

STATE OF TENNESSEE

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Opinion No. 05-114

Inability of the State to Deny a Pension to Legislators Who Became Members of T.C.R.S. Before the Enactment of Tenn. Code Ann. §§ 8-35-124(a)(1) and (2)

QUESTIONS

1. Does Tenn. Code Ann. § 8-35-124, along with applicable state and federal constitutional law, allow the State to deny a pension, in whole or in part, to a person who was initially elected to office prior to the effective dates found in subsection (e) of that section but was later re-elected after those dates?
2. If the State may deny a pension in part on this basis, how is the determination made regarding what portion of the pension may be denied?

OPINIONS

1. No, it does not. Once a legislator becomes a member of the State retirement system, he or she acquires rights in the terms of that plan which cannot be altered by subsequent legislation except for reasons of actuarial soundness not present in the situation presented.
2. Because the State may not deny a pension in this way, this question is pretermitted.

ANALYSIS

1. Tenn. Code Ann. §§ 8-35-124(a)(1) and (2) provide that no elected official shall be entitled to receive benefits from the Tennessee Consolidated Retirement System (“T.C.R.S.”) or any other public pension system if such a person is convicted in any Tennessee (subdivision (a)(1)) or state or federal court (subdivision (a)(2)) of a felony arising out of the official’s “employment or official capacity, constituting malfeasance in office.” Tenn. Code Ann. § 8-35-124(e), however, states that “[s]ubdivision (a)(1) applies only to persons who become members of public pension plans after July 1, 1982. Subdivision (a)(2) applies only to persons who become members of public pension plans on or after May 31, 1993.” These dates represent the respective effective dates of each subdivision.

Upon election to the General Assembly, a legislator has the option of becoming a member of T.C.R.S. Tenn. Code Ann. § 8-35-109. Once he or she elects to become a member of T.C.R.S.,

a legislator is not required to re-elect for membership at the beginning of each new legislative term. Instead, membership continues on through re-election and re-installation in office without interruption. This is made explicitly clear by Tenn. Code Ann. § 8-35-114, which declares that “[t]he classification and membership rights of any member or prior class member of the retirement system shall continue in force without interruption and remain applicable as long as such member remains in a position for which such classification originated.” Membership in a superseded system existing before the creation of T.C.R.S. automatically converted to membership in T.C.R.S. as of July 1, 1972. Tenn. Code Ann. § 8-35-101. In fact, membership becomes irrevocable once it is chosen and a legislator would be treated no differently under T.C.R.S. than a state employee for whom membership is mandatory. Tenn. Code Ann. § 8-35-123.¹ Even considering the possibility that a legislator’s multiple elections could be viewed as a series of re-hirings, as posited in this request, such a view would still not alter the fact that each legislator joins the retirement system at one time and is thereafter irrevocably a member, whether or not he or she is accruing creditable service during any particular period.

By the terms of Tenn. Code Ann. § 8-35-124 itself, subsections (a)(1) and (a)(2) do not apply to any legislator who was already a member of the retirement system at the time of the effective dates of those sections. Any legislator who became a member of T.C.R.S. under the provisions of Tenn. Code Ann. §§ 8-35-101 and -109 before those specified dates therefore would not be subject to the forfeiture provisions of Tenn. Code Ann. § 8-35-124. Thus, any legislator who became a member of T.C.R.S. after July 1, 1982 and was convicted of a felony by a Tennessee court would forfeit his or her retirement benefits under Tenn. Code Ann. § 8-35-124(a)(1). Similarly, a legislator who became a member of T.C.R.S. after May 31, 1993 and was convicted of a felony by another state or federal court would forfeit his or her retirement benefits under subsection (a)(2).

Applying Tenn. Code Ann. § 8-35-124 to a legislator whose retirement system membership predates the effective dates of Tenn. Code Ann. § 8-35-124 would be unconstitutional. A member of T.C.R.S. acquires rights to the terms of the system as they stand at the time the membership becomes effective, under Tennessee’s version of the so-called “Pennsylvania rule,” as pronounced in *Blackwell v. Quarterly Court of Shelby County*, 622 S.W.2d 535 (Tenn. 1981). This rule recognizes that a pension plan confers some contractual rights on employees, even if no other aspect of the public employment does so. *Id.* at 540. It creates different levels of protection for employees in public retirement systems, depending upon whether or not the employee is vested, a term that refers to those who have met the minimum service requirements for receiving retirement benefits at some point in the future. For prospective employees, the public employer may modify its system at will. *See* Op. Tenn. Att’y Gen. 05-058 (April 20, 2005). For employees already in the system, the *Blackwell* version of the Pennsylvania rule “permits reasonable modifications when necessary to protect or enhance the actuarial soundness of the plan, provided that no such modification can adversely affect an employee who has complied with all conditions necessary to be eligible for a retirement allowance.” *Blackwell*, at 543. For vested employees then, no detrimental modification to the terms of the plan may be carried out by the public employer absent the consent of the affected

