



Office of the Attorney General
State of Texas

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December 12, 1996

The Honorable Barry Telford
Chair, Committee on Pensions
and Investments
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 96-133

Re: Whether a 1995 General Appropriations Act rider regarding the state contribution to the Optional Retirement Program is unconstitutional, and related questions (ID# 38890)

Dear Representative Telford:

You ask about the legality of a 1995 General Appropriations Act rider regarding the state contribution to the Optional Retirement Program ("ORP"), a retirement program available to certain employees of state-supported institutions of higher education as an alternative to participation in the Teacher Retirement System. The ORP is governed by Government Code chapter 830. Participation in the ORP is available to employees of any public technical institute, public junior college, public senior college or university, medical or dental unit, or other agency of higher education.¹ Section 830.201 of the Government Code requires an ORP participant to contribute to the program 6.65% of his or her annual compensation. It also provides that "[e]ach fiscal year the state shall contribute to the [ORP] an amount equal to 8½ percent of the aggregate annual compensation of all participants in the program during that year." Gov't Code § 830.201(a).

The 1995 General Appropriations Act provides for a state contribution to the ORP for the 1995-96 biennium based on 6% of payroll.² The rider at issue provides as follows:

Institutions and agencies authorized under state law to provide the [ORP] to their employees are authorized to use local funds or other sources of funds to supplement the General Revenue Fund appropriation in order to provide the same employer contribution during the 1996-97 biennium, for employees who are on the state payroll or who are employed by a Public Community or Junior College as of August 31, 1995, as they received during the 1994-95 biennium. The [ORP] state contribution rate for employees of the

¹See Gov't Code §§ 830.003, 821.001(10); Educ. Code § 61.003 (defining "institution of higher education"). In this opinion, we refer to the institution at which an ORP participant is employed as the "employing institution."

²See General Appropriations Act 1995, 74th Leg., R.S., ch. 1063, 1995 Tex. Gen. Laws 5242, 5479 (Teacher Retirement System and Optional Retirement System, Rider 5, at III-29).

aforementioned institutions who are hired on or after September 1, 1995 is the same state contribution rate as established in the General Appropriations Act for members of the Teacher Retirement System. Institutions of higher education must notify all newly hired employees that the state contribution rate for the [ORP] may fluctuate over time.

General Appropriations Act 1995, 74th Leg., R.S., ch. 1063, 1995 Tex. Gen. Laws 5242, 5479 (Teacher Retirement System and Optional Retirement System, Rider 6, at III-29). The 1993 General Appropriations Act provided for a state contribution to the ORP for the 1994-95 biennium based on 7.31% of payroll, and authorized institutions of higher education to use local funds or other sources of funds to supplement the general revenue fund appropriation in order to provide a maximum state/employer contribution³ of 8.5% of payroll.⁴ The 1995 General Appropriations Act provides for a state contribution to the Teacher Retirement System based on 6% of payroll.⁵ Thus, the employees referred to in the first sentence of the rider are eligible to receive the same contribution they received in the 1994-95 biennium -- a maximum state/employer contribution of 8.5% -- whereas the employees referred to in the second sentence of the rider receive only a 6% state contribution.

First, we address your question about the 1995 General Appropriations Act rider's failure to authorize employing institutions to use "local funds or other sources of funds" to provide an employer contribution to supplement the 6% state contribution for the latter category of employees. You suggest that it is improper for an appropriations act rider to limit an institution of higher education's use of local funds.

The Texas Constitution, article III, section 35 limits appropriations bills to a single subject, the appropriation of funds from the State Treasury.⁶ A general appropriations act may include multiple "items of appropriation," each one setting aside or dedicating a sum of money for a stated purpose.⁷ Because general appropriations acts are limited to the single subject of appropriating funds,

³In this opinion, we refer to the state contribution appropriated from state general revenue funds as the "state contribution"; we refer to a contribution made by an employing institution from local funds as an "employer contribution"; we refer to the combination of the state contribution and the maximum authorized employer contribution as the "maximum state/employer contribution."

⁴See General Appropriations Act 1993, 73d Leg., R.S., ch. 1051, 1993 Tex. Gen. Laws 4518, 5009 (Teacher Retirement System and Optional Retirement System, Riders 7, 8, at III-30).

⁵See General Appropriations Act 1995, 74th Leg., R.S., ch. 1063, 1995 Tex. Gen. Laws 5242, 5479 (Teacher Retirement System and Optional Retirement System, Rider 3, at III-29).

