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April 22, 1991

Honorable Dale McCormick
Chair, Joint Standing Committee on
Aging, Retirement and Veterans
State House Station #3
Augusta, ME 04333

Dear Senator McCormick:

In your capacity as Chair of the Joint Standing Committee on Aging, Retirement and Veterans, you have requested the opinion of this Department regarding the constitutionality of several provisions of Legislative Document No. 927, "AN ACT Making Unified Appropriations and Allocations for the Expenditures of State Government, General Fund and Changing Certain Provisions of the Law Necessary to the Proper Operations of State Government for the Fiscal Years Ending June 30, 1992 and June 30, 1993." The provisions with regard to which you seek advice are contained in Part F of the bill, and concern the retirement benefits for State employees as follows: provisions affecting the time and conditions of retirement for State employees, provisions concerning the amount of contribution which the Maine State Retirement System will make to health insurance premiums for retired State employees, and provisions relating to the contributions which existing State employees must make to the Maine State Retirement System. For the reasons which follow, it is the opinion of this Department that the Legislature's constitutional power to alter the terms of participation in and the benefits to be received from the Maine State Retirement System by State employees is severely restricted with regard to those members who are already eligible to retire or whose rights to a service retirement benefit have "vested" as of the effective date of

any new legislation. However, the Legislature has constitutional leeway to make such alterations with regard to those State employees whose rights have not yet "vested,"[1] including those employees who have not yet been hired. Accordingly, this Department would discourage the Legislature from enacting the provisions of Part F of L.D. 927 to the extent that those provisions apply to State employees whose rights to a service retirement pension have "vested."

I. The Proposals.

The proposals contained in L.D. 927, Part F, fall into three categories. First, the bill proposes to alter the time and conditions on which a member of the System may obtain a service retirement benefit ("pension") by raising the age at which a member may retire without penalty from 60 to 62 years (§§ F-11, F-12 and F-14), by raising substantially the penalty which a member reaching the minimum retirement age must sustain if he or she retires in advance of the age of 62 (§ F-13), and by eliminating provisions that allow a person retiring to count unused sick leave or vacation leave for purposes of determining the amount of that person's service credit (§§ F-2 and F-10). The evident purpose of these provisions is to cause State employees to retire at a later date, so as to reduce the amount of current State contributions to the Retirement Allowance Fund, which is calculated on an actuarial basis pursuant to 5 M.R.S.A. § 17253. Second, the bill proposes to reduce the amount which the Maine State Retirement System will pay, on a sliding scale, for health insurance premiums for persons retiring with less than ten years of service[2] (§ F-1). Finally, the bill would increase the amount which various classes of State employees would be required to contribute to the System by 1.15 percent (§§ F-3 through F-9). The purpose of these last two provisions is to shift more of the financial burden for the maintenance of the Retirement Allowance Fund onto the members of the System, and thereby further reduce the amount of the current State contribution.

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[1] Generally, State employees' rights to retirement benefits "vest" by law after ten years of State service. 5 M.R.S.A. § 17851. This means that after ten years of service, an employee's right to a retirement benefit may not be forfeited, even if the employee leaves State service.

[2] Under the proposal, the System will pay 90 percent of the premium if the retiree has nine years of service down to nothing if the retiree has less than two years of service.

II. Analytical Framework.

The principal difficulty in responding to your request is that neither the United States Supreme Court or the Maine Supreme Judicial Court has had occasion to give any recent consideration to the question of the constitutionality of State legislative limitations on State employees' pensions. The United States Supreme Court has dealt with the question only once, over a century ago, holding that a death benefit funded by a compulsory pension system was a gratuity and could be extinguished at the will of the State Legislature. Pennie v. Reis, 132 U.S. 464 (1889). This holding, however, has been widely criticized. See, e.g., Note, Public Employee Pensions in Times of Fiscal Distress, 90 Harv.L.Rev. 992, 994-95 (1977); Cohn, Public Employee Retirement Plans--The Nature of the Employees' Rights, 1968 U.Ill.L.Forum 32, 35 (1968).[3/] The Maine Supreme Judicial Court was presented with the question in Soucy v. Board of Trustees of the Maine State Retirement System, 456 A.2d 1279 (Me. 1983), but decided the case on statutory grounds, expressly declining to advance any view on the constitutional question. Id. at 1282, n.3. Thus, this Department--and the Legislature--is without conclusive authoritative guidance on this important question of constitutional law.

In the absence of controlling authority, this Department must predict how the United States Supreme Court and the Maine Supreme Judicial Court would deal with the question. This effort is severely complicated by the fact that, although numerous state courts of last resort have reviewed legislative efforts to adversely affect the pension rights of public employees, these courts have been unable to agree upon a common analytical framework for the resolution of the constitutionality of such actions, let alone on results. Consequently, the first step which this Department must take is to determine the mode of analysis most likely to be employed by the United States Supreme Court or the Maine Supreme Judicial Court if either were to be presented with the question of the constitutionality of the pending legislation.

