

RETIREMENT:
SOCIAL SECURITY:

The Missouri Local Government Employees' Retirement System is an instrumentality of the state and/or one or more of its political subdivisions within the meaning of the Social Security Act.

OPINION NO. 193

June 1, 1971

Honorable John C. Vaughn
Comptroller and Budget Director
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Vaughn:

This is in response to your request for an opinion as to whether Missouri Local Government Employees' Retirement System (LAGERS) is an instrumentality of the state and/or one or more political subdivisions of the state under Section 218 of the Social Security Act, 42 U.S.C.A. Section 418.

Section 218b(2) of the Social Security Act provides that the term "political subdivision" includes an "instrumentality" of a state, one or more of the political subdivisions of a state, or the state and one or more of its political subdivisions. The Social Security Act does not expressly define the term "instrumentality." However, the Handbook for State Social Security Administrators put out by the United States Department of Health, Education and Welfare provides that the issue of what is a political subdivision is a question of state law, Section 130(h). Since under federal law Section 218b(2) of the Social Security Act provides that the term "political subdivision" includes an instrumentality of one or more political subdivisions of the state, we believe we must consider state law to determine if LAGERS is an instrumentality of the State of Missouri and/or one or more of its political subdivisions for the purposes of the Social Security Act.

We find that Sections 105.300 to 105.495, RSMo 1969, are the state statutes which deal with social security coverage of Missouri public employees. Section 105.300(7) provides with respect to the term "instrumentality" as follows:

"(7) 'Instrumentality', an instrumentality of a state or of one or more of its political subdivisions but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or such political

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subdivision and whose employees are not by virtue of their relation to such juristic entity employees of the state or such subdivision;"

We believe that section to include instrumentalities of both the state and one or more of its subdivisions, as well as each separately. Therefore, it is appropriate to consider, first, whether LAGERS is an instrumentality of the state and/or its subdivisions; and then, whether as an instrumentality, it comes within the scope of Section 105.300(7) for purposes of the Social Security Act.

In Opinion No. 282, Trigg, 1964, we had occasion to consider a similar question with respect to the Missouri Bar, which we held to be an instrumentality of the state for purposes of the Social Security Act. There we stated:

"There is no all-inclusive definition of the term 'instrumentality'. See Unemployment Compensation Commission of North Carolina v. Wachovia Bank and Trust Company, 215 N.C. 491, 2 S.E.2d 592. In Falls City Brewing Company v. Reeves, 40 F. Supp. 35, 1.c. 39, in holding that a military post exchange was a governmental instrumentality and therefore tax exempt, the court stated:

"Instrumentality" is defined by Webster as "condition of being an instrument; subordinate or auxiliary agency; agency of anything as means to an end." The same word is defined in 32 Corpus Juris. page 947, as "anything used as a means of an agency; that which is instrumental; the quality or condition of being instrumental."

"Pointing out that post exchanges are not purely voluntary organizations, the court held that they are set up, organized and operated pursuant to military authority. So, too, the Missouri Bar, having been set up, organized and operated pursuant to court authority for the more effective exercise of the judicial authority over the legal profession, the Bar is therefore an agency or instrumentality of the state, having those powers, purposes and functions which have been delegated and conferred upon it by the Supreme Court."

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Sections 70.600 to 70.760, RSMo 1969, concern the organization and powers of LAGERS. In Section 70.605 we find the purpose of LAGERS is to provide ". . . for the retirement or pensioning of the officers and employees and the widows and children of deceased officers and employees of any political subdivision of the state, . . ." Once a political subdivision of the state elects to become an employer as that term is defined by Section 70.600(11), RSMo 1969, all employees of a political subdivision who are not excluded by statute are members of the system, Section 70.630, RSMo 1969, Therefore, LAGERS is not a voluntary organization. Rather, LAGERS is a creation of the General Assembly under the powers granted that body by Article VI, Section 25 of the State Constitution which permits the General Assembly by statute to authorize:

". . . any county, city or other political corporation or subdivision to provide for the retirement or pensioning of its officers and employees and the widows and children of deceased officers and 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; . . ."

Therefore, it appears that LAGERS is an agency which provides the means by which political subdivisions may provide for the retirement and pensioning of officers and employees. Consequently, LAGERS is an instrumentality of the State of Missouri and/or its political subdivisions--it not being necessary to distinguish for the purpose of this opinion between the state and its political subdivisions.

However, Section 105.300(7) does not include all instrumentalities of the state and/or its subdivisions but places the further limitation that the instrumentality must be a juristic entity which is legally separate and distinct from the state and its political subdivisions.

As to LAGERS being a juristic entity, the term "juristic entity" was discussed in Opinion No. 282, supra. There we stated:

". . . Webster defines juristic as 'relating to, created by, or recognized in law.' A juristic person is defined as 'a body of persons, a corporation, a partnership, or other legal entity that is recognized by law as the subject of rights and duties.' The word 'entity',

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just as is true with respect to the word 'instrumentality', has no all-inclusive definition. In Finston v. Unemployment Compensation Commission, 132 N.J.L. 276, 39 A. 2d 697, 1.c. 698, it was said:

'So, too, "entity" is a word with elastic application. It is defined as something which has reality and distinctness of being; but that reality and distinctness may be either in fact or thought. (Webster's New International Dictionary)'"

Under Section 70.605-1, LAGERS is a body corporate with power to be sued in its own name, transact business and hold and dispose of property. Under the second paragraph of that section, the general administration and the responsibility for the proper operation of the system is vested in a board of trustees. Therefore, it is clear that LAGERS is a body recognized by law as having a distinct existence apart from the state and its subdivisions. Consequently, LAGERS is a juristic entity of the State of Missouri legally separate and distinct from the state and its political subdivisions.

Section 105.300(7) also requires, for the instrumentality to be included in the scope of that section, that the instrumentality's employees are not, by virtue of their relation to such juristic entity, employees of the state or one of its political subdivisions. Section 70.605-10 allows the board of trustees of LAGERS to hire employees. However, those employees are not compensated by the state or one of its political subdivisions, but by LAGERS itself out by its income-expense fund authorized by Section 70.725, RSMo 1969. The state and its political subdivisions have no control over the number of employees the board of trustees of LAGERS might hire and has no obligation to compensate such employees. Therefore, such employees are not by virtue of their employment by LAGERS employees of the state or one of its political subdivisions as the term "political subdivision" is defined in Section 105.300(8).

From the foregoing, we conclude that LAGERS, for the purposes of the Social Security Act, is an instrumentality of the State of Missouri and/or one or more of its political subdivisions.

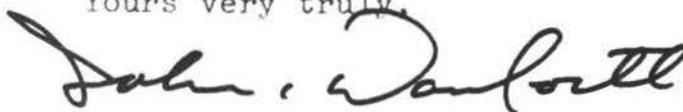
CONCLUSION

It is the opinion of this office that the Missouri Local Government Employees' Retirement System is an instrumentality of the state and/or one or more of its political subdivisions within the meaning of the Social Security Act.

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The foregoing opinion, which I hereby approve, was prepared by my Assistant, Charles A. Blackmar.

Yours very truly,

A handwritten signature in cursive script that reads "John C. Danforth". The signature is written in dark ink and is positioned above the typed name.

JOHN C. DANFORTH
Attorney General