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Opinion No. 05-152

Constitutionality of Requiring Public Officers and Employees Who Accept Re-Election, Re-Appointment, Promotion, or a Change in Classification to Forfeit State Pension Benefits upon a Felony Conviction

QUESTION

In light of Op. Att'y Gen. No. 05-114 (July 19, 2005), would a bill be constitutional if it were patterned after Pennsylvania law 43 Pa. Cons. Stat. Ann. § 1313 (1991), under which public employees and public officials are deemed, upon re-election, promotion, appointment or change in classification to consent to forfeiture of their public retirement benefits if they are convicted of a felony arising out of their public employment?

OPINION

It is the opinion of this Office that such a bill would be constitutional. While the State is constitutionally prohibited from unilaterally modifying the terms of an employee's retirement plan, it may require, as a condition of future re-election, reappointment, promotion, or change in classification that the employee consent to forfeiture of public pension benefits upon conviction of a felony arising out of public employment.

ANALYSIS

Tenn. Code Ann. § 8-35-124 mandates a forfeiture of the retirement benefits of State employees and officials who are "convicted . . . of a felony arising out of the employee's or official's employment or official capacity, constituting malfeasance in office." Tenn. Code Ann. § 8-35-124(a)(1) covers convictions in Tennessee courts, while Tenn. Code Ann. § 8-35-124(a)(2) mirrors that subsection's language and applies it to convictions in federal courts or courts of another state. Under the terms of Tenn. Code Ann. § 8-35-124(e), neither provision may be applied to employees or officials who became members of the Tennessee Consolidated Retirement System ("T.C.R.S.") before those laws were enacted.

Furthermore, under the State constitution, "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 other aspects of public employment do not. *Id.* at 540."

Op. Tenn. Att'y Gen. No. 05-114 (July 19, 2005). These rights cannot be detrimentally modified as to an employee whose rights in the system have vested, which occurs when the employee has "complied with all conditions necessary to be eligible for a retirement allowance." *Blackwell* at 543. They can be modified for non-vested T.C.R.S.-member employees, but only after meeting "the requirement that the modification be necessary to protect or enhance actuarial soundness." Op. Tenn. Att'y Gen. No. 05-114 (July 19, 2005). Either type of employee may consent to a detrimental modification.

Pennsylvania's forfeiture provision, 43 Pa. Cons. Stat. Ann. § 1313 (1991), is similar to that of this State in most respects. Subsection (a) of that statute states that "[n]otwithstanding any other provision of law, no public official or public employee . . . shall be entitled to receive any retirement or other benefit or payment of any kind except a return of the contribution paid into any pension fund without interest, if such public official or public employee is convicted or pleads guilty or no defense to any crime related to public office or public employment."[1] In addition to that provision, Pennsylvania requires that "[e]ach time a public officer or public employee is elected, appointed, promoted, or otherwise changes a job classification, there is a termination and renewal of the contract for purposes of this act." 43 Pa. Cons. Stat. Ann. § 1313(c).

Op. Tenn. Att'y Gen. No. 05-114 responded to a proposal that the re-election of a State legislator be viewed as the termination of the previous employment and retirement relationships and the institution of new ones, begun under the auspices of whatever law governed the pension plan at the time of the latest election, even if these changes would work a detrimental modification of the terms of the legislator's plan as they stood before that election. This Office opined that the key status for determining whether modifications are appropriate is *membership* in T.C.R.S., and not hiring status, and that under current law, the choice of membership by each legislator is a one-time event, after which "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 continuing membership status is established in the statutes (*see* Tenn. Code Ann. §§ 8-35-109, -114) and nothing in Tenn. Code Ann. § 8-35-124 purports to alter it, even for the limited purposes of the forfeiture statute. Because of this, under the theory considered in Op. No. 05-114, no notice would have been provided to those State legislators who stood for re-election that by doing so they would be bringing themselves within the ambit of Tenn. Code Ann. § 8-35-124.

The bill contemplated by the instant question would, however, explicitly address membership status. Presumably, it would specifically purport to alter the membership rights of those State employees who stand for re-election or accept a promotion, different appointment, or change in classification. This alteration is still subject to the constitutional protections for public pension plan terms, but the existence of a provision in the law terminating and then re-instituting membership makes a crucial difference in applying a pension plan modification to an employee who was already a member of T.C.R.S. when that modification was adopted. Unlike the action posited in Op. Tenn.

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[1]Tennessee's statute also includes pleas of guilty or *nolo contendere* as forfeiture events, under Tenn. Code Ann. § 8-35-124(b).

Att'y Gen. No. 05-114, the bill contemplated here would make this necessary change in membership rights in the retirement system. Additionally, it would at the very least provide potentially affected employees and officials notice that the forfeiture provision no longer purported to exempt them.

