The court held the word "employees," as used in this constitutional provision authorizing the Legislature to provide retirement benefits for employees of the state, was broad enough to include state legislators. Id. at _____, 196 P.2d at 550.

The decision in Knight, relying on the specific provision in the California Constitution authorizing the establishment of retirement systems for state employees as authority for upholding a legislative retirement plan, is inapplicable to the issue of the proper interpretation of Article III, section 7, of the Nebraska Constitution, as our Constitution contains no similar specific provision for retirement plans of this nature.

Chamber of Commerce v. Leone, 141 N.J. Super. 114, 357 A.2d 311 (1976), also involved a challenge to the constitutionality of legislation creating a legislative pension plan. In Leone, however, the constitutional attack was based on the argument that the benefits would not be received during the legislator's term of office. The plaintiffs contended this violated Article IV,

section IV, par. 7 of the New Jersey Constitution, which provided, in part: "Members of the Senate and General Assembly shall receive annually, during the term for which they shall have been elected and while they shall hold their office, such compensation as shall, from time to time, be fixed by law. . . ." Id. at 120, 357 A.2d at 314 (Emphasis added). The court held that, as the "right" to receive benefits is earned while the legislator is in office, the plan did not violate the constitutional requirement that compensation be received during the legislator's term of office. Id. at 137, 357 A.2d at 324.

Similarly, in Boryszewski v. Brydges, 37 N.Y.2d 361, 372 N.Y.S.2d 623, 334 N.E.2d 579 (1975), the court construed the following New York constitutional provisions in an action raising the constitutionality of a legislative and executive retirement plan:

Each of the state officers named in this constitution shall, during his continuance in office, receive a compensation, to be fixed by law, which shall not be increased or diminished during the term for which he shall have been elected or appointed; nor shall he receive to his use any fees or perquisites of office or other compensation.

* * *

Each member of the legislature shall receive for his service a like annual salary, to be fixed by law. * *
* Neither the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he shall have been elected, nor shall he be paid or receive any other extra compensation. (Emphasis added).

The petitioners in Boryszewski contended these constitutional provisions precluded future payments to legislators for past services in the form of pension benefits, and thus compensation could only be paid to legislators during their "continuance in office." The court rejected this assertion, concluding that a pension was a proper form of compensation and that, although payment itself would be received subsequent to the legislator's term of office, the right to receive payment was received during the "continuance in office." In reaching this conclusion, the court stated: "Retirement benefits are a component of present compensation." Id. at 367-68, 372 N.Y.S.2d at 629, 334 N.E.2d at 583.

The constitutional provisions construed in Leone, supra, and Boryszewski, supra, both provided that legislators would receive compensation at the level "fixed by law." Thus, under both the New Jersey and New York Constitutions, the Legislature of each state possessed the authority to set their own level of compensation. In contrast, Article III, section 7, of the Nebraska Constitution, establishes a specific maximum dollar amount with each member of the Legislature may receive in salary, and further prohibits the receipt by state senators of any pay or perquisites in addition to the salary authorized under this section.

The one decision from another jurisdiction which provides some authority for upholding the constitutionality of establishing retirement or pension benefits for members of the Legislature is Campbell v. Kelly, 202 S.E.2d 369 (W.Va. 1974). The constitutional provision at issue in Campbell, which was adopted in 1872, provided:

Each member of the legislature shall receive for his services the sum of one thousand five hundred dollars a year, and expenses for one round trip in connection with any session. . . . No other allowance or emolument than that by this section provided shall directly or indirectly be made or paid to the members of either house for postage, stationery, newspapers, or any other purpose whatever. (Emphasis added).

Id. at 373.

Rejecting the contention that the establishment of a legislative pension system constituted an "allowance" or "emolument" prohibited under this constitutional provision, the Supreme Court of West Virginia stated:

This Court is persuaded that in the absence of evidence that it was the intent of the framers of our Constitution by Section 33 to prohibit pension plans under conditions as they have changed in the last century, our Constitution should be interpreted in conformity with the great weight of precedent from other jurisdictions interpreting similar provisions of other state constitutions. All the modern decisions interpreting the power of legislators to enact pension programs hold that constitutional limitations on "allowances" or "emoluments" do not apply to pension programs.

* * *

[P]ensions are not traditional "salary," and by extension not either an "allowance" or "emolument," but rather are things sui generis which were not contemplated within the constitutional structure established in 1872.

Id. at 375-76.

An analysis of the rationale behind the decision in Campbell reveals two potentially critical distinctions between the West Virginia constitutional provision construed in that case, and Article III, section 7, of our State Constitution. First, the court in Campbell emphasized that, at the time the constitutional provision in question was adopted in 1872, no state pension plans or retirement systems were in existence, and thus could not have been within the contemplation of the framers who established the constitutional prohibition. In contrast, the portion of Article III, section 7, providing "Members of the Legislature shall receive no pay nor perquisites other than said salary and expenses," was adopted following a vote of the people amending this provision in 1934. Thus, while the concept of a state pension plan or system may have been unknown in 1872 when the West Virginia constitutional provision was adopted, it is far less likely that the existence of such benefit systems was beyond the comprehension of the drafters of the present language in Article III, section 7, when voted on by the people of Nebraska in 1934.

Furthermore, the language employed in Article III, section 7, providing members of the Legislature shall receive no "pay nor perquisites" other than the salaries specifically stated in that section, appears to be broader in scope than the different language in the West Virginia constitutional provision barring any "allowance or emolument." This would seem to be particularly true in light of the specific statement by our Supreme Court in Beermann, supra, that the "pay" or "perquisites" language in Article III, section 7, means Nebraska's legislators shall receive "no wages, remuneration, compensation, fees, profit or gain incidental to their office other than the salary mandated in the first sentence of the section." 216 Neb. at 849, 347 N.W.2d at 302.

In conclusion, based on the characterization by our Supreme Court of public retirement or pension benefits as a form of deferred compensation, and the broad language contained in Beermann, supra, construing Article III, section 7, to prohibit legislators from receiving any "wages, remuneration, compensation, fees, profit, or gain incidental to their office" other than the maximum salary provided for by the Constitution, we believe that either the establishment of a state-funded

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pension plan for legislators, or the inclusion of state senators within the State Employees Retirement System, poses serious constitutional difficulties, and that either proposal would likely be held to violate the proscription contained in Article III, section 7. While an argument could be advanced to support the constitutionality of legislation of this nature, we cannot affirmatively conclude that any such proposal, if enacted, would withstand constitutional challenge.

Very truly yours,

ROBERT M. SPIRE
Attorney General

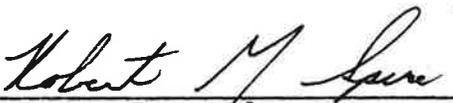


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cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED:


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