[3/]The Supreme Court has also narrowly held that the United States Congress may constitutionally alter the terms of the Social Security Act, relying particularly on a clause in the Act reserving to the Congress the right to amend it, Flemming v. Nestor, 363 U.S. 603 (1960), a decision also criticized. See Note, Public Employee Pensions in Times of Fiscal Distress, 90 Harv.L.Rev. at 995-97.

This Department has reviewed all of the principal approaches thus far advanced, and finds that they break down into three broad categories. On the one hand, there are those decisions--representing what might be called the extreme pro-government position--which regard the grant of a pension to a public employee as essentially a gratuity, which may be constitutionally extinguished at any time up to the actual grant of the benefit. The United States Supreme Court's decision in Pennie v. Reis, supra, is an example of this approach, as are the positions taken by the courts in Indiana and Texas.[4/] The category also includes those jurisdictions which take the position that retirement benefits "vest" only at the point at which the employee is eligible to retire, and therefore can be constitutionally modified by the Legislature prior to that time. See the decisions of the courts of last resort in Arkansas, Delaware, Florida, Kentucky, Louisiana, North Dakota, Ohio, Missouri, South Dakota and Utah cited in Note, 'Til Death Do Us Part: Pennsylvania's "Contract" With Public Employees for Pension Benefits, 59 Temp.L.Q. 553, 571, n.152 (1986).[5/]

[4/]Ballard v. Board of Trustees of Police Pension Fund, 324 N.E.2d 813 (Ind. 1975), appeal dismissed 423 U.S. 806 (1975); Cook v. Employees Retirement System, 514 S.W.2d 329 (Tex. Ct. App. 1974).

[5/]Also included in the extreme pro-government category is the decision of the Supreme Court of Connecticut in Pineman v. Oechslin, 488 A.2d 803 (Conn. 1983). In that case, the court acknowledged that the question of legislative alteration of pension statutes was governed by the Contract Clause of the United States Constitution, but found that the Connecticut legislature had not expressed any intent to enter into a contract with its employees. The court did state, however, that such legislative action might be subject to minimal substantive review under the due process provisions of the federal and state constitutions, citing Spina v. Consolidated Police & Firemen's Pension Fund Commission, 197 A.2d 169 (N.J. 1964), another pro-government decision. The Connecticut approach, however, has commanded no support elsewhere, in addition to which the Maine retirement statutes contain a expression of legislative intent that State employees be able to rely on the provisions of these statutes in making their retirement plans. 5 M.R.S.A. § 17050.

On the other hand, the decisions of other jurisdictions--representing what might be called the extreme pro-employee position--hold that an employee's right to a pension "vests" at the time of employment, and that the Legislature may not substantially alter those rights thereafter. Included in this category are those states with provisions in their constitutions guaranteeing such rights,[6] as well as the decisions of the Supreme Courts of Arizona, Georgia and Pennsylvania.[7] The category also includes the decisions of the California Supreme Court beginning with Allen v. City of Long Beach, 287 P.2d 765 (Cal. 1955) and best exemplified by Betts v. Board of Administration of the Public Employees' Retirement System, 582 P.2d 614 (Cal. 1978), in which the court held that a public employee has a constitutionally protected right in his or her pension from the date of employment, and that the conditions of those pensions can only be altered if necessary to maintain the financial integrity of the retirement system and if any alterations which are disadvantageous to the employee are accompanied by offsetting new advantages. This approach has been followed in Colorado, Idaho, Kansas, Maryland, Massachusetts, and Washington.[8]

Because of the rigidity of both of these approaches, this Department is of the view that neither is likely to be adopted

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[6] ILL. CONST., art. VIII, § 5; N.Y. CONST., art. V, § 7. The constitutions of Alaska, Hawaii and Michigan have similar provisions, but the courts in those states have interpreted them to allow for reasonable legislative modification of the conditions for future benefits. See Note, 'Til Death Do Us Part, 59 Temp.L.Q. at 574, n.174.

[7] Yeazell v. Copins, 402 P.2d 541 (Ariz. 1965); Burks v. Board of Trustees, 104 S.E.2d 225 (Ga. 1958); Association of Pennsylvania State College and University Faculties v. State System of Higher Education, 479 A.2d 962 (Pa. 1984).

