

MAINE STATE LEGISLATURE

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March 7, 2006

Sandra Featherman, Chair
Judicial Compensation Commission
c/o 5 State House Station
Augusta, ME 04333-0005

Dear Ms. Featherman:

In connection with the work that the Judicial Compensation Commission ("Commission") is doing pursuant to Chapter 86 of the Resolves of 2005, you have asked the following question: Does current Maine law allow the portability of service credit in the Maine Judicial Retirement System ("MJRS") for time spent as a legislator if the judge or justice made payments to the Maine Legislative Retirement System ("MLRS") during that legislative service? After your written opinion request was made, we received a copy of a letter to you from Judge Charles LaVerdiere, raising the issue of whether legislation to permit such portability of service credits would be subject to the requirement of Me. Const. Art. IX, § 18-A ("Section 18-A") that unfunded liabilities cannot be created in the Maine State Retirement System ("MSRS"). Lock Kiermaier asked, on behalf of the Commission, that we address this second question as well.

These questions have never been answered by a Maine court. Based on the analysis provided below, we believe that a court reviewing the issue would likely conclude that legislative service credits cannot be counted toward creditable service under the MJRS in the absence of an express statutory provision. If legislation were to be enacted that permits past legislative service credits to be counted toward creditable service in the MJRS, a new liability would thereby be created in that system. However, the prohibition in Section 18-A against the creation of new unfunded liabilities applies by its terms only to the MSRS and does not appear to apply to the MJRS. This issue has never been addressed by a Maine court. While the prudent action would be to fund any such liability that is created, we cannot say with certainty that funding is constitutionally required.¹

¹ It has been suggested that current funds in the MJRS are adequate to fund this additional liability in addition to the existing liabilities of the system. If this is the case, the relevant question is whether funding is required for future periods.

Portability of Retirement Service Credit

The MSRS provides retirement and ancillary benefits specified by statute to its members. Those members include state employees, teachers and members of participating local districts. 5 M.R.S.A. chapter 423, subchapter II (state employees and teachers) and chapter 425, subchapter II (participating local districts).² The term "state employee" is defined by § 17001(40), and generally includes both classified and unclassified employees of departments and agencies of state government (with certain particulars not relevant to the issues presented here). The definition specifically excludes the following:

- A. A judge, as defined in Title 4, section 1201 or 1301, who is now or later may be entitled to retirement benefits under Title 4, chapter 27 or 29;
- B. A member of the State Police who is now entitled to retirement benefits under Title 25, chapter 195; or
- C. A Legislator who is now or later may be entitled to retirement benefits under Title 3, chapter 29.

5 M.R.S.A. § 17001(40).

The MJRS was established by P.L. 1983, c. 853, pt. C, effective December 1, 1984. The persons who serve the MSRS as trustees, executive director, actuary and medical board are, by statute, authorized to serve the same role for the MJRS. See 4 M.R.S.A. §§ 1231(1), 1232, 1233, and 1234 (respectively). The trustees may combine funds of the two systems for investment purposes, but "the assets and funds of the Maine State Retirement System and the assets and funds of the Maine Judicial Retirement System shall not be combined for benefit payment purposes or administrative expenses." 4 M.R.S.A. § 1254. The MJRS is a separate corporation. 4 M.R.S.A. § 1202.

The MLRS was established by P.L. 1985, c. 507, effective September 19, 1985, and made membership mandatory for most legislators by December 3, 1986. The structure of the MJRS was repeated in the MLRS statute, with the MSRS board, executive director, actuary and medical board serving the same role for the MLRS. See 3 M.R.S.A. §§ 731, 732, 733, 734 and 735. Again, the statutes authorize combining the funds of the MLRS and MSRS for investment purposes but not for benefit payment purposes or administrative expenses, and the MLRS is a separate corporation. See 3 M.R.S.A. §§ 754 and 702.

To accommodate the transfer of employees covered by one of the state retirement systems to another, various statutory provisions specify how service earned and contributions made under one system are treated when an employee moves to a job covered by another. The concept of "portability" of retirement service credits as it applies to the various systems of retirement benefits established by the state means that service credits (*i.e.*, years of service) or earnings under one plan can be counted toward minimum service requirements, calculation of

² Hereafter, statutory references are to Title 5 unless otherwise specified.

benefits, or both, in a different plan subsequently joined by the employee, and from which the employee seeks to retire.