⁶*Jessen Assoc., Inc. v. Bullock*, 531 S.W.2d 593, 600 (Tex. 1975); *Moore v. Sheppard*, 192 S.W.2d 559, 561 (Tex. 1946); *Linden v. Finley*, 49 S.W. 578, 579 (Tex. 1899); Attorney General Opinions H-321 (1974) at 2, V-1254 (1951) at 4.

⁷*Jessen*, 531 S.W.2d at 599; see generally Tex. Const. art. IV, § 14 (if bill contains several items of appropriation, governor may veto one or more of such items and approve rest of bill).

a general law may not be enacted, amended, or repealed in such acts.⁸ A rider to the general appropriations act may not impose affirmative requirements on state officers or entities.⁹ A rider that is merely declarative of existing law, however, is not invalid.¹⁰ A general appropriations bill may constitutionally include language that qualifies or directs the use of funds appropriated by the bill or that is merely incidental to an appropriation.¹¹ Such provisions, or “riders,” may do no more than “detail, limit, or restrict the use of the funds or otherwise insure that the money is spent for the required activity for which it is therein appropriated.”¹²

We conclude that the implied limitation on the use of local funds in the rider at issue is consistent with general law and is therefore permissible. The rider appears to refer to “local funds” as that term is used in subchapter A, chapter 51 of the Education Code, particularly the funds described in section 51.002.¹³ Section 51.006 of the Education Code provides as follows:

No part of any of the funds listed in Section 51.002 of this code shall ever be used to increase any salary beyond the sum fixed by the legislature in the general appropriations act; provided, however, that the use of such funds by an institution for this purpose may be specifically authorized by the legislature in general law or the general appropriations act.

Section 51.006 was amended to its present form in 1991. The legislative history of the 1991 amendment states that under this provision local funds may be “used for salary enhancement only if specifically authorized by the Legislature in statute or the General Appropriations Act.” House Research Organization, Bill Analysis, H.B. 1973, 72d Leg. (1991).

An employer contribution to the ORP to supplement the state contribution is a component of salary and is fixed by the legislature in the general appropriations act. Given that general law generally prohibits the use of local funds to increase a salary beyond the sum fixed by the legislature in a general appropriations act unless the legislature specifically authorizes the use of local funds for this purpose, we do not believe that the rider enacts, amends or repeals general law. Indeed, in limiting the use of local funds to supplement the state contribution to the ORP except in certain

⁸*Moore*, 192 S.W.2d at 561; *Linden*, 49 S.W. at 579; Attorney General Opinion V-1254 (1951) at 7; *see also* Attorney General Opinions DM-93 (1992), DM-81 (1992), JM-1151 (1990).

⁹*See generally* Attorney General Opinions DM-81 (1992), MW-51 (1979) at 4.

¹⁰Attorney General Opinion JM-343 (1985) at 3 (modified in part by Attorney General Opinion DM-81 (1992) at 2).

¹¹*Jessen*, 531 S.W.2d at 599.

¹²Attorney General Opinion V-1254 (1951) at 17 (summary).

¹³*See generally* Attorney General Opinion JM-575 (1986) at 3-5 (recognizing that prior version of Education Code section 51.002 described “local funds”).

authorized circumstances, the rider is in complete harmony with section 51.006 of the Education Code.

You raise two additional questions about the rider. First, you ask whether faculty members, newly-hired for the 1995-96 academic year, who had arrived on campus and were working prior to September 1, 1995, are eligible to receive the 8.5% maximum state/employer contribution available to faculty members who received that contribution during the 1994-95 biennium.¹⁴ The rider distinguishes between employees who are eligible to receive the 1994-95 biennium contribution and those who are not with the following language:

Institutions and agencies authorized under state law to provide the [ORP] to their employees are authorized to use local funds or other sources of funds to supplement the General Revenue Fund appropriation in order to provide the same employer contribution during the 1996-97 biennium, for *employees who are on the state payroll or who are employed by a Public Community or Junior College as of August 31, 1995, as they received during the 1994-95 biennium.* The [ORP] state contribution rate for employees of the aforementioned institutions *who are hired on or after September 1, 1995* [is limited to 6%]. . . .

General Appropriations Act 1995, 74th Leg., R.S., ch. 1063, 1995 Tex. Gen. Laws 5242, 5479 (Teacher Retirement System and Optional Retirement System, Rider 6, at III-29) (emphasis added).

