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FILE NO. S-1344

PENSIONS:
Effect of 1970 Constitution on
Home Rule Units' Participation
in Pension Systems

Honorable James R. Thompson
Governor
State Capitol
Springfield, Illinois 62706

Dear Governor Thompson:

I am responding to your request for amplification of matters discussed in my Opinion No. S-1295. That opinion stated that all State and local employees paid with funds under the Federal Comprehensive Employment and Training Act of 1973 are by statute participants in the pension systems established in the Illinois Pension Code. (Ill. Rev. Stat. 1975, ch. 108 1/2, par. 1-101 et seq.) You state that the Regional Administrator of the Federal Department of Labor has now asked more specifically

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whether home rule units, absent a positive act of withdrawal, continue to participate in those pension systems under the Illinois Constitution of 1970. For reasons to be stated, I conclude that they do.

The Illinois Constitution of 1970, in article VII, section 6(a), provides in part:

" * * * Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

* * *

I express no opinion on whether this provision would authorize a home rule unit to withdraw from participation in the pension systems, or whether such withdrawal would be prohibited on the ground that pensions are a subject of state-wide concern as in Cummings v. Daley (1974), 58 Ill. 2d 1, and Ampersand, Inc. v. Finley (1975), 61 Ill. 2d 537. It might be noted that sections 3-150 and 4-142 of the Code (Ill. Rev. Stat. 1975, ch. 108 1/2, pars. 3-150, 4-142) explicitly prohibit withdrawal of home rule units from certain pension systems. What is clear is that each governmental entity to which the Pension Code applies is a participant, at least until it attempts to withdraw.

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That conclusion follows directly from the provisions of the 1970 Constitution, as well as from cases decided under it. The Pension Code was enacted in 1963. (1963 Ill. Laws, 161.) The Illinois Constitution of 1970, in section 9 of its Transition Schedule, provides in part:

"The rights and duties of all public bodies shall remain as if this Constitution had not been adopted with the exception of such changes as are contained in this Constitution. All laws, ordinances, regulations and rules of court not contrary to, or inconsistent with, the provisions of this Constitution shall remain in force, until they shall expire by their own limitation or shall be altered or repealed pursuant to this Constitution. * * *"

Thus, all statutes outstanding when the 1970 Constitution took effect and not inconsistent with its provisions, were to remain in effect until they expired or were changed pursuant to the Constitution. The relevant provisions of the Pension Code have not been held inconsistent with the Constitution of 1970. The requirement for positive local action to bring about an exemption from a statute is further shown in article VII, section 6, subsections (d) through (i). These speak of the superseding of statutes as a positive action. Thus:

" * * *

(f) A home rule unit shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provided by law * * *.

* * *

(1) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit [with exceptions].

* * *

The Illinois Supreme Court has interpreted these provisions to require positive action to supersede statutes. In People ex rel. Hanrahan v. Beck (1973), 54 Ill. 2d 561, 565, that Court stated:

"

* * *

* * * In Kanellos v. County of Cook, 53 Ill. 2d 161, we held that a home-rule county may adopt an ordinance pursuant to its home-rule power and thereby supersede a statute antedating the present constitution.

* * *

(Emphasis added.)

Similarly, in Paglioni v. Police Board of Chicago (1975), 61 Ill. 2d 233, 235, the Court stated:

"

* * *

Section 6 (a) of article VII of the Constitution of 1970 contains a broad grant of powers to home rule units:

[quoting section 6(a)]

An ordinance of a home rule unit enacted under this grant of power can supersede a previously enacted conflicting statute. [Citations.]

* * *

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Thus, I conclude that, if home rule units have authority to exempt themselves from the Illinois Pension Code, they can do so only by exercising that authority by ordinance. Without such action, they continue to participate in the pension systems established by the Code. I repeat, however, that I express no opinion as to whether a home rule unit is authorized to withdraw from participation in the pension systems, or whether such withdrawal would be prohibited on the ground that pensions are a subject of state-wide concern.

Very truly yours,

A T T O R N E Y G E N E R A L