[8] Police Pension & Relief Board v. Bills, 366 P.2d 581 (Col. 1961); Nash v. Boise City Fire Department, 663 P.2d 1105 (Idaho 1983); Brazelton v. Kansas Public Employees Retirement System, 607 P.2d 510 (Kan. 1980); City of Frederick v. Quinn, 371 A.2d 724 (Md. Ct. Spec. App. 1977); Opinion of the Justices, 303 N.E.2d 320 (Mass. 1973); Eisenbacher v. City of Tacoma, 333 P.2d 642 (Wash. 1958).

by the United States Supreme Court or the Supreme Judicial Court of Maine were those courts to be presented with questions concerning the constitutional limitations on state legislatures altering the pension rights of state employees. Rather, this Department thinks it is more likely that the courts will adopt an approach which allows them, on a case-by-case basis, to weigh the particular alteration of the state employee's pension rights against the asserted governmental objective underlying the legislative action. The likely basis for such an approach would be a series of decisions of the United States Supreme Court beginning in 1977, in which the Court began, for the first time in three decades,[9/] to review State legislation for compliance with the Contract Clause of the United States Constitution, Art. I, § 10.[10/] In that year, the Supreme Court decided the case of United States Trust Company of New York v. New Jersey, 431 U.S. 1 (1977), in which it struck down, as violative of the Contract Clause, state legislative action altering a legislatively-authorized state contract, thus establishing the principle that whatever the Contract Clause means, it means that the state must comply with its own contracts. Several years later, in Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983), the Court set forth a three-part test for reviewing state legislation for compliance with the Contract Clause. First, the court will assess the degree of substantiality of the impairment of the contract. Second, if a substantial impairment has occurred, the court will inquire whether there is a significant and legitimate public purpose behind the legislation. Third, if such a purpose has been identified, the court will then determine whether or not the particular impairment is appropriate to the accomplishment of the public purpose, in which regard the court will generally defer to the legislative judgment as to the reasonableness of the measure, "[u]nless the State itself is a contracting party," in which case the measure will receive stricter review. Id. at 411-413 (citations omitted).

Since its enunciation, the Energy Reserves test has been applied by at least two state courts reviewing the constitutionality of legislative alterations of pension

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9/See generally, Tribe, American Constitutional Law, § 9-11 (2d ed. 1988).

10/The Maine Constitution contains a similar clause. ME. CONST., art. I, § 11.

statutes.[11] In Christensen v. Minneapolis Municipal Employees Retirement Board, 331 N.W.2d 740 (Minn. 1983), the Supreme Court of Minnesota, while characterizing the problem as involving the doctrine of promissory estoppel rather than contract,[12] nevertheless applied the Energy Reserves test to a state statute imposing for the first time a minimum age requirement for entitlement to a pension. Finding that the impairment of the right to obtain a pension for those under the minimum age was substantial, the court then weighed that impairment against the asserted objectives of the legislation, namely the integrity of the pension fund and the state's overall fiscal soundness. While acknowledging that in some circumstances these objectives might sustain an impairment of a pension right, the court found that they were insufficiently strong to allow the impairment at issue to be considered "appropriate" to accomplish the legislative objectives, within the meaning of the third prong of the Energy Reserves test, at least with regard to those persons already receiving a pension. Id. at 750-52.

Similarly, in Simpson v. North Carolina Local Government Employees Retirement System, 363 S.E.2d 90 (N.C.Ct.App. 1987) aff'd without opinion, 373 S.E.2d 559 (N.C. 1988), the Court of Appeals of North Carolina remanded for reconsideration under the Energy Reserves test a case involving a legislative adjustment of disability retirement benefits adverse to "vested" members of a public employee retirement system. Both courts expressly considered both the gratuity and strict contract approach to the problem, but concluded that the better method of analyzing questions of state legislative impairments of statutory pension rights was to apply the balancing approach mandated by Energy Reserves. See also Pineman v. Oechslin, 637 F.2d 601 (2nd Cir. 1981); Maryland State Teachers Ass'n v.

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[11] Significantly, the Maine Supreme Judicial Court, as indicated above, did not reach the constitutional question in Soucy v. Board of Trustees of Maine State Retirement System, 456 A.2d 1279 (Me. 1983), but it cited one of the United States Supreme Court's Contract Clause cases: Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). Soucy at 1282.

[12] Under the doctrine of promissory estoppel, a person making a promise may be legally obligated to carry out the promise, even if no contract had been formed, if he intends that the person to whom the promise is made rely on it, and that person takes action in such reliance. Restatement (Second) of Contracts, § 90 (1973).

Hughes, 594 F.Supp. 1353 (D.Md. 1984); Fund Manager, Public Safety Personnel Retirement System v. City of Phoenix Police Department Public Safety Personnel Retirement Board, P.2d 1237 (Ariz.Ct.App. 1986); Halpin v. Nebraska State Patrolmen's Retirement System, 320 N.W.2d 910 (Neb. 1982).

