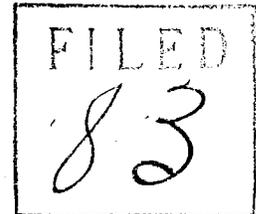


APPROPRIATION BY GENERAL ASSEMBLY:

Appropriation to the Board of Trustees of **Public School** Retirement System of Missouri is constitutional as being made for a state purpose.

November 3, 1945



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This department is in receipt of your request for an opinion upon the following state of facts:

"In Section 85 of HB 428 there is an appropriation of \$29,000 which is in the form of a loan to the Board of Trustees of the Public School Retirement System.

"We would like an opinion as to the constitutionality of this section or whether we can legally pay out any part of this \$29,000 as provided for in this section."

Section 85 of House Bill 428 is as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Twenty-nine Thousand Dollars (\$29,000.00), or such part thereof as may be necessary for the use of the Board of Trustees of the Public School Retirement System of Missouri, from July 1, 1945, to June 30, 1946, to enable it to put into effect the provisions of House Bill No. 151, enacted by the 63rd General Assembly, approved by the Governor on May 24, 1945. Provided, that the above funds shall be repaid into the State Treasury, credited

to the General Revenue Fund not later than July 1, 1947."

In order to determine whether or not the General Assembly may so appropriate from the general revenue fund, it is necessary to determine whether its authority to make such an appropriation is denied by the Constitution.

It is a fundamental principle of law that the people in the Constitution of the State or the Legislature in the exercise of its general legislative power, when not restricted by the federal or state constitution, may adopt such laws as they see fit. The case of *Harris v. Compton Bond & Mortgage Co.*, 149 S. W. 603, 1. c. 609, says:

"* * * The Legislature is vested with the whole power of the state, in the absence of some such constitutional limitation, and may establish any public or municipal corporation it deems necessary or expedient in the public interest. It may also confer upon such corporations such public power and authority as it may deem wise and best. Moreover, it may not only create such public corporations, but it may also change, divide, and abolish them at pleasure.

"Judge Dillon, in discussing this subject, said: 'Subject to constitutional limitations presently to be noticed, the power of the Legislature over such corporations is supreme and transcendent. It may, where there is no constitutional inhibition, erect, change, divide, and even abolish them at pleasure, as it deems the public good to require.' 1 Dillon on Municipal Corporations (5th Ed.) Sec. 92, p. 143.

"Parliament may create new corporations or abolish or alter charters or impose new ones at its will, and without the consent of the inhabitants. And so may the state Legislatures in this country, if there be no constitutional restriction upon the power.' 1 Dillon on Municipal Corporations (5th Ed.) Sec. 92, p. 181."

Also, Sluder v. Transit Co., 189 Mo. 107; State v. Field, 17 Mo. 529, 1. c. 532.

The purpose of the establishment of the Public School Retirement System of Missouri is to provide retirement allowances and other benefits for the public school teachers. In order to determine whether the Legislature is denied the power to appropriate moneys from the state funds for such purpose, we must search the Constitution.

Under the title dealing with "Limitation on Legislative Power" is found the limitation of withdrawals to appropriations, Section 36, Article III, Constitution of Missouri, 1945, as follows:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. All appropriations of money by successive general assemblies shall be made in the following order:

"First: For payment of sinking fund and interest on outstanding obligations of the state.

"Second: For the purpose of public education.

"Third: For the payment of the cost of assessing and collecting the revenue.

"Fourth: For the payment of the civil lists.

"Fifth: For the support of eleemosynary and other state institutions.

"Sixth: For public health and public welfare.

"Seventh: For all other state purposes.

"Eighth: For the expense of the general assembly." (Underscoring ours)

With regard to this section the Supreme Court of Missouri has held in the case of State ex rel. Davis v. Smith, 335 Mo. 1069, that the power of the General Assembly with respect to public funds raised by general taxation, subject to constitutional limitations, is supreme. The court said (l. c. 1072):

"Relator makes a contention that the power of the General Assembly with respect to the public funds raised by general taxation, subject to express constitutional limitations, is supreme. In this connection it is also contended that the Constitution does not restrict the power of the Legislature to make appropriations from the general revenue to compensate public officers for services rendered the public and reimburse them for expenses incurred in the performance of such service."