For example, if a legislator subsequently becomes a state employee within the meaning of § 17001(40) or a teacher, her service as a legislator participating in the MLRS is combined with service in the MSRS for purposes of determining whether minimum service requirements establishing retirement eligibility have been met. § 17851. However, the MSRS benefit is calculated solely on the basis of service and earnings under that plan, with the legislative service and earnings excluded. § 17852.³ A separate benefit is then calculated based on the retiree's legislative service and earnings. 3 M.R.S.A. § 852. Conversely, a state employee or teacher with service earned in the MSRS plan who becomes a legislator can transfer both membership service and contributions made to the MSRS to the MLRS. 3 M.R.S.A. § 802(4). In this case, service is portable for both eligibility purposes and for benefit calculation purposes. *See* 3 M.R.S.A. §§ 851 & 852.

Creditable service for purposes of determining benefits under the MJRS is prescribed by 4 M.R.S.A. § 1302. Creditable service includes: 1) all judicial service of a member after November 30, 1984 for which contributions are made (subsection 1); 2) service of a member as a judge prior to December 1, 1984 (subsection 1-A); and 3) the period following termination of service for which a beneficiary receives disability retirement allowance payments (subsection 3). In addition, § 1302(3)(A) provides:

Creditable service as a member of the Maine State Retirement System shall be allowed as creditable service of the Maine Judicial Retirement System as follows.

A. Any member who has not withdrawn his accumulated contributions with the Maine State Retirement System may, upon appointment as a judge, have his Maine State Retirement System contributions and membership service transferred to his account with the Maine Judicial Retirement System and all creditable service resulting from his membership in the Maine State Retirement System shall be creditable service in the Maine Judicial Retirement System. All funds in the Maine State Retirement System contributed by the employer on account of his employment shall be transferred to the Maine Judicial Retirement System and shall be used to liquidate the liability incurred by reason of his previous employment. The State shall make such contributions, from time to time, as may be necessary to provide the benefits under the Maine Judicial Retirement System for the member as have accrued to him by reason of his previous

³ *See e.g.*, § 17851(1-B), describing eligibility for members who had 10 years of creditable service on July 1, 1993: "For purposes of determining completion of the 10-year requirement, the 10 years of creditable service may include creditable service as a member of the Maine Legislative Retirement System under Title 3, section 701, subsection 8." Section 17852(1)(A), which establishes the computation of benefits for a member retiring under § 17851(1-B), provides: "1/50th of the member's average final compensation multiplied by the number of years of membership service and up to 25 years of prior service. Membership service under this paragraph does not include creditable service under the Legislative Retirement System..."

employment and may accrue to him by reason of his membership in the Maine Judicial Retirement System.⁴

At the time the MJRS became operative on December 1, 1984, legislators could choose to be members of the MSRS. 5 M.R.S.A. §§ 1091 and 1094(3) (1979). Accordingly, a legislator who chose to participate in the MSRS at that time and who subsequently became a judge would have been eligible to transfer his service as well as his contributions and those of his employer made on his behalf to the MJRS. However, that changed when the MLRS subsequently became operative on December 3, 1986, at which time the following membership definition applied:

1. Membership mandatory. Every Legislator serving in the Legislature on or after December 3, 1986, shall be a member of the Maine Legislative Retirement System, except that any Legislator who is a member of the Maine State Retirement System on December 2, 1986, may continue to be a member of that system instead of becoming a member of the Maine Legislative Retirement System, and any Legislator who is a public school teacher on leave of absence shall continue to be a member of the Maine State Retirement System and to have contributions deducted from his legislative salary as provided by Title 5, section 1094, subsection 3. A Legislator who is the recipient of a retirement allowance from the Maine State Retirement System shall become a member of the Maine Legislative Retirement System, but no creditable service granted under the Maine State Retirement System shall be transferred to the Maine Legislative Retirement System. A member shall cease to be a member when he withdraws his contributions, becomes a beneficiary as a result of his own retirement or dies.

P.L. 1985, c. 507, § 1.

Under this provision only a legislator who was a member of the MSRS on December 2, 1986 or was a public school teacher on leave of absence had the option of continuing to be a member of the MSRS. By continuing to be MSRS members, these legislators would be able to transfer their service and contributions to the MJRS under 4 M.R.S.A. § 1302. All other legislators were required to be members of the MLRS with respect to legislative service on or after December 3, 1986. There is no provision authorizing the MJRS to accept a transfer of contributions from the MLRS or even to include legislative service in calculating retirement eligibility under the MJRS.

