

MAINE STATE LEGISLATURE

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

November 26, 1985

Honorable Nancy Randall Clark
Maine Senate
State House Station #3
Augusta, Maine 04333

Dear Senator Clark:

You have requested the Opinion of this Department on two questions regarding amendments to the laws of the Maine State Retirement System (the "System") enacted at the First Regular Session of the 112th Legislature.

The amendments relate to 5 M.R.S.A. § 1094(13) which governs the ability of members of the System to obtain service credit for time which they may have served in the Armed Forces of the United States. The first group of amendments, P.L. 1985, ch. 365, § 7, approved by the Governor on June 15, 1985, amended the section to make various changes in the manner in which credit for military service may be obtained. The second group of amendments, P.L. 1985, ch. 502, approved by the Governor on July 1, 1985, repealed and replaced the entire section to add a new subsection extending eligibility for military credit for certain veterans of the Viet Nam War era, but in so doing did not include the amendments of Chapter 365 in the reenacted version of the statute. Your first question, therefore, is whether the amendments contained in Chapter 365 nevertheless became law on September 19, 1985, the effective date of both statutes. You then ask whether, if they did enter into force, they would violate the Contract Clauses of the United States and Maine Constitutions^{1/} to the extent that they adversely affect the rights of current members of the System.

^{1/} U.S.Const. art.I, § 10, cl. 1; Me.Const. art.I, § 11.

For the reasons which follow, it is the Opinion of this Department that, notwithstanding the subsequent enactment of Chapter 502, the amendments to Section 1094(13) contained in Chapter 365 did become law on September 19, 1985, but that they cannot constitutionally be applied to those members of the System whose retirement rights had "vested" (that is, who had been members of the System for ten years) as of that date.

I. Effectiveness of Chapter 365 Amendments
to Section 1094(13)

Prior to the 1985 amendments to the retirement laws, persons who had served in the Armed Forces of the United States were eligible to purchase a corresponding amount of service credit up to four years in the Maine State Retirement System once they had accumulated fifteen years of service credit in the System. In 1975, however, the Legislature limited this right to those members of the System who joined before January 1, 1976. P.L. 1975, ch. 622, § 36, amending 5 M.R.S.A. § 1094(13).

As indicated above, at its 1985 Session, the Legislature enacted several additional changes to the law relating to military service credits. Chapter 365 contains three changes to 5 M.R.S.A. § 1094(13). Two of these three changes occur in the first sentence of the section. The first now spells out in the law that full-time active duty is necessary for military service to be credited. This change makes explicit in the statute the interpretation of it that has been followed consistently by the Board of Trustees of the Maine State Retirement System. The second change in the first sentence provides that members of the System who are qualified for military service credits or benefits shall be ineligible to purchase military service credit. The change reverses a long-standing interpretation of the Section by the Board that persons eligible for military pension be nonetheless eligible for military service credit in the System as well. The third change is found in the third sentence of Section 1094(13) and raises the rate of interest that must be paid by a member on his contributions for his military service credit after January 1, 1976 or the date of attainment of 15 years of creditable service, if later, to the date of payment.^{2/}

Chapter 502 repealed and replaced Section 1094(13) in its entirety for the purpose of enacting a new subsection

^{2/} The rate of interest was changed from a rate that is 2% greater than regular interest (regular interest is defined by 5 M.R.S.A. § 1001(19)) to a rate to be set by the Board not to exceed the regular interest by 5 percentage points.

permitting veterans of the Viet Nam War era to purchase military service credit in the System.^{3/} In so doing, however, the Act repealed and replaced the pre-existing provisions of Section 1094(13) without including within them the amendments thereto contained in Chapter 365, which, as indicated above, had been approved by the Governor two weeks before he approved Chapter 502. Thus, the question is raised whether the latter statute should be deemed to have repealed the amendments contained in the former.

In the Opinion of this Department it should not. An examination of the legislative history of Chapter 502 reveals no indication whatever that the Legislature intended, by repealing and replacing Section 1094(13) in its entirety, to undo the amendments which it had made to the section only weeks earlier. The fact that the amendments were not included in the latter statute must therefore be regarded as an oversight by the drafters of Chapter 502, and the proper interpretation of the two enactments is to give legal effect to both. See 1A Sutherland, Statutory Construction, § 23.17 (4th ed. 1985) ("If the same legislative session enacts two or more acts on the same subject they are presumed to have been actuated by the same policy and intended to have effect together").