"We agree that the power of the Legislature over these matters, subject to constitutional limitations, is supreme. * * *"

Section 38 (a), Article III, Constitution of Missouri, 1945, concerns the limitations of the use of state funds by the General Assembly, and reads as follows:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions, for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during this service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

The limitation placed on the use of state public funds by the General Assembly is that they may not use these funds regarding private persons, associations or corporations, with exceptions.

We are directly confronted with the problem, at the present, of whether the recipient of the appropriation described in Section 85 of House Bill No. 428, falls under any such classification, and we will therefore attempt to determine the status of the Public School Retirement System of Missouri.

House Bill No. 151, referred to in Section 85 of House Bill No. 428, declares that such system is to provide allowances and other benefits for public school teachers. It is a corporate body, which, by and in the name of the Public School Retirement System of Missouri, may sue and be sued, transact all business, invest all its funds and hold all its cash, securities, and other property. The system includes all school districts in the state except those in cities of 75,000 population or more. Administration of the system is vested in a board of trustees consisting of five members, two of whom are appointed by the State Board of Education, two of whom are elected by members of the Retirement System, and the remaining member is the State Superintendent of Public Schools or Commissioner of Education.

The Trustees are commissioned by the Governor and are required to take and subscribe to an oath to support the Constitution of the United States and of Missouri, which oath is filed in the office of the Secretary of State of Missouri. The Board of Trustees may formulate and adopt rules and regulations, subject to the limitations of the act. The Board is empowered, by the Legislature, to hold hearings in carrying out its business, and appeals from its decisions go to the circuit court. Records of such proceedings are open to the public. Headquarters is established in Jefferson City with office space provided by the Board of Permanent Seat of Government. The Attorney General is the legal adviser of the Board of Trustees and represents the Board at all legal proceedings. The State Auditor audits the records and accounts of the system.

Funds required for the operation of the system come from contributions made in equal amounts by members of the system and their employers, and from interest derived from the investment of any part of such contributions. All members of the system are required to contribute, and failure to transmit such contributions to the Board of Trustees constitutes a misdemeanor

and upon conviction thereof the party shall be fined not less than \$25.00 and not more than \$200.00. The rate of contributions is set out in the act. All funds thus arising belong to the Retirement System and are not revenue collected or moneys received by the state and are not to be commingled with the state funds. The Board is restricted by the Legislature as to how these funds may be invested.

All employees of public school districts, as defined in the act, are members of the system. The act provides for retirement of these members under various circumstances.

This, in brief, is a resume of House Bill No. 151, which we will also discuss later.

In establishing this system the Legislature has seen fit to designate it as a "body corporate," and it being a corporation we must determine under what class of corporations it falls. If it is a private corporation the appropriation of Section 85 of House Bill No. 428 must fall under Section 38 (a), Article III, Constitution of Missouri, 1945.

McQuillin on Municipal Corporations, 2d Ed., Vol. 1, Sec. 125, page 371, states that a strictly private corporation is one which has as its direct object the promotion of private interests such as banking, insurance, trading and manufacturing.

The case of *Head v. Curators of the University of the State of Missouri*, 47 Mo. 220, 1. c. 224, states:

"* * * The State established an institution of its own, and provided for its control and government, through its own agents and appointees. The act creating the institution, in its first section, declares that a 'university is hereby instituted in this State, the government whereof shall be vested in a board of curators.' The university is then (Sec. 2) declared a 'corporation and body politic' and invested with certain powers. These powers are given into the hands of a board which was made subject to the pleasure of the Legislature. This is not the way in which a private corporation is brought into being and endowed with corporate franchises. A private corporation involves the idea

of private parties and private rights. No such parties or rights were concerned in the institution of the University of the State of Missouri. By establishing the university the State created an agency of its own, through which it proposed to accomplish certain educational objects. * * *"

The case of *Washingtonian Home v. Chicago*, 157 Ill. 414, 41 N. E. 893, holds in brief that a corporation composed of private individuals, not restrained by law in conducting its business for private benefit, which does not report to and is not inspected by the state, elects its own managers without the state's approval, and by law owes the state no duty, is a private corporation within the provisions of the Constitution of Illinois forbidding donations to private corporations.