¹Tenn. Code Ann. § 8-35-123 applies to “any person participating in the Tennessee consolidated retirement system pursuant to . . . § 8-35-101,” among others. Under § 101, a legislator is considered a “general employee.”

employee. *See id.* Non-vested employees are protected only by the requirement that the modification be necessary to protect or enhance actuarial soundness.

This Office opined several times in the early 1980s that retirement benefits “are in a sense part of the contract of employment.” Op. Tenn. Att’y Gen. 81-291 (May 6, 1981). That opinion noted that “[a]rticle I, Section 20 of the Tennessee Constitution provides that ‘no retrospective law, or law impairing the obligations of contracts shall be made.’ Consequently, [a pending bill was deemed] unconstitutional to the extent that it would now revoke the retirement privileges of anyone who already has a vested right to such benefits, if convicted of a felony arising out of his government employment.” *Id.* This opinion was in response to a question about the constitutionality of a bill that would have deprived State employees and officials of their retirement benefits upon their conviction of a felony relating to their employment duties, with any contributions into the plan being refunded. This rationale, based on preventing the impairment of existing contract obligations, was relied upon by this Office to opine on other occasions that similar bills were unconstitutional. *See* Op. Tenn. Att’y Gen. 81-489 (August 31, 1981); Op. Tenn. Att’y Gen. 81-569 (October 21, 1981). This was essentially the same rationale relied upon by the Tennessee Supreme Court in *Blackwell* (decided September 21, 1981), which elaborated upon the contours of the rule and strictly confined the contractual nature of the employment relationship to the terms expressed in the pension plan.

The application of Tenn. Code Ann. § 8-35-124(a)(1) and (2) to retirement system members who entered their plans before the effective dates of those provisions (July 1, 1982 and May 31, 1993, respectively) would be a detrimental modification, as these statutes provide for a total forfeiture of benefits for reasons not previously contemplated by the terms of the retirement system. Such a modification could not be applied to any legislator whose rights to receive benefits had vested. Legislators who began service prior to June 30, 1976 are entitled to full retirement based on their years of service (*see* Tenn. Code Ann. § 8-36-103), but those who began their terms of office on or after that date must have four years of creditable service to become eligible for a retirement allowance. Tenn. Code Ann. § 8-36-204.²

Moreover, without that legislator’s consent, a modification could not be applied to any non-vested legislator unless it could be shown that the modification was reasonably necessary to enhance or protect actuarial soundness. Any claim that the proposed modification was necessary for the actuarial soundness of T.C.R.S. will likely fail. Pension forfeitures under Tenn. Code Ann. § 8-35-124 will be random, unpredictable events and relying on them to enhance the plan’s actuarial soundness in a situation of necessity would clearly be a flawed approach. It is also quite plain on the face of the statute that the intent behind these forfeiture provisions is to prevent a legislator from continuing to draw money from the State after abusing the public trust as a member of the General Assembly, rather than for any financial interest pertaining to T.C.R.S. The pension forfeiture

²This is pursuant to subsection (a) of this provision. Subsection (b)(1) generally requires ten years for employees who became members of T.C.R.S. after July 1, 1979, and subsection (b)(2) generally requires five years for those who became members on or after January 1, 1992, but subsection (b) does not apply to members of the General Assembly pursuant to subsection (c), which modifies subsection (b). *See* 1979 Pub. Acts 288, § 6.

provisions in Tenn. Code Ann. § 8-35-124(a)(1) and (2) therefore could not be applied to any legislator elected before the relevant effective dates of each section, regardless of how many times that legislator has been re-elected.

These principles, derived from *Blackwell* and Tenn. Code Ann. § 8-35-114, do not apply to legislators who become members of T.C.R.S. after July 1, 1982 or May 31, 1993, because of Tenn. Code Ann. §§ 8-35-124(a)(1) and (a)(2), respectively. These subsections embody the terms of the retirement plans under which such T.C.R.S. member legislators initially joined the plan, and they are therefore fully bound by the forfeiture provisions of Tenn. Code Ann. § 8-35-124.

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