



JOHN WHITMIRE

District 15
P.O. Box 12068
Austin, Texas 78711
(512) 463-0115
TDD: (512) 475-3758
FAX: (512) 475-3737

803 Yale Street
Houston, Texas 77007
(713) 864-8701
FAX: (713) 864-5287

The Senate of
The State of Texas

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Committees:
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GOVERNMENTAL INQUIRY
UNIT

September 29, 1997

RR-1006

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FILE # ML-39809-97
I.D. # 39809

The Honorable Dan Morales
Attorney General of Texas
P.O. Box 12543
Austin, Texas 78711

Opinion Committee

**Re: Chapter 800.001 et seq of the Texas Government Code, Public Retirement System;
(Opinion Request)**

Dear General Morales:

Please accept this correspondence as a request for an opinion regarding the above mentioned matter.

FACTS

Several Police Officers in the City of Port Arthur, Texas recently became aware of errors in their respective Texas Municipal Retirement System Accounts (TMRS). It was discovered that the City of Port Arthur, by clerical errors and/or omissions, failed to enroll these officers in the TMRS system upon the completion of their employment probationary periods. The affected employees were approximately hired in 1973 and were scheduled to become eligible to retire this next year. It was discovered that each officer was not enrolled for a period of months and therefore will not be eligible to retire for this additional period. The times range between two (2) and six (6) months.

Since the discovery of the errors, the City of Port Arthur has contacted the TMRS in order to explore adjusting the respective officers retirement accounts to correct for these errors. The TMRS has stated that it cannot correct errors which occurred more than four (4) years ago. Further, TMRS has stated that each officer should have received annual statements and should have discovered the error at some time in the past.

QUESTIONS OF LAW

The questions to be answered:

(1) Does section 855.410 of the Texas Government Code allow for a remedy in this situation to make payments to adjust the respective employee's TMRS account for the errors and/or omissions?

Section 855.410 of the Texas Government Code allows for late contributions to the TMRS system. The express terms of this section allow for a participating municipality to remit late contributions to the TMRS system together with applicable interest on these late sums. Can this section be used to correct this error and/or omissions regarding nonpayment which occurred approximately twenty (20) years ago?

(2) Did the respective employees waive their rights to these retirement sums by failing to act within a four (4) year period?

In relation to a waiver on any right to these retirement sums, can an employee waive a statutory right to retirement contributions in a municipality which has adopted participation in TMRS. Section 855.401 of the Texas Government Code states that a municipality shall participate in the TMRS system upon adoption by the voters. Therefore, the employee would have a statutory right to the contributions. Additionally, since the right is guaranteed by statute, does the employee, by law, have a property interest in the retirement sums.

If the employee has a statutory right and/or property right to these retirement sums, can the employee effectively waive that right by failing to seek correction of errors within a four (4) year period. The Texas Supreme Court has published the authority that waiver of statutory right and/or property interest cannot occur unless there is an intentional relinquishment of that known right or intentional conduct inconsistent with claiming that right. (Sun Exploration & Production Co. v. Benton, 728 S.W. 2d 35 (Tex. 1987))

(3) Can the TMRS refuse to accept these late payments?

It is the preliminary opinion of the TMRS that it can not adjust mechanical errors, no matter what the cause, more than four (4) years old. This preliminary opinion is based on a 1985 legal memorandum from a TMRS staff attorney. As previously stated, Section 855.410 of the Texas allows for late contributions by a municipality. Additionally, this section places a mandatory duty on TMRS to notify the municipality of the rate of interest that will be due on late payments.

Thank you for your consideration of these issues. I look forward to hearing from you soon.

Sincerely,



JOHN WHITMIRE

JW/yb