There are certain requirements to be fulfilled in order to bring a private corporation into being, but this system was not so established. The Retirement System is a creature of the Legislature, restrained by law in conducting its business, inspected by the state, does not elect its own managers without the state's approval, it does owe the state duties, and has as its object the promotion of a public interest. We conclude that it is not a private corporation and therefore Section 38 (a), Article III, Constitution of Missouri, 1945, is inapplicable.

Section 25, Article VI, Constitution of Missouri, 1945, reads:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation, except that the general assembly may authorize any municipality to provide for the pensioning of the salaried members of its organized police force or fire department and the widows and minor children of the deceased members, and may

authorize any city of more than 100,000 inhabitants to provide for the pensioning of other employees, and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services, and to their beneficiaries or estates."

This section is a limitation on the use of credit and grant of public funds by local governments, with certain exceptions which the General Assembly may authorize. However, the funds with which we are concerned are those of the state and therefore this section is inapplicable.

Another section relating to a retirement fund of any description (except the exemption under Section 38(a), supra), is found under Article IV, "Executive Department," subheading "Highways," Section 30, of the Constitution of 1945. This provision deals with the funds collected for the purpose of maintaining the Highway Department, and states that the funds realized from taxation for that purpose shall stand appropriated for direct uses, except . . . and among those exceptions is the provision numbered "(5)", which says:

"* * * less the cost, * * * (5) of the share of the highway department in any retirement program for state employees as may be provided by law, * * *"

This could be said to give the Legislature implied authority to appropriate funds for a Public School Retirement System which might be put into operation by law. However, the Supreme Court of Missouri, in the case of State ex rel. Heaven v. Ziegenhein, 144 Mo. 283, l. c. 291, 45 S. W. 1099, laid down a rule to follow in construing Constitutions as to the proper or improper use of public funds. The court in that case said:

"The courts should not search for plausible reasons and specious pretexts to evade and set aside constitutional prohibitions against the improper use of public funds, and thereby unnecessarily

increase the burdens of taxation. Upon the contrary, all such provisions in the organic law of the State should be enforced and made effectual according to their plain meaning and intent.

"We are not unmindful of the important services rendered by the officers of the police force and of the benefits derived from their faithfulness in protecting and guarding the lives and property of the citizens. They are officers of the State, however, and the Constitution has declared that, like all others holding official stations, they must rest content with the remuneration fixed by law, and after their services have been performed, no matter how valuable they may have been, the city can not, as a gratuity or pension, 'grant public money to or in aid of any individual,' and the courts have no power to require it to be done. A peremptory writ must be denied."

The only remaining constitutional limitation which bears on this question is Section 39 (1), Article III, Constitution of Missouri, 1945, which reads:

"The general assembly shall not have power:

"(1) Use of State Credit in Aid of Others.--To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation;"

This section has been construed by the Supreme Court of the United States in the case of *Cole v. City of LaGrange*, 5 Sup. Ct. 416, 113 U. S. 1, 28 L. Ed. 896, l. c. 898, where Mr. Justice Gray said:

"The 13th section (same as above) peremptorily denies to the state the power

of giving or lending its credit to, or becoming a stockholder in, any corporation whatever." (In parenthesis ours)

We can see no grounds upon which to suppose that a debt has been created against the state by this act. On the contrary, the state is appropriating funds to the Retirement System, which funds are to be returned by it to the state within a stipulated period of time. Therefore, Section 39 (1), Article III, supra, is also inapplicable.

