

"Persons engaged in the production of agricultural products as *farmers*, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock . . .

"The next query is, whether it [defendant corporation] is within the scope of the Capper-Volstead Act, which has been quoted. As has been stated, that statute authorizes persons engaged in the production of agricultural products as *farmers* or dairymen to act together in associations, corporate or otherwise, with or without capital stock. It is urged by the government that the words 'dairymen' and 'farmers' should be restricted to natural persons who personally work on dairy farms and who derive the major portion of their income from the farms. The Court sees no basis for such a restricted definition. The owner or operator of a dairy is a dairyman, whether he personally works on his dairy or has the work done by employees. So, too, the owner of a farm may be regarded as a farmer even though he devotes the major portion of his activities to other pursuits. When Congress desired to put a more circumscribed definition on the term 'farmer' it did so expressly, as is true of the Bankruptcy Act, 11 U.S.C.A. §1 et. seq." (Emphasis added)

The specific history of the subject statute and its interpretation, coupled with the indicated trend of legal authority on the subject, persuade me that the term "farmer," as used in paragraph Tenth of Section 9 of the General Property Tax Law, includes, by legislative intendment, a farming corporation.

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670626.2

RETIREMENT SYSTEMS: Legislative.
LEGISLATURE: Retirement.

A retirant of the legislative retirement system who is again elected to the legislature may not again become a participant of the retirement system.

Such a retirant will continue to receive his retirement allowance as accrued by his past service in the legislature.

A survivor of one dying during the legislative membership subsequent to retirement may receive the survivor's allowance if otherwise qualified.

No. 4365

June 26, 1967.

Mr. William Baird, Secretary
Legislative Retirement System
State Capitol
Lansing, Michigan

You advise me that the possible election to the legislature of present "retirants;" i.e., former legislators receiving retirement allowances; presents the following questions upon which you seek my opinion:

1. If a retirant again becomes a member of the legislature, can he again become a participant in the retirement system?

2. During such subsequent membership in the legislature, is the retirant entitled to continue receiving a retirement allowance?
3. If not, does his retirement allowance recommence upon subsequent termination of his second period of legislative service?
4. Does he receive service credit for the period upon which his benefit has been based, or does his service begin with his new status as a participant?
5. Upon completion of a second period of the minimum 8 years of service required to qualify, is he entitled to receive a second retirement allowance concurrent with the first?
6. In case of his death while a member of the legislature, will his widow be entitled to the benefits provided in Sec. 24 of Act 261, P.A. 1957?

The Michigan legislative retirement system was established by Act 261, P.A. 1957, as amended [C.L.S. 1961 §38.1001 et. seq.; M.S.A. 1961 Rev. Vol. §2.169(1) et. seq.] and the following provisions thereof are pertinent to the various questions raised by you:

"Sec. 3. For the purposes of this act the words specified in any section or sections shall have the meanings set forth in such section or sections, unless different meanings are plainly indicated by their context."

"Sec. 6. 'Member' means members of the legislature of the state of Michigan and the presiding officer of either body thereof."

"Sec. 7. 'Eligible member' means any member other than one who has elected not to participate in the system as provided in section 18 of this act."

"Sec. 8. 'Participant' means any member who has elected to participate in the system as provided in section 18."

"Sec. 12. 'Retirement allowance' means a series of equal monthly payments payable at the end of each calendar month during the life of a retirant. The first payment shall be prorated for any fraction of a month to the end of the first month but no payment shall be made for any fraction of a month elapsing at the time of death."

"Sec. 13. 'Retirant' means a person receiving a retirement allowance from this system."

"Sec. 14. 'Refund beneficiary' means the person entitled to receive funds of a participant's contribution upon his death, provided no survivor's retirement allowance is payable under the provisions hereof."

"Sec. 18. Each person who is a member on or after January 1, 1957, shall become a participant in and be subject to the provisions of this system unless prior to December 1, 1957, such member has filed with the board a written notice of election not to participate in the system.

"Each person who becomes a member on or after January 1, 1959, and who is then not a participant shall become a participant in and be subject to the provisions of this system beginning upon the date such person becomes a member, unless within 90 days from said date he

has filed with the board a written notice of election not to participate in this system.

