In summary, Section 158 of 1955 P.A. 269, as last amended by 1968 P.A. 316, supra, authorizes a board of education of a second class school district to borrow money for temporary school purposes subject to the provisions of the Municipal Finance Act, as amended, supra. Under Chapter IV, Section 2 of that statute, a school district borrowing for operating purposes in anticipation of the collection of taxes for the next succeeding fiscal year is expressly limited to operating expenses that were not reasonably foreseeable at the time of the tax levy for the current fiscal year.

FRANK J. KELLEY,
Attorney General.

711229.1

CIVIL SERVICE: Power of civil service commission to fix rate of retirement pensions.

CONSTITUTIONAL LAW: Authority of civil service commission to fix rates of compensation.

In the exercise of its power to fix rates of compensation for all classes of positions in the classified service, the civil service commission may adopt a retirement plan that supplements the retirement plan for state employees established by the legislature.

No. 4732 December 29, 1971.

Representative John Bennett
House of Representatives
The Capitol
Lansing, Michigan

Referring me to Article XI, Section 5, Paragraphs 4 and 6, of the Michigan Constitution of 1963, you have requested my opinion on the following question:

> "Is the amount of pension benefits payable by the State of Michigan to State Employees on the classified Civil Service deemed compensation under paragraphs 4 and 6 of Section 5, Article XI?"

The pertinent portions of the constitutional provisions referred to provide as follows:

> "The commission shall classify all positions in the classified service according to their respective duties and responsibilities, *fix rates of compensation for all classes of positions,* approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, *and regulate all conditions of employment in the classified service.*
>
> " * * *
>
> "Increases in *rates of compensation* authorized by the commission may be effective only at the start of a fiscal year and shall require prior

notice to the governor, who shall transmit such increases to the legislature as part of his budget. The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in *rates of compensation* to be effective at a time other than the start of a fiscal year. Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, waive the notice increases in *rates of compensation* authorized by the commission. Any reduction ordered by the legislature shall apply uniformly to all classes of employees affected by the increases and shall not adjust pay differentials already established by the civil service commission. The legislature may not reduce *rates of compensation* below those in effect at the time of the transmission of increases authorized by the commission." [emphasis supplied]

It is apparent that your request concerns the issue of whether the power of the Michigan civil service commission to "fix rates of compensation for all classes of positions" includes within it the power to adopt a pension program for classified state employees.

My review of authorities leads me to the conclusion that the term "compensation," within the context of the above constitutional provision, is a generic term incorporating within its meaning not only salaries but also fringe benefits including pension benefits.

In *Salz v. State House Commission,* 112 A. 2d 716 (N.J. 1955), the New Jersey Supreme Court discussed the commonly understood use of the term "compensation" and concluded that pensions are included within its meaning. Explaining its position, the court there stated:

" 'Compensation' is a generic term comprehending that which constitutes, or is regarded as, an equivalent or recompense; that which makes good the lack of variation of something else; that which compensates for loss or privation; amends; remuneration; recompense. Webster's New International Dictionary, 2d ed. * * *.

"A public pension, * * *, is akin to wages and salaries in that it is payable in stated installments for the maintenance of the servant after his productive years have ended, and is basically a recompense for past services. Passaic National Bank & Trust Co. v. Eelman, 116 N.J.L. 279, 183 A. 677 (Sup. Ct. 1936). A 'pension' is a stated allowance or stipend in consideration of past services or of the surrender of rights or emoluments to one retired from service. In earlier usage, now obsolete, it also had the meaning of a 'payment regularly made to any person; as: *a* To one employed for current services; salary; wages.' Webster, Ibid.

"This concept has general acceptance.

" 'Pension annuities, after the expiration of the period of active service, are in the nature of compensation for the services previously rendered for which full and adequate compensation was not received at the time of the rendition of such services. They are in effect pay withheld to induce long-continued and faithful service.' Giannettino v. McGoldrick, 295 N.Y. 208, 66 N.E. 2d 57. (Ct. of App. 1946.)"

"And in a more recent case involving a disqualification for benefits under the Connecticut Unemployment Compensation Act in the event of 'any payment by way of compensation for loss of wages,' this is said:

" 'A pension is, however, closely akin to wages in at least three particulars. It consists of payments made by or provided by an employer. Although it is not paid in direct compensation for services rendered currently, it is paid in consideration of services rendered in the past. It serves the same purpose as wages to the recipient in that it helps him to meet the expense of living. It is a substitute for the wages which the employee has lost by reason of the loss of his job. The payment of a pension, therefore, comes within the plain meaning of the words of the statute. It is a payment made "by way of compensation for the loss of wages.' " Kneeland v. Administrator, Unemployment Compensation Act, 138 Conn. 630, 88 A. 2d 376, 32 A.L.R. 2d 896 (Sup. Ct. Err. 1952).