We have reviewed all of the provisions of the Constitution of Missouri, 1945, which we believe applicable, and find no restriction that such purpose as is undertaken in House Bill No. 151, is not within the scope of the legislative power of the General Assembly.

We have hereinbefore pointed out that the system is a corporation, and it is also, in our opinion, such corporation as would fall under the classification of being a state agency.

McQuillin on Municipal Corporations, 2d Ed., Vol. 1, Sec. 125, page 369, in talking of public corporations, states:

"First, public corporations, variously styled public, political, civil and municipal, created by the sovereign power for public or political purposes, having for their object the administration of a portion of the powers of the state, as counties, townships, parishes, schools, reclamation, irrigation, road, levee, drainage, sanitary, fire and taxing districts, cities, towns, villages, and boroughs, or municipal corporations, full or quasi-corporations, invested with certain specified subordinate powers, to be exercised for local purposes connected with, and designed to promote, the public good. Public corporations are not only creations, but instrumentalities of the state, and are subject to visitation and control."

The Retirement system was created by the Legislature of the state and has as its purpose the establishment of the

public school retirement scheme, which is most certainly for the public good. The Board of Trustees is empowered to administer the system which, as we have pointed out before, is a portion of that which the state itself could undertake. The system, being created by the Legislature, is also under the control of the state and, this being so, is an instrumentality of the state since it is subject to such control. The Legislature may amend or alter the act creating the system and may also do away with the system. All school districts in the state, except those in cities of 75,000 population or more, are in the system. Of course, these school districts have been held to be state agencies often. The case of *State ex inf. McKittrick v. Whittle*, 333 Mo. 705, l. c. 709, states:

"Respondent next contends that a school district is not a political subdivision of the State. The authorities are to the contrary. It is defined by a standard text as follows:

"'A school district, or a district board of education or of school trustees, or other local school organization, is a subordinate agency, subdivision, or instrumentality of the state, performing the duties of the state in the conduct and maintenance of the public schools.' (56 C. J. 193.)

"This definition is approved by this court in *State ex rel. v. Gordon*, 231 Mo. 547, l. c. 574, 133 S. W. 44, in which we said:

"'A school district is but the arm and instrumentality of the State for one single and noble purpose, viz., to educate the children of the district--a purpose dignified by solemn recognition in our Constitution (Sec. 1, Art. 11), reading: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State

between the ages of six and twenty years." In obedience to that constitutional mandate, the General Assembly has established such schools and given over to school districts, acting through boards of directors, the single duty and authority to maintain them.'

"In City of Edina to use v. School District, 305 Mo. 452, 1. c. 461, 267 S. W. 112, we also said:

"Under the Constitution of 1875, the public schools have been intrinched as a part of the State Government, and it is thoroughly established that they are an arm of that government and perform a public or governmental function, and not a special corporate or administrative duty. They are purely public corporations, as has always been held in counties in this State."

The present system is therefore composed of boards which are already classified as state agencies. Nor does the fact that the Board of Trustees is not appointed by the Governor, by and with the advice and consent of the Senate, alter the status of the organization since such appointment is not essential to the establishment of a state agency.

The system is supported by contributions which are mandatory and, in effect, the General Assembly has empowered the Board of Trustees to assess all of the members of the system, which lends strength to the fact that such system is a state agency.

Therefore, since the Public School Retirement System of Missouri is a creature of the state, under its control, its trustees commissioned by the Governor, represented by the Attorney General's Office, audited by the State Auditor, and subject to the control of the state, we are of the opinion that it is a state agency. As such, it is within the power of the General Assembly to appropriate state funds to it as is undertaken in Section 35, House Bill No. 428.

Hon. Forrest Smith - 13

Conclusion

The Public School Retirement System of Missouri is a state agency and such appropriation as is undertaken by Section 85, House Bill No. 428, is therefore constitutional, it being within the power of the General Assembly to appropriate state funds for state purposes.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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