II. Constitutionality of Chapter 365 Amendments to Section 1094(23)

Both the Contract Clauses of the United States and Maine Constitutions forbid the passage of laws by the Maine Legislature "impairing the obligation of contracts." While the United States Supreme Court has been quite clear that the Clause should not be taken literally with regard to any private contract which happens to exist at the time of the passage of a particular piece of legislation, United States Trust Co. of New Jersey v. New Jersey, 431 U.S. 1, 21 (1977) quoting Home Building & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 428 (1934), it is now clear, as a result of numerous decisions of state courts of last resort around the country,^{4/} that the

^{3/} As indicated above, prior to this amendment, only those veterans of the Viet Nam War era who actually joined the System prior to January 1, 1976 were eligible to purchase military service credit for their service in the Armed Forces of the United States.

^{4/} The Maine Supreme Judicial Court has yet to have occasion to rule on the applicability of the Contract Clause to government pension plans. See Soucy v. Board of Trustees of the Maine State Retirement System, 456 A.2d 1279, 1282, n. 3 (Me. 1983). There is no reason to suppose, however, that the Court would not find the clauses applicable.

Clause does apply, at least to some extent, to pension rights granted to government employees through pension systems requiring, like Maine's, contributions on a compulsory basis. The general rule appears to be that, as a minimum,

rights in pension systems calling for contributions on a compulsory basis [are] nonvested only during the period prior to an employee's fulfillment of the requirements for grant of the pension; upon fulfillment of these conditions, the pension rights are deemed to vest, thereafter being immune from abolition, if not from adverse change of any kind. Annotation, Vested Right of Pensioner to Pension, 52 A.L.R.2d 437, 442 (1957).

In Maine, employees who accumulate ten years of service credit are entitled to a pension as a matter of law upon reaching the age of 60, regardless of whether they remain in state service. 5 M.R.S.A. § 1121(1)(A). Thus, the rights of these employees must be regarded as "vested" in the constitutional sense, which means that the Legislature cannot adversely alter them.

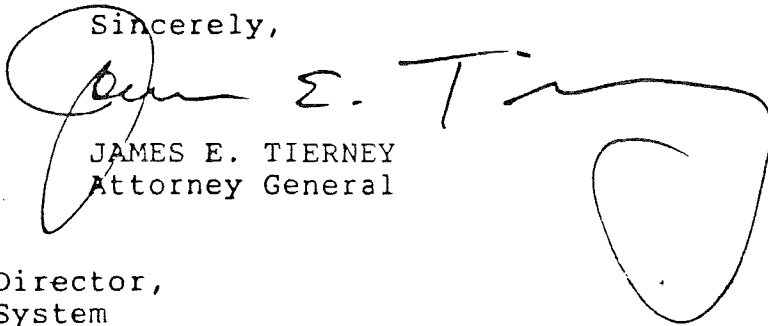
In the present case, the Legislature, in Chapter 365, has sought to alter the rules by which a person may, upon the accumulation of fifteen years of service credit, purchase additional credit based upon prior military service. To the extent that these amendments apply to employees who had accumulated ten years of services on the date of their effectiveness (September 19, 1985), they are unconstitutional because they adversely interfere with the constitutionally protected expectations of such persons to be able to purchase additional service credit upon their accumulation of fifteen years' service credit. Moreover, it should be noted that, as indicated above, this class of employees should include virtually everyone eligible to purchase service credit based on military service who has not as yet done so, since the option to purchase such service was eliminated for new members of the System in 1975, effective January 1, 1976 - almost exactly ten years prior to the effective date of Chapter 365. Thus, the amendments to Section 1094(13) contained therein are virtually unconstitutional on their face.^{2/}

* * * *

^{2/} Since the only persons to whom the amendments could possibly be applied constitutionally are those who joined the System between September 19, 1975 and January 1, 1976, this Department would suggest that the fairest way for the Legislature to proceed would be simply to repeal the amendments in their entirety.

I hope this answers your questions. Please feel free to reinquire if further clarification is necessary.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "James E. Tierney". The signature is written over the typed name and title.

JAMES E. TIERNEY
Attorney General

JET/ec

cc: Robert Weil, Executive Director,
Maine State Retirement System