Your letter suggests that the first sentence of the rider sets up different criteria for public community and junior college employees and all other ORP participants. We disagree. We understand that unlike other ORP participants, public community and junior college employees are not on the state payroll. We believe that the first sentence does not use the phrase "state payroll" in conjunction with public community and junior college employees for this reason, and that it is intended to refer uniformly to employees on the employing institution's payroll as of August 31, 1995. Furthermore, in this sentence, the legislature authorized the supplemental employer contribution for one purpose, that is to maintain the "same contribution . . . received during the 1994-95 biennium." Thus, we conclude that the first sentence of the rider refers uniformly to participants who were on the payroll of their employing institutions on or prior to August 31, 1995, and received a state/employer contribution in the 1994-95 biennium. The second sentence of the rider uses slightly different language, referring to employees "hired on or after September 1, 1995," which could be construed to refer to the date an offer of employment was accepted rather than the first date of employment. The first and second sentences of the rider refer to the same two classes of employees--those who are eligible for the higher 1994-95 biennium state/employer contribution and those who

¹⁴Again, the 1993 General Appropriations Act provided for a state contribution to the ORP based on 7.31% of payroll, and authorized institutions of higher education to use local funds or other sources of funds to supplement the general revenue fund appropriation in order to provide a maximum state/employer contribution of 8.5% of payroll. See General Appropriations Act 1993, 73d Leg., R.S., ch. 1051, 1993 Tex. Gen. Laws 4518, 5009 (Teacher Retirement System and Optional Retirement System, Riders 7, 8, at III-30).

will receive only a 6% state contribution -- and must be construed consistently. The legislature obviously intended to establish a "grandfather" provision for employees who had received a higher state/employer contribution during the 1994-95 biennium. We believe that the legislature intended to distinguish between these two classes of employees based on their first date of employment *and* whether they had in fact received a state/employer contribution during the 1994-95 biennium.

Again, you ask about faculty members hired for the 1995-96 academic year. A faculty member whose first date of employment preceded September 1, 1995, and received a state/employer contribution during the 1994-95 biennium, is eligible to continue to receive the same contribution. A faculty member whose first date of employment was on or after September 1, 1995, is not eligible to receive the 8.5% maximum state/employer contribution and will receive only a 6% state contribution.

Generally, a faculty member's first date of employment is determined by the faculty member's contract,¹⁵ or, if there is no contract, the date the faculty member is first on the employing institution's payroll.¹⁶ The mere fact that a faculty member had arrived on campus and was performing faculty duties prior to September 1, 1995, would not be sufficient to establish that the faculty member's first date of employment preceded September 1, 1995. Whether a particular faculty member's first date of employment preceded September 1, 1995, is a question of fact and therefore is not amenable to the opinion process.¹⁷

Finally, your letter states that many new faculty members hired for the 1995-96 academic year "received specific benefit information with their offer of employment. . . . [T]hey signed contracts based on the representation that they would receive an employer ORP contribution of 7.31% or higher. When they got to campus, they discovered it had been lowered to 6.0%." Your letter also states that in most cases the contracts were signed well before the 1995 General Appropriations Act was passed by the legislature. Although your letter does not articulate a legal argument with respect to these facts, it suggests that these new faculty members have a contractual right to an 8.5% maximum state/employer contribution, that the rider has caused employing institutions to breach these

¹⁵A contract for the 1995-96 academic year would commence as of the first date of the academic year unless otherwise provided in the contract.

¹⁶In most cases these dates will be the same. It may be the case that a faculty member was not on the employing institution's payroll until some date after the first date of employment set forth in the contract. In this case, the earlier date is the pertinent one for purposes of the rider. (Of course, the faculty member will not be eligible to receive the higher state/employer contribution unless he or she actually received such a contribution during the 1994-95 biennium. See discussion *supra* p. 4.). In the event the date the faculty member was first on the employing institution's payroll precedes the first date of employment set in the faculty member's contract, there is an ambiguity regarding the parties' intent with respect to the first date of employment that would have to be resolved by a trier of fact. (Again, there would be no reason to establish an employee's first date of employment unless the employee had actually received a state/employer contribution prior to August 31, 1995. See discussion *supra* p. 4.).

¹⁷See note 16 *supra*.

new faculty members' contracts, and that the rider may impair contracts in contravention of article I, section 16 of the Texas Constitution.