"Each person so electing not to participate shall forever thereafter be ineligible to participate and to receive benefits hereunder. Each person who filed with the board before January 30, 1959, a written notice of election not to participate in the system, and who is still a member, may become a participant in and be subject to the provisions of this system upon his filing with the board on or before January 1, 1962 a written rescission of his notice of election not to participate. Such person shall thereupon become a participant and shall be subject to all of the provisions of this act. Upon making a contribution to the system of an amount equal to the contributions he would have made as a participant from the effective date of this act to the date of becoming a participant, with interest thereon at the rate of 3% per annum until paid, such person shall be entitled to receive credit for service as member prior to the date of the rescission [sic] of the waiver, both before and after January 1, 1957 the same as he would have received if he had never executed the written notice of election not to participate in the system. Such accrued contributions shall be made within a period of 6 months following the date when the person becomes a participant, otherwise no credit for service prior to the date of participation shall be granted.

"Participation of each participant shall continue until the date upon which he becomes a retirant, dies, or accepts a refund.

"Any participant who dies during the term of office for which he has been elected and qualified, for the purpose of this act shall be deemed to have completed his term of office and shall be credited therefor. Deductions provided for in this act shall be made from appropriations to the survivor of such deceased participant for the balance of the salary due to him for the term for which he was elected."

"Sec. 23. Any participant whose service as a member is terminated, regardless of his age at the time of such termination and regardless of cause, shall be entitled to a retirement allowance, if

1. The date upon which the retirement allowance begins is subsequent to the date of final termination of service of such participant, and . . ."

"Sec. 23a. Any participant who has attained or attains age 55 years, but who has not attained age 60 years, and has 8 or more years of credited service may retire upon his written application to the retirement board setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired. Upon his retirement he shall receive a retirement allowance computed according to section 23 of this act reduced by an amount which is 0.5% of the retirement allowance multiplied by the number of months, and fraction of a month, his age at retirement is under 60 years. No participant shall be retired while he remains a member. No participant shall be entitled to a retirement allowance for any period of time during which he is a member."

"Sec. 55. A participant who ceases to be a member of the legislature or a presiding officer of either body thereof, upon written request therefor, shall receive, without interest, a refund of his contributions standing to his credit in the participants savings fund. By accepting such refund a participant forfeits, except as hereinafter provided, all accrued rights and benefits in the system and loses credit for all service rendered to the state for which credit is given under this act.

A participant who ceases to be a member and accepts a refund, if he again becomes a member, may resume his status as a participant by paying to the system, within 1 year after he again becomes a member, the full amount of any moneys he has received as a refund together with interest at the prescribed rate of interest not to exceed 3% per annum from the time of the refund until he again becomes a participant. If a member's contribution is not exhausted in benefits paid hereunder, any excess shall be paid to the beneficiary designated by the member or if no beneficiary is designated, then to his estate."

It is also to be noted that Sec. 21 creates a "participants savings fund" financed by contributions of 5% from each legislator's salary during his service as a member not exceeding 20 years, and that Sec. 22 creates a "survivors retirement fund" financed by a 2% deduction from the legislator's salary with the same 20 year limitation.

Thus, the above provisions of the statute clearly characterize the subject retirement system as voluntary and contributory.

In *Brown v. City of Highland Park*, 320 Mich. 108 (1948); *Wyrzykowski v. Budds*, 324 Mich. 731 (1949); *Attorney General v. Connolly*, 193 Mich. 499 (1916); *Thiesen v. Dearborn City Council*, 320 Mich. 446 (1948) and *Van Coppennolle v. City of Detroit*, 313 Mich. 580 (1946), the Michigan court established and confirmed the rule that no vested rights are accorded by statutes for pensions for public employees whether such systems be contributory or noncontributory. But this view was re-examined in the light of a change in attitude towards the nature of pensions for public employees due, very likely, to the widespread adoption of pension programs in the private sector of the economy. As stated in 52 A.L.R. 2d (1957) 437, 441, under the annotation "Vested Right of Pensioner to Pension:"

"Development of the law on the question under annotation has been long and tortuous, reflecting the increasing pressure placed upon the judiciary by the evolution of the now generally accepted theory that pensions are a part of the compensation of an employee to which, under ordinary circumstances, he is as much entitled as he is to the wages paid him for the work he has actually performed . . ."

This change in attitude is reflected in the adoption by the people of Article IX, Section 24 of the Michigan Constitution of 1963 which provides:

"The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby."