The legislative history concerning the establishment of the MLRS contains no mention of the MJRS or the then existing ability of legislators who had chosen to join the MSRS to transfer their service and contributions to the MJRS on becoming a judge. It therefore appears that the Legislature's elimination of its members' ability to transfer their service and contributions to the MJRS was inadvertent rather than intentional. Nonetheless, determining the extent to which service and contributions are portable from one plan to another is a straightforward matter of statutory interpretation. There is simply no provision for legislative service to be taken into account in determining either minimum eligibility or benefit calculations under the MJRS, and no basis to infer the existence of benefits where such are not affirmatively provided. For these

⁴ Section 1302(3)(B) addresses the terms on which a member who has withdrawn his accumulated contributions to the MSRS may, prior to retirement, "buy back" that service.

reasons, we think it highly likely that a court would conclude that there is no basis upon which service earned in the MLRS can be combined with service in the MJRS, either for purposes of eligibility or calculation of benefits, under current statutes.

Application of Section 18-A

In the absence of current authority so providing, enactment of a statute allowing portability of legislative service credits to the MJRS for purposes of determining retirement eligibility or benefit amounts or both would thereby create a new liability in the MJRS. Whether that liability would be unfunded, in an actuarial sense, is a question of fact outside the scope of this opinion. You have asked whether Section 18-A would require that new liability to be funded.

Section 18-A provides as follows, with the pertinent provision in bold print:

Beginning with the fiscal year starting July 1, 1997, the normal cost of all retirement and ancillary benefits provided to participants under the Maine State Retirement System must be funded annually on an actuarially sound basis. **Unfunded liabilities may not be created except those resulting from experience losses.** Unfunded liability resulting from experience losses must be retired over a period not exceeding 10 years.

This provision and Section 18-B, which were approved by the voters concurrently,⁵ each establish funding requirements for certain retirement benefits. Section 18-A, like § 18-B, refers specifically to the "Maine State Retirement System." As no definition is provided in § 18-A, we look to the meaning of the term at the time the bill proposing this constitutional amendment was before the Legislature and the proposal was on the ballot for approval by the voters, in 1995.

In 1995, the MSRS was (as it is now), by statute, a body corporate. § 17101(5). As noted above, the MJRS and the MLRS were also each established by statute as a body corporate, and while funds of these systems can be combined for investment purposes, they cannot be combined for benefit payments or administrative expenses. We have also noted above that the same persons serve each of the three systems as trustees, executive director, actuary and medical board; however, each has specified statutory duties to three separate entities. The purpose of each system was prescribed by statute.

The purpose of the Maine Judicial Retirement System is to provide retirement allowances and other benefits under this chapter for judges.

4 M.R.S.A. § 1202.

⁵ Amendment CLXV to the Maine Constitution, approved by the voters in November 1995 and effective November 27, 1995.

The purpose of the Maine Legislative Retirement System is to provide retirement allowances and other benefits under this chapter for Legislators.

3 M.R.S.A. § 702.

In the case of the MSRS:

1. Purpose. There is established a retirement system, the functions and operations of which are under the supervision of the board, for the purpose of providing retirement allowances and other benefits under this Part [Part 20] for employees.

2. Name. The retirement system shall be known as the "Maine State Retirement System" and by that name all of its business shall be transacted, all of its funds invested and all of its cash and securities and other property held in trust for the purpose for which received.

§ 17101(1)-(2). "Employee" is defined in § 17001(40) as follows:

40. State employee. "State employee" means any regular classified or unclassified officer or employee in a department, any employee of the Maine Community College System except those who make the election provided under Title 20-A, section 12722, any employee of the Maine Educational Center for the Deaf and Hard of Hearing and the Governor Baxter School for the Deaf except as provided in Title 20-A, section 7407, subsection 3-A, any employee of the Maine Military Authority, any employee of the Northern New England Passenger Rail Authority and any employee transferred from the Division of Higher Education Services to the Finance Authority of Maine who elects to be treated as a state employee, but does not include:

A. A judge, as defined in Title 4, section 1201 or 1301, who is now or later may be entitled to retirement benefits under Title 4, chapter 27 or 29;

B. A member of the State Police who is now entitled to retirement benefits under Title 25, chapter 195; or

C. A Legislator who is now or later may be entitled to retirement benefits under Title 3, chapter 29.⁶

Reading these statutory provisions together, it is clear that the term "Maine State Retirement System" applies only to that system which provides retirement benefits to teachers and to state employees other than legislators and judges. This was the case in 1995, and remains so at the present time. The only question that remains, therefore, is whether the term should be construed differently for purposes of Section 18-A.