We conclude as a matter of law that an ORP participant does not have a vested or contractual right to a state or employer contribution of a certain amount beyond any one biennium.¹⁸ As noted above, Government Code section 830.201 provides that “[e]ach fiscal year the state shall contribute to the [ORP] an amount equal to 8½ percent of the aggregate compensation of all participants in the program during that year.” Article VIII, section 6 of the Texas Constitution provides, however, that “[n]o money shall be drawn from the Treasury but in pursuance of specific appropriations made by law.” Because of this constitutional restriction on withdrawing money from the treasury, the legislature’s funding obligations are generally limited to the amount it appropriates, even though a general law may authorize the appropriation of a larger amount. See *Edgewood Indep. Sch. Dist. v. Meno*, 893 S.W.2d 450, 470 (Tex. 1995). A statute that sets compensation for a certain position is not in itself an appropriation, and the incumbent will not receive the full compensation authorized by statute unless the legislature appropriates that amount. *Pickle v. Finley*, 44 S.W. 480 (Tex. 1898); *Mutchler v. Texas Dep’t of Public Safety*, 681 S.W.2d 282 (Tex. App.--Austin 1984, no writ); Attorney General Opinion JM-115 (1983). In sum, Government Code section 830.201 is not itself an appropriation to the ORP. Although the legislature is authorized to appropriate to the ORP a state contribution based on 8.5% of payroll, it is not required to do so.

Furthermore, neither Government Code section 830.201 nor the ORP provisions of a particular general appropriations act bind the state to provide the same ORP contribution in subsequent bienniums:

[A]n act merely fixing salaries of officers creates no contract in their favor, and the compensation named may be altered at the will of the Legislature. . . . The presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise.

Fazekas v. University of Houston, 565 S.W.2d 299, 305 (Tex. App.--Houston [1st Dist.] 1978, writ ref’d n.r.e.) (quoting *Dodge v. Board of Educ.*, 302 U.S. 74 (1937)).

Your letter suggests that employing institutions may have led new faculty members to believe that they had a vested or contractual right to a state or employer contribution of a certain amount. We note, however, that “[t]he powers of all state officers are fixed by law, and all persons dealing with them are charged with notice of the limits of their authority and are bound at their peril to ascertain whether the contemplated contract is within the power conferred.” *Id.* at 304 (relying upon *State v. Ragland Clinic-Hosp.*, 159 S.W.2d 105 (Tex. 1942)). Employing institutions are not authorized to contract to provide an employee with a state or employer contribution of any fixed

¹⁸We do not address whether an ORP participant has a vested or contractual right to a state or employer contribution of a certain amount *during* the period of a biennium.

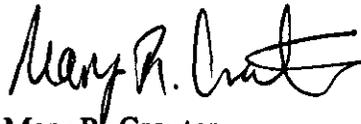
amount beyond the current biennium, and any person contracting with an institution of higher education is deemed to be on notice of this limitation on its authority.

Your letter notes that the rider purports to require institutions of higher education to “notify all newly hired employees that the state contribution rate for the [ORP] may fluctuate over time,”¹⁹ and states that many employing institutions have failed to do so. We believe that this requirement is invalid because it imposes an affirmative requirement on state officers or entities that cannot be found in general law. In addition, it does not qualify or direct the use of appropriated funds. See discussion *supra* pp. 2-3. Although it may be a prudent practice for an employing institution to inform newly hired employees that the state (and employer) contribution rate may fluctuate over time, an employing institution is not required to do so and the failure to provide such notice is of no legal consequence.

S U M M A R Y

A 1995 General Appropriations Act rider is not unconstitutional due to its failure to authorize institutions of higher education to use local funds to supplement the 6% state contribution to the Optional Retirement Program (“ORP”). See General Appropriations Act 1995, 74th Leg., R.S., ch. 1063, 1995 Tex. Gen. Laws 5242, 5479 (Teacher Retirement System and Optional Retirement System, Rider 6, at III-29). The rider distinguishes between employees eligible to receive the same state/employer contribution they received during the 1994-95 biennium and those who will receive only a 6% state contribution based on their first date of employment and whether they actually received a state/employer contribution during the 1994-95 biennium. An ORP participant does not have a vested or contractual right to a certain state or employer contribution beyond any one biennium. The rider’s requirement that institutions of higher education notify all newly hired employees that the state contribution rate may fluctuate over time purports to impose an affirmative requirement on state officers and entities that cannot be found in general law and is therefore unconstitutional.

Yours very truly,



Mary R. Crouter
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Opinion Committee

¹⁹General Appropriations Act 1995, 74th Leg., R.S., ch. 1063, 1995 Tex. Gen. Laws 5242, 5479 (Teacher Retirement System and Optional Retirement System, Rider 6, at III-29).