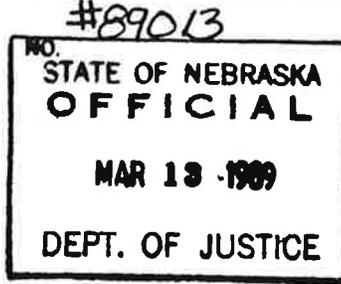


Linda Willard

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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



ROBERT M. SPIRE  
Attorney General  
A. EUGENE CRUMP  
Deputy Attorney General

DATE: March 7, 1989

SUBJECT: Constitutionality of Legislative Amendment  
Authorizing Selection Between Retirement Plans by  
Employees of the Nebraska Department of Education

REQUESTED BY: Senator Rex Haberman, Chairman  
Nebraska Retirement Systems Committee

WRITTEN BY: Robert M. Spire, Attorney General  
Fredrick F. Neid, Assistant Attorney General

This is in response to your inquiry concerning whether a legislative proposal which authorizes certain state employees to elect to not participate in the State Employees Retirement System would be constitutionally valid.

You have indicated that you are considering an amendment to Neb.Rev.Stat. § 79-1565 (Reissue 1987) which would ". . . allow an individual who is a public school employee (defined in § 79-1501), who is subsequently hired by the State Department of Education, an option to remain in the School Retirement System or to become a member of the State Employees Retirement System." Neb.Rev.Stat. § 79-1565 (Reissue 1987) currently provides that employees of the Nebraska Department of Education (State school officials) employed after July 19, 1980, shall become members of the State Employees Retirement System.

Generally, legislation which creates a class of persons and further divides that class and designates different rules for these divisions have been found to be special laws and constitutionally invalid. A legislative act which confers special or exclusive privileges or immunities to individuals is expressly prohibited by Article III, Section 18, of the Constitution of the State of Nebraska.

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Whether a law is special and thereby constitutionally invalid is determined by the nature of the legislatively created class. Aschenbrenner v. Nebraska Public Power Dist., 206 Neb. 157, 291 N.W.2d 720 (1980); State ex rel. Douglas v. Marsh, 207 Neb. 598, 300 N.W.2d 181 (1980).

The class which would be created by the proposed amendment would be employees of the Department of Education who have previously been public school employees. The election to join or not join the State Employees Retirement System would be afforded only those Department of Education employees who have previously been public school employees. Similarly situated employees are excluded from the class. That is, other state employees who have previously been public school employees appear to be excluded from the class. Further, other employees of the Department of Education with prior employment experience other than as a public school employee also appear to be excluded from the class.

Since we have no knowledge as to the reasons for creating this special division or class of state employees, we are unable to determine the necessity or actual basis for the different treatment of similarly situated employees. Without this information, it is difficult to render an opinion with certainty concerning whether the class would be reasonable or whether a rational basis exists for the class.

Generally, classification is proper if the special class has some distinction from other subjects of a like general character. While we do not have sufficient information to determine the distinction, our Supreme Court has generally been supportive of legislative acts dealing with the State's various retirement systems. In upholding the validity of the State Employees Retirement Act in Gossman v. State Employees Retirement System, 177 Neb. 326, 129 N.W.2d 97 (1964), the court noted that the Act did not deal with a tax or with a regulation or invasion of the freedom of a citizen under the police, health, or welfare clauses of the Constitution. All that is required is that the classifications and the requirements have some reasonable relationship to the purposes and objectives of the Act.

If creation of the special class was deemed necessary by the Legislature to offer special inducements to attract certain employees or to meet competitive provisions of other retirement acts, it would be our conclusion that the classification would be reasonable. Accordingly, it would be our opinion that the proposed legislation which would authorize certain employees to elect to not

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join the State Employees Retirement Systems would not be prohibited by Article III, Section 18, of the Constitution of the State of Nebraska.

Sincerely,

ROBERT M. SPIRE  
Attorney General



Fredrick F. Neid  
Assistant Attorney General

21-01-14.1

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

APPROVED:

  
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Attorney General