⁶ This is the current version of Section 17001(40); changes have been made to the introductory paragraph since 1995, but the exceptions have remained as they appear here.

In the absence of any ambiguity, a term should be given its plain or common meaning. "In construing a statute, and the same principle holds true with respect to the Constitution, we look primarily to the language used which may be illumined in cases of doubt by the surrounding circumstances." *Farris ex rel. Dorsky v. Goss*, 143 Me. 227, 230, 60 A.2d 908 (1948), "In construing the Constitution, we seek the meaning that the words would convey to an intelligent, careful voter." *Opinion of the Justices*, 673 A.2d 1291, 1297 (Me. 1996). Applying these rules of construction, the funding restrictions in § 18-A apply by their express terms only to the MSRS, and not to the MJRS or the MLRS. In light of this specificity, and the separate legal existence of the MSRS, MJRS and MLRS, a strong argument can be made that § 18-A does not apply to the MJRS. If a court were to accept this argument, the decision of whether to fund newly created liabilities in the MJRS would be one of policy rather than a matter of constitutional constraint.

An opinion of the Attorney General issued on February 10, 1992 (Me. Op. Atty. Gen. 92-1) reaches the same conclusion with respect to use of the term "Maine State Retirement System" in Art. IX, § 18 of the Maine Constitution. The question addressed concerned the prohibition in the final sentence of § 18, which had recently been added by amendment, against the deappropriation of funds appropriated to the MSRS by the Legislature. Specifically, the MSRS' Executive Director had asked whether it applied to prohibit deappropriation of funds previously appropriated to the MJRS by the Legislature. After reviewing the history of the MJRS and its longstanding status as an entirely separate entity from the MSRS, the Attorney General concluded:

Because members of the Judiciary were not part of the Maine State Retirement System when Article IX Section 18 became effective in 1962, and because the Maine Judicial Retirement System was subsequently created as a separate corporation, the reference to the Maine State Retirement System in the amendment to Article IX, Section 18 enacted in 1991 cannot be regarded as encompassing the Maine Judicial Retirement System. Therefore, the deappropriation by the Legislature of funds appropriated to the Maine Judicial Retirement System does not violate the constitutional provision.

Me. Op. Atty. Gen. 92-1, p. 3.⁷

A 1996 opinion reaches the opposite conclusion in construing the term "Maine State Retirement System" as it is used in Section 18-B of Article IX of the Maine Constitution, which requires that the Legislature appropriate funds sufficient to retire the unfunded liability of the MSRS in 31 years, beginning with the fiscal year starting July 1, 1997. Our analysis in Me. Op. Atty. Gen. 96-5 (April 25, 1996) (pp. 7-8) relies principally on the legislative history of the bill proposing the constitutional amendments that became Sections 18-A and 18-B. That history, particularly the statements of several members of the House during debate, emphasizes the practical consequences of failing to fund retirement liabilities and leaving this responsibility for another day as reasons for supporting Sections 18-A and 18-B. The opinion concludes that this

⁷ Me. Op. Atty. Gen. 84-24 (August 22, 1984) issued shortly after the establishment of the MJRS, also emphasizes the separateness of the MSRS and the MJRS in advising the Executive Director of the MSRS that benefits for retirees of the MJRS could not be paid out of the reserves of the MSRS.

concern for fiscal responsibility in the funding of retirement benefits applies to all those employed by the state, including legislators and judges, and that Section 18-B should be construed accordingly. This same argument would support a similar interpretation of Section 18-A.

We believe that a court would more likely conclude that Section 18-A does not apply to the MJRS. The contrary analysis in the 1996 opinion does not discuss the long history of separation between the MSRS and retirement benefits for judges, as outlined in detail in Op. 92-1. Further, it does not explain why the plain meaning of the term "MSRS," as consistently expressed in a number of statutes over a period of years, does not control, other than referring to it as a "technical" construction. We are mindful of the principle that constitutional provisions are "accorded a liberal interpretation in order to carry out their broad purpose, because they are expected to last over time and are cumbersome to amend." *Allen v. Quinn*, 459 A.2d 1098, 1102 (Me. 1983). However, the argument supporting the more expansive reading of Section 18-A is largely one of policy. As a practical matter, the funding of retirement liabilities on an actuarially sound basis is a prudent course of action. This decision, however, is one for the Legislature to make. If the Legislature were to extend portability of retirement benefits to legislators who become judges without funding the additional liability that results, we cannot conclude that such an action would be indefensible.

I hope this information is helpful.

Sincerely,



G. STEVEN ROWE
Attorney General