That the newly developed concept of public pensions was uppermost in the minds of the framers of the Michigan Constitution of 1963 when Article

IX, Sec. 24 was proposed is amply demonstrated by the following statement of Mr. Van Dusen, a member of the Committee on Finance and Taxation which proposed this clause:

"Now, it is the belief of the committee that the benefits of pension plans are in a sense deferred compensation for work performed. And with respect to work performed, it is the opinion of the committee that the public employee should have a contractual right to benefits of the pension plan, which should not be diminished by the employing unit after the service has been performed. Now, this does not mean that a municipality or other public employing unit could not change the benefit structure of its pension plan so far as future employment is concerned. But what it does mean is that once an employee has performed the service in reliance upon the then prescribed level of benefits, the employee has the contractual right to receive those benefits under the terms of the statute or ordinance prescribing the plan . . ."

Official Record, p. 771

This point was further stressed in a colloquy between Mr. Downs and Mr. Van Dusen that subsequently ensued:

"Mr. Downs: The other question I have, then: if the legislative body wanted to increase the pension rights, such as lowering the age at which a person would be eligible for benefits, and so on, could an additional contractual right be bestowed, or could that apply only in the future to a new financial system?"

"Mr. Van Dusen: Mr. Chairman and Mr. Downs, the more hypothetical the questions get, the tougher the answer is, as I'm sure Mr. Downs appreciates. However, what we are trying to deal with here are those financial benefits which have accrued. Once the employee, by working pursuant to an understanding that this is the benefit structure presently provided, has worked in reliance thereon, he has the contractual right to those benefits which may not be diminished or impaired. As far as his future service is concerned, he remains, as does any other employee, subject to the terms of employment prescribed by his employer."

"Chairman Martin: Mr. Downs."

"Mr. Downs: May I ask, through the Chair, another question? Then, if I understand this right, if he has the contractual right of, say, retirement at such and such a year, on a certain basis, that could not be diminished? Am I correct on that?"

"Mr. Van Dusen: That is correct."

Official Record, p. 774

Campbell v. Michigan Judges Retirement Board, 378 Mich. 169 (1966) represents further recognition that accrued pension rights of public employees may be treated as contractual obligations even though the circumstances therein arose prior to effective date of Article IX, Sec. 24 so that consideration of this constitutional provision was not involved. Writing for the majority, Justice Dethmers pointed out that judges' retirement system established under Act 198, P.A. 1951; M.S.A. § 27.125(1) et seq; C.L.S.

1961 § 38.801 et seq, was a voluntary plan and therefore constituted a contract which could not be unilaterally abrogated by the State. In so holding, the court stated:

"Here the judge voluntarily agrees to enter the system and pay the contributions, he does pay, and the State agrees to pay certain retirement benefits. There is, then, legal consideration, mutuality of agreement, and mutuality of obligation. A contract is made. Accordingly, a problem of impairment of contract is involved here, as contrasted with the above cited Michigan cases relied on by defendant.

"Michigan Constitution of 1908, art. 2, § 9, followed by Michigan Constitution of 1963, art. 1, § 10, and article 1, § 10, of the United States Constitution, prohibit the impairment by State law of the obligation of a contract. Vested rights acquired under contract may not be destroyed by subsequent State legislation or even by an amendment of the State Constitution . . ."

(page 180)

But, it must be noted, the determination of specific pension rights in an individual case and the determination of when such rights accrue are dependent upon the terms and conditions of the retirement system itself which, in this case, are established by the statute.

With this background information in mind, we turn to the specific questions raised by you and answer them *seriatim*.

1. As to the first of these questions, in my opinion if a retirant again becomes a member of the legislature he cannot again become a participant. This result flows from two identical provisions in Sec. 23 and Sec. 23a which specifically prohibit a person from having dual status as participant and retirant. The applicable clauses of these sections are:

Sec. 23 and Sec. 23a:

" . . . No *participant* shall be entitled to a retirement allowance for any period of time during which he is a member." (Emphasis supplied)

Thus, having failed to exercise the available option under Sec. 55 permitting refund to the legislator and repayment by him and having, instead, elected to become a retirant, the individual has effectively shut off re-entry into the legislative retirement system.

2. During his subsequent membership in the legislature, a retirant is entitled to continue receiving his retirement allowance. There is no provision in the statute which prohibits a person from having a dual status of "member" and "retirant" as we have sought in vain for any express provision to the effect that "no *member* shall be entitled to a retirement allowance for any period of time during which he is a member." (Emphasis supplied)

Further, Sec. 18 provides that:

"Participation of each participant shall continue until the date upon which he becomes a retirant, dies, or accepts a refund."