As noted, such a forfeiture must also come within the bounds of the constitutional safeguards for retirement plan terms pronounced in *Blackwell* and described above. In Op. No. 05-114, this Office opined that "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." Of course, the rights may be altered with the consent of the employee or official — this restriction applies only to unilateral modifications by the State. *See Blackwell* at 543. The question presented here, then, is whether or not a bill mirroring 43 Pa. Cons. Stat. Ann. § 1313(c) would constitute an impermissible, unilateral "alter[ation] by subsequent legislation." It is the opinion of this Office that it would not.

Those terms of 43 Pa. Cons. Stat. Ann. § 1313 in question here have been upheld by the Supreme Court of Pennsylvania. Pennsylvania was the original source of the rule adopted in *Blackwell*. *Blackwell* at 543. *Shiomos v. Pennsylvania*, 626 A.2d 158 (Penn. 1993), involved a judge (who qualified as a "public official" under Pennsylvania's forfeiture act, "Act 140"), Shiomos, who was convicted of two counts of extortion in federal court in June 1988. Shiomos first assumed judicial office in 1972 at which point "the terms and conditions of Shiomos' pension contract were set." This term ended in 1982; Act 140 became law on July 8, 1978. The court stated that:

> Had Shiomos retired in 1982 without assuming any additional public service his pension contract would not be subject to the forfeiture provisions of Act 140. . . . However, when appellant Shiomos assumed his second term in office in 1982 he did so fully aware of the existence of Act 140 and its applicability to public employees in his position. Section 3 of Act 140 declares: 'Each time a public officer or public employee is elected, appointed, promoted, or otherwise changes a job classification, there is a termination and renewal of the contract for purposes of this act.' By assuming his second term in office subsequent to the enactment of Act 140 appellant became subject to Act 140 and the terms and conditions of Act 140 were incorporated into his renewed pension contract.[2]

[2] Note that the relevant portion of the Pennsylvania Constitution, Article I, Section 17, is essentially identical to Tennessee's constitutional protection for contractual obligations. The Pennsylvania provision states that "[n]o *ex post facto law*, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities shall be passed." Article I, Section 20 of the Tennessee Constitution states "[t]hat no retrospective law, or law impairing the obligation of contracts, shall be made." The Pennsylvania Constitution was an important source for the drafters of Tennessee's original constitution in 1796. STANLEY J. FOLMSBEE ET AL., TENNESSEE: A SHORT HISTORY 107 (1969).

Shiomos at 162. Given the similarities between Pennsylvania's and Tennessee's approaches to the constitutionality of detrimental modifications of public retirement plans[3] and the fact that *Shiomos* dealt with the law upon which the posited bill would be modeled, this case serves as persuasive authority for the appropriate analysis of this question.

This Office is of the opinion that the *Shiomos* court's analysis was sound and would be equally appropriate under Tennessee law, presuming passage of the bill in question. The key in considering a bill mirroring 43 Pa. Cons. Stat. Ann. § 1313(c) is that it requires no forfeiture of benefits without the consent of the employee or official. Under the bill, consent to be bound by the forfeiture provisions would become a condition for any employee or official to stand for re-election or accept a promotion, different appointment, or change in classification, but this consent would not be required to receive any benefits the employee had then accrued and would continue to accrue until the occurrence of such an event. No employee who failed to consent to this modification would be in danger of forfeiting any retirement benefits under Tenn. Code Ann. § 8-35-124. He or she could always decline to accept the new position. For this reason, it is the opinion of this Office that a bill modeled on 43 Pa. Cons. Stat. Ann. § 1313(c) would be constitutional.

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[3] It appears that Pennsylvania's rule has become even more protective of benefits since *Blackwell*. "Under the reasoning of the Opinions in Support of Grant of Summary Judgment in *Catania*, which we now adopt as the better view, section 7's unilateral devaluation of the retirement benefits of non-vested members would be prohibited absolutely without regard to the Commonwealth's claim of actuarial enhancement." *Ass'n of Pa. State College and Univ. Faculties v. State System of Higher Education*, 479 A.2d 962, 966 (Pa. 1984). However, the same result would obtain under either this stricter view or the traditional "Pennsylvania rule" (a distinction which had split the Pennsylvania Supreme Court evenly in the cited *Catania* case). *Ass'n of Pa. State College and Univ. Faculties* was followed by the Pennsylvania Supreme Court in *Pa. Fed'n of Teachers v. Sch. Dist. of Phila.*, 484 A.2d 751 (Pa. 1984), but this case again did not turn on the distinction between the traditional Pennsylvania rule and the stricter version first offered in *Catania*.

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