III. Constitutionality of Part F of L.D. 927.

Applying the Energy Reserves balancing test to the bill before your Committee, the first determination is the degree of substantiality of the impairment to the public employees' rights to receive a pension. In this regard, this Department first notes that there is support in the cases for distinguishing between the rights of persons who have not fulfilled the requirements for the grant of a pension, and those who have. See generally Annotation, Vested Right of Pensioner to Pension, 52 A.L.R.2d 437, 442 (1957). Under current Maine law, employees who accumulate ten years of service credit are entitled to a pension upon reaching the age of 60, regardless of whether they remain in state service. 5 M.R.S.A. § 17851(1) and (2). Since these rights have "vested" in the statutory sense, this Department is of the view that their impairment would likely be considered "substantial" within the meaning of the Energy Reserves test, and that the Legislature would therefore have to show a very significant public purpose in order to be able to affect them.13/ This view is consistent with that taken by this Department in a 1985 Opinion involving another proposed legislative alteration of pension rights. Op. Me. Att'y Gen. 85-25 at 3-4.

As indicated above, the evident public purpose of the amendments to the retirement laws contained in Part F of L.D. 927 is to reduce the impact on the State Treasury occasioned by State contributions to the Retirement System. This objective is furthered on the one hand by the class of amendments which would encourage employees to retire later, thereby reducing the current amount which the State government is obliged to contribute to the Retirement Allowance Fund for their pensions, and on the other, by the amendments which would increase the current contribution rates for State employees, thereby permitting the State government to contribute less. In the view of this Department, this objective, absent a showing of a financial crisis making it very difficult for State government to continue to fund contributions to the Retirement System at

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13/Needless to say, a person actually eligible for a pension (as well as one receiving one) would have even greater, and perhaps insurmountable, rights against a legislative impairment.

current levels,[14] would be found insufficient by the courts to warrant a substantial impairment of the terms and conditions of vested pension rights held by those members of the System with more than ten years of creditable service at the time of the effectiveness of the legislation.[15] The public purpose which finds support in the cases to date that might serve as a basis for a restriction on the pension rights of "vested" employees would be if such restrictions were necessary to safeguard the financial integrity of the Retirement Allowance Fund itself.[16] Since such a concern does not appear to be at issue here, this Department would discourage the Legislature from applying the proposed amendments to employees whose pension rights are "vested" as of the date of the effectiveness of the legislation.

That leaves the question of the extent to which the Legislature may apply the proposals to "non-vested" employees, that is, those with less than ten years of creditable service. On this score, there is a considerably better chance that such restrictions might survive constitutional scrutiny. The court might well determine that the degree of impairment is less substantial than that which would apply to "vested" employees, and that the asserted public purpose, reducing the burden on the State Treasury of contributions to the Fund, would be a sufficient basis to allow the court to find that the restrictions were "appropriate" within the meaning of the third

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[14]/The bill contains a provision indicating that the total savings to the State Treasury of the enactment of all the provisions relating to the Retirement System contained in Part F is $37,132,000 in the first year of the biennium, and $40,171,000 in the second (§ T-2). These amounts represent approximately 1 percent of the entire State budget.

[15]/The proposal to limit Retirement System contributions to retired employees' health insurance premiums by its terms does not apply to "vested" employees.

[16]/See, e.g., the decision of the Supreme Court of Pennsylvania (a strong pro-employee jurisdiction) in Harvey v. Allegheny County Retirement Board, 141 A.2d 197, 203 (Pa. 1958). See also Opinion of the Justices, 303 N.E.2d 320, 329 (Mass. 1973).

prong of the Energy Reserves test.[17] Therefore, while the question is by no means free from doubt, the Department would not discourage the Legislature from applying the proposed amendments to "non-vested" State employees.[18]

I hope the foregoing provides some useful guidance to your Committee in resolving these important questions of public policy. Please feel free to reinquire if further clarification is needed.

Sincerely,

MICHAEL E. CARPENTER
Attorney General

MEC:sw

cc: Governor John R. McKernan, Jr.
Claude R. Perrier, Executive Director
Maine State Retirement System
Senator Ruth S. Foster
Senator Michael D. Pearson
Representative Judith C. Foss
Representative Mary H. MacBride
Sponsors, Legislative Document 927

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[17] As indicated above, the State's overall fiscal soundness has been found to be a legitimate public interest for purposes of the Contract Clause. Christensen v. Minneapolis Municipal Retirement Board, 331 N.W.2d at 751.

[18] There is no constitutional problem at all, of course, with the Legislature altering the rules for contribution to and eligibility for pensions for employees not yet hired by the State.