"See also Hooker v. Hoey, 27 F. Supp. 489 (D.C. N.Y. 1939), affirmed 107 F. 2d 1016 (2d Cir., 1939)." (p. 719)

Our Supreme Court has recognized and followed the concepts expounded by the New Jersey court. In *Bowler v. Nagel,* 228 Mich. 434 (1924), the court was faced with the question of whether a home rule city is empowered to adopt a charter provision providing for retirement of its employees. The court first pointed out that the home rule act (1909 P.A. 279; M.C.L.A. 117.1 et seq.; M.S.A. 5.2071 et seq.) authorizes city charters to provide for "the qualifications, duties and compensation of its officers" and for the establishment of a system of civil service (pp. 435, 436). After deciding that the home rule act granted broad powers to home rule cities, the court held that such a city could adopt a retirement program. In so ruling the court noted that:

"The moneys to be paid to retiring employees under the amendment are not gratuities. They are annuities, commonly called pensions, and in the nature of compensation for services theretofore rendered. Provisions for such payments to certain Federal officials and officers, soldiers and sailors, and the power of congress to provide therefor, although not expressly conferred by the Federal Constitution, has been upheld. *United States v. Hill,* 98 U.S. 343. As before stated, such payments are provided for in laws like that before us in the belief on the part of those favoring their enactment that the city is benefited thereby, that more efficient service is rendered, and that the long continuous service necessary to bring the employees within its provisions justifies its payment as an economic proposition. A very full discussion of the principle involved will be found in the following cases: *In re Roche,* 141 App. Div. 872 (126 N.Y. Supp. 766); *Mahon v. Board of Education,* 68 App. Div. 154 (74 N.Y. Supp. 172); *Trustees v. Roome,* 93 N.Y. 313; *Hammitt v. Gaynor,* 144 N.Y. Supp. 123, affirmed in 165 App. Div. 909 (150 N.Y. Supp. 1089); *State v. Love,* 89 Neb. 149 (131 N.W. 196, 34 L.R.A. [N.S.] 607, Ann. Cas. 1912C, 542); *People v. Abbott,* 274 Ill. 380 (113 N.E. 696, Ann. Cas. 1918D, 450); *O'Dea v. Cook,* 176 Cal. 659 (169 Pac. 366)." (pp. 440, 441)

The *Bowler* court also brushed aside the argument that payment of a pension would violate the constitutional prohibition against a city lending its credit for other than a private purpose, stating:

> " * * *. That the money which will be expended under this amendment is for 'a public purpose' we have no doubt. The annuities, or pensions if you please, to be paid under it are not gratuities but in the nature of additional compensation for valuable services rendered to the city. As was said in *Mahon v. Board of Education, supra*:
>
> " 'Such statutes are designed to benefit the public service in two ways: *First,* by encouraging competent and faithful employees to remain in the service and refrain from embarking in other vocations; and, *second,* by retiring from the public service those who, by devoting their best energies for a long period of years to the performance of duties in a public office or employment have, by reason thereof or of advanced age, become incapacitated from performing the duties as well as they might be performed by others more youthful or in greater physical or mental vigor.' " (p. 441)

Bowler v. Nagel, supra, has been cited with approval by the attorney general more than thirty times (see Shepard's Michigan Citations 1961, p. 565 and Shepard's Michigan Citations, Oct. 1971, p. 71), several of these references being of particular import.

In 1 O.A.G. 1959-60, No. 3414, p. 206 (October 12, 1959), the attorney general ruled that the Michigan civil service commission has authority to provide for group life insurance and a hospital-medical-surgical benefits for employees in the state classified service. In so ruling the attorney general relied upon *Bowler v. Nagel,* supra, *Kane v. City of Flint,* 342 Mich. 74 (1955), and Article VI, Section 22 of the Michigan Constitution of 1908, the predecessor constitutional source of the power of the civil service commission to fix rates of compensation and regulate conditions of employment in the state civil service (p. 207). In this opinion the attorney general pointed out:

> "The Michigan civil service commission in its rules recognizes that in some instances there may be some remuneration for services of state employees in form other than money. Rule XIX provides for compensation of employees. Subsection D of Rule XIX provides that maintenance allowances under certain circumstances are considered as part of the compensation of the employee. Rule XIX, adopted by the Michigan civil service commission under its rule-making authority, is pursuant to the commission's constitutional power to 'fix rates of compensation for all classes of positions' in state civil service. The constitution does not designate that the medium of compensation must be solely in the form of money; therefore, it is within the discretion of the civil service commission to provide within reasonable limits that a portion of the compensation be in some other form.
>
> "In the case of *People v. Standard Accident Insurance* Company, 42 Cal. App. 2d 409, it was held that the expenditure of public funds to insure public officers and employees against possible tort liability where the state could not be held liable did not constitute a gift of public

funds as such an expenditure serves a public purpose. As in the Standard Accident Insurance Company case, one issue here is whether funds expended for insurance programs for employees serve a public purpose. The constitution gives to the state civil service commission plenary powers in its sphere of authority, part of which is fixing rates of compensation and regulating all conditions of employment, and such constitutional provision is self-executing and needs no enabling legislation except initiation of the appropriation by the legislature.

"It is therefore my opinion that the civil service commission has the authority to provide a group life insurance program underwritten by an insurance company for employees in the state classified service." (pp. 208, 209)

In 2 O.A.G., 1959-60, p. 62, it was stated:

"Retirement benefits for public employees have been upheld as proper by the Supreme Court in *Bowler v. Nagel,* 228 Mich. 434, where the Court ruled that *pensions are in the nature of compensation for services* heretofore rendered, such payments being provided to afford more efficient service on the part of public employees." (emphasis supplied) (p. 62)

And in 2 O.A.G., 1959-60, p. 95, the attorney general noted:

"The law is well settled that pension statutes are constitutional in that the public interest is served by inducing persons to enter the public service and to motivate those already in the public employ to continue and render a better service through the means of a retirement benefit program. *Attorney General v. Connolly,* 193 Mich. 499; *Bowler v. Nagel,* 228 Mich. 434." (p. 96).

Another particularly pertinent attorney general's opinion appears in 2 O.A.G. 1957-58, p. 166, wherein it was held that a legislative act purporting to limit payment of accumulated sick leave under rules promulgated by the civil service commission was unconstitutional. One of the questions put to the attorney general was phrased as follows:

"1. Is the commission properly acting within its constitutional authority in its adoption and enforcement of its rule which provides each state classified employee with payment, at the employee's current rate of pay, of fifty percent of his accumulated unused sick leave at the time of death or retirement?"
(p. 167)

He answered:

"* * *, we think there can be no doubt that the adoption and enforcement of such a rule is within the constitutional powers of the civil service commission, * * *."
(p. 168).

It will be noted that there is a marked similarity between authorizing payment of a sum of money to an employee after retirement as a pension and authorizing payment to him of a sum of money for accumulated sick leave after retirement for in both instances the employee receives the money after he has left state employment.

The Michigan supreme court has also ruled in *Kane v. City of Flint*, supra, that retirement pensions, insurance premium payments and the furnishing of uniforms are to be treated as "compensation." In this case the city's civil service commission was commanded by its charter to provide that like classifications of work receive "like compensation." The commission set up special provisions for firemen and policemen and, in lieu of salary benefits, provided that these employees receive the benefits of insurance protection, retirement and allowances for uniforms. Answering the challenge of city firemen and policemen to this action of the civil service commission, the court said:

> "We do not agree with plaintiffs that charter retirement pensions, insurance premium payments and the furnishing of uniforms cannot be considered as 'compensation.' "
> (p. 80).

The court also adopted the following statement from 3 McQuillin Municipal Corporations (3d ed.), at pp. 499, 500:

> " 'Laws providing for pensions for municipal officers and employees are generally sustained as valid and constitutional, on the ground that pensions are in the nature of compensation for services previously rendered and for which pay was withheld to induce long-continued and faithful service.' "
> (p. 80).

And the court then added the following statement:

> "The alternative, if these benefits which the plaintiffs receive were not to be considered as being part of plaintiffs' compensation, would seem to be that they would have to be considered as gratuities. If that were true, it would follow that the retirement pension plan here involved would be *ultra vires* and void, the city lacking the power to pay gratuities, under *Bowler v. Nagel, supra.*"
> (p. 81)

The court thereafter cited with approval 40 Am Jur, Pensions, § 16, p. 972, for the proposition that a pension is not a gratuity but "a part of the stipulated compensation" and concluded that:

> "* * * the city commission had the authority, in fixing the compensation of firemen and policemen, to take into account the additional benefits to firemen and policemen when allowing them 'like compensation' for like classifications. * * *."
> (p. 83)