Thus, unless the statute provides otherwise, the right to the retirement allowance has accrued and has become vested when the legislator has become a retirant.

It may be argued that because Sec. 23, *supra*, says that "the date upon which the retirement begins is subsequent to the date of *final* termination of service of such participant . . ." (Emphasis supplied), the right to the retirement allowance has not accrued or vested until such "final" termination. But, unless the words "final termination of service" be read as "final termination of ANY CONTINUOUS service," no legislator would ever be entitled to receive any retirement allowance at all because only his death will conclusively cut off the possibility that he might serve again and thereby achieve a "final termination of service" so narrowly construed. Such a result could not have been intended.

Further consideration must also be given to the apparent anomaly of having a legislator serve as such and, at the same time, receive a retirement allowance. This apparent anomaly, however, is neither as serious nor as contradictory as might first appear when it is noted that the amount of the allowance is based upon number of years of past service only. The formula in Sec. 23 provides for an allowance of 26% of final salary for the first 8 years of service plus 3% for each of the next 8 years of service up to a maximum of 50% of his salary. If this benefit is viewed as part of his compensation for services rendered, there should be no policy which would permit him to receive this allowance if he serves in any other capacity, public or private, while denying it to him if the electors in his district choose to return him to the legislature after a period of absence.

The general rule is stated in 162 A.L.R. (1946) 1469 under the annotation "Effect of re-entry into public employment on retirement pension previously granted to public officer or employee," as follows:

" . . . where the statute under which the pension is granted provides for forfeiture or suspension of a retirement pension granted to a public officer or employee in case he should accept employment by the Federal government, the state, or one of its political subdivisions, such statute will effectively forfeit or suspend the payment of the pension in case the contingency happens. On the other hand, where the statute does not contain such a clause, the acceptance of public employment by a retired public servant has no effect whatsoever on his pension right, unless he is found to have waived such right . . ."

As indicated above, in my opinion there is no provision in the legislative retirement act which would have the effect of denying a retirement allowance to a legislator who has become a retirant and thereafter returned to the legislature.

3. No answer to your third question is required since, as I have stated, the retirant is entitled to receive his retirement allowance during his second period of legislative service and may not become a participant during such second period of service.

4. The answer to your fourth question is identical with the answer to the third.

5. Similarly, the answer to your fifth question is identical with the answer to the third.

6. As to your final question, Sec. 24 specifically provides that:

"The survivor of a deceased participant or *retirant* . . . shall be entitled to receive a survivors retirement allowance payable from the survivors retirement fund, . . . Such retirement allowance shall be payable beginning (1) on the date of death of such participant or *retirant* if . . ." [following which certain conditions relating to age, marriage, remarriage, children and death are spelled out in detail].
(Emphasis supplied)

Since, as I have stated, a legislator who has become a retirant and is then returned to the legislature does not thereby lose his status as a "retirant," it is clear that his widow is entitled to the benefits of Sec. 24 subject to the conditions stated therein.

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670705.1

CRIMINAL LAW: Sentences.

Act 213, P.A. 1965, construed. A judge may not order a conviction set aside pursuant to Act 213, P.A. 1965, while the sentence based on such conviction is still being served.

No. 4536

July 5, 1967.

Mr. Bruce Barton
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Your predecessor asked whether, pursuant to Act 213, P.A. 1965, being M.S.A. 1965 Cum. Supp. §§ 28.1274(101) and (102), a judge may order the conviction of an individual set aside while such person is still serving the sentence.

Act 213 provides:

"Section 1. Any person who is convicted, or pleads guilty to not more than 1 offense, excepting traffic violations and criminal offenses, the maximum punishment for which is life imprisonment, the commission of which occurred before his twenty-first birthday, may move the convicting court for the entry of an order setting aside the conviction in said cause. Such motion shall not be made until the expiration of 5 years from the time of the entry of the guilty plea or rendition of the decision of the court or jury. A copy of such motion shall be served upon the office of the prosecuting attorney or attorney general who prosecuted the crime and an opportunity be given to contest the motion. Upon the hearing of the motion the court may require the filing of such affidavits and may require the taking of such proofs as it deems proper. If the court determines that the circumstances and behavior of the applicant from the date of his conviction to the filing of the motion