More recently, in *Hite v. Evart Products Company*, 34 Mich. App. 247 (1971), the Michigan court of appeals was called upon to determine whether the term weekly "wages" or "earnings" as used in the workmen's compensation act, M.C.L.A. 412.11; M.S.A. 17.237(371), included payments of the employer into a pension fund that would not vest until after ten years employment. The court decided this point in favor of including pensions as part of compensation, stating:

> "We may only speculate whether plaintiff would have worked a full ten years for defendant had she not been injured. However, the

> *facts* are that at the time of the injury her employer was putting aside this potential benefit for her and that the injury prevented a continuation of this potential toward a vested interest. As the result of her injury she must find some other way of providing income for retirement. The pension payment was a part of her weekly wage." (p. 254)

The fact that the civil service commission has not seen fit to exercise its power to adopt a retirement program since its inception would not, of course, serve as a basis for denying that it has this power. Since its inception the commission has directed its attention to the salaries, insurance programs, annual leave provisions, sick leave provisions, and other fringe benefits that have been accepted as part of the compensation of state employees. No doubt the commission has abstained from adopting a retirement program for state classified employees because the state legislature had adopted a comprehensive retirement statute providing in considerable detail for retirement benefits for state classified employees and for the establishment of a retirement board to administer and manage the system. This statute is 1943 P.A. 240; M.C.L.A. 38.1 et seq.; M.S.A. 3.981(1) et seq.; § 13(a). The existence of the legislative act, however, does not preclude the civil service commission from adopting a supplementary retirement plan providing, of course, its adoption is in accordance with procedures outlined in Michigan Constitution of 1963, Article XI, Sections 4 and 6, supra.

Although the above discussion answers your question, it is also necessary, I believe, to review the status of the legislative retirement program.

It will be noted that the power of the legislature to enact laws is limited only by the United States Constitution and the State Constitution. *Attorney General v. Marr,* 55 Mich. 445, 450 (1885) and it is clear that the framers of the 1963 Constitution did not intend to divest the legislature of a power it had exercised prior to its adoption. This is made apparent by the inclusion of Article IX, Section 24, 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.
>
> "Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities."

It will further be noted that the 1963 Constitution, Article III, Section 7, states:

> "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."

It is presumed that the framers of the Constitution had knowledge of existing laws and acted in reference to that knowledge. *Hall v. Ira Township,* 348 Mich. 402 (1957). Therefore, in view of the above constitutional provisions, it is unthinkable that the framers intended to nullify the legislatively established state employees retirement system.

It is therefore clear that the legislative enactment of a retirement program for state classified employees provided for in 1943 P.A. 240, supra, created a vested right in these employees to certain pension benefits. There is, however, no inherent conflict between having a legislative retirement program for state employees and a civil service retirement program that provides for supplementary retirement benefits. The retirement act and its machinery of implementation, therefore, continues in effect and can only be amended or repealed by legislative act providing accrued financial benefits are not diminished or impaired thereby. Should the legislature decide that it is desirable to transfer the entire state classified employees retirement program to the civil service commission it must do so by enactment of a statute accomplishing this purpose.

FRANK J. KELLEY,
Attorney General.

72 0406.1

SOCIAL SERVICES: Welfare Recipients.

COUNTIES: Board of Commissioners.

Access of board of county commissioners to list of welfare recipients.

No. 4733 January 6, 1972.

R. Bernard Houston, Director
Department of Social Services
Commerce Center Building
Lansing, Michigan

You ask whether a county department of social services can properly and legally furnish a county board of commissioners with lists of all clients receiving any form of public assistance through a particular county office. You attach a letter to a county director from the chairman of a county board of commissioners. He asks for a list of constituents who are receiving "welfare assistance of any type," stating as the purpose of the board of commissioners to check the list and to notify the Department of Social Services of any case that they wish to have investigated. The letter states that the commissioners realize that the list is strictly confidential and will be used only to determine if constituents are receiving assistance when the board of county commissioners feels they should not be. Assistance of any type would include general assistance by the county pursuant to M.C.L.A. 400.55; M.S.A. 16.455, as well as categorical assistance with state-federal funds to persons eligible for old age assistance, aid to dependent children, aid to the blind, aid to the disabled and medical assistance. Section 35 of the Michigan social welfare act provides that:

> "All records relating to categorical assistance, including medical assistance, shall be confidential and shall not be open to inspection except that the state bureau shall have the power to promulgate and enforce regulations for the use of such records as may be necessary