

Opinion No. 42.

Public Employees Retirement System
— Contracts, Validity of—County
Commissioners, Power to
Contract.

HELD: That the contract between Silver Bow County and the Public Employees Retirement System is a valid, existing contract. Under the Act and the contract, appropriate deductions as prescribed by the Public Employees Retirement Act must be made as to all employees who elected to come under the System at the time the contract was made and as to all new employees of Silver Bow County as set out in the Public Employees Retirement Act. Deduction of the appropriate contributions as provided in the Public Em-

employees Retirement Act does not contravene any provision of the Constitution of the State of Montana or of the United States.

September 16, 1953.

Mr. N. A. Rotering
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Rotering:

You have requested my opinion on the following questions:

- (1) Is the contract between Silver Bow County and the Public Employees Retirement System valid?
- (2) Are new employees of Silver Bow County required to become members of the Public Employees Retirement System upon accepting employment?

I have examined the contract between Silver Bow County and the Board of Administration of the Public Employees Retirement System. On its face, it is a complete, proper and lawful contract and one which is within the power of the Board of County Commissioners to make on behalf of the County. I have also examined the Resolution of Intention adopted by the then Board of County Commissioners under the provisions of Section 68-301, R. C. M., 1947, and find that it is in compliance with the requirement of subsection (a) of that section of the Act, in that it contains a sufficient summary of the major provisions of the proposed Retirement System.

If the contract is invalid, it must be by reason of the fact that the ballot submitted to the then employees of Silver Bow County is insufficient to meet the requirements of sub-section (a) of Section 68-301, R. C. M., 1947.

So far as here pertinent, Section 68-301, R. C. M., 1947 after providing generally for the making of contracts between the Public Employees Retirement System and the various municipal corporations, reads:

"(a) Said legislative body (Board of County Commissioners) shall adopt a resolution giving notice of

intention to approve said contract, which resolution shall contain a summary of the major provisions of the proposed retirement system. Such contract shall not be approved unless and until an election has been held to permit the employees proposed to be included in the retirement system to express, by secret ballot, their approval or disapproval of said retirement proposal. The ballot at such election shall include the summary of the retirement system as set forth in the foregoing resolution . . ."

The ballot as submitted to the then employees of Silver Bow County did not contain the summary of the Retirement System that appeared in the Resolution of Intention. The ballot as submitted was in the following words:

"Shall Silver Bow County, State of Montana, participate in the Public Employees Retirement System, established by the law with respect to its employees upon the same basis as applying to State employees in said statute. (Chapter 212, Laws of Montana, 1945)."

Whether the ballot sets out, with the particularity that seems to be contemplated by the statute, the general provisions of the Retirement System need not be determined to answer your question. It does spell out that the employees of Silver Bow County shall participate in the system on the same basis as State employees. Further, specific reference is made to the provisions of the statute which sets out the basis upon which State employees participate in the System.

This contract between the County and Public Employees Retirement System was made within the statutory authority of the County Commissioners. From the letter of the Clerk and Recorder, there is nothing to indicate that any of the complaining employees were employed by Silver Bow County at the time the contract was entered into. Of the 111 employees who voted, 107 voted in favor of participating in the Retirement System. There seems to be no contention that the then employees of Silver Bow County would not have voted for participation in the system had the language appearing in

the Notice of Intention appeared on the ballot. Further, it is to be noted that in the six years the contract has been in effect, the County Commissioners of Silver Bow County have not sought to have the contract abrogated, modified or set aside, nor is there anything now indicating that it is the desire of the County Commissioners of Silver Bow County, or of the majority of its employees to have the contract set aside.

In my opinion, the provisions of Section 68-301, sub-section (a), as to what is to appear on the ballot, are directory and in the absence of a showing that the participating employees voting at the election were misled to their prejudice by the failure to incorporate in the ballot the summary of the provisions of the proposed Retirement System, failure to incorporate in the ballot the major provisions of the proposed Retirement System does not render the contract void.

As to the statements attributed to members of the Board of County Commissioners at the time the contract was entered into as to their understanding of the meaning of the contract, the ordinary rules, of course, apply. The contract speaks for itself. Its terms seem to be clear and unambiguous, and the terms of the contract may not be varied by parol statements of members of the Board of County Commissioners.

The Resolution of Intention sets out the procedure adopted by the Board of Administration of the Public Employees Retirement System for the making of contracts with Counties. The resolution specifically refers to the statute creating the Retirement System, and it specifically provides that the contract between the County and the Board of Administration of the Public Employees Retirement System shall be amended by any amendment to the Public Employees Retirement Act made by subsequent State Legislatures. The contract is a valid, existing one which may be avoided or rescinded only as provided in the Public Employees Retirement Act.

Your second question concerns whether or not new employees of Silver Bow County are required, by the

contract or the law, to become members of the system upon their employment.

By the terms of the contract itself, Paragraphs I, VI and VII, the provisions of the Public Employees Retirement Act are incorporated into the contract. By the Act, the then employees of Silver Bow County had an election whether or not they wished to be covered by the Retirement System.

At the time of the execution of the contract, Section 68-202, R. C. M., 1947, provided that all employees become members of the Retirement System after one half year of continuous service. This section was amended in 1951, and now reads:

"Except as herein expressly excluded from membership all employees shall become members of the retirement system as follows: (a) All permanent and probationary employees shall become members on the first day of employment . . ."

This provision relates to State employees, but Paragraph I of the contract specifically provides that the Public Employees Retirement Act "shall apply to the employees of the contracting County upon the identical terms and conditions as set forth in said Act for State employees, effective as of the first day of July, 1947."

Further, Section 68-301 (b) reads:

"Membership in the retirement system shall be compulsory for all employees included under said contract."

Paragraph VI of the contract provides that any amendments made to the Public Employees Retirement Act "shall immediately apply to and become a part of this contract, and shall amend the same accordingly."

It is clear that under the terms of the contract and the statute, all new employees of Silver Bow County, employed after the effective date of the contract, must become members of the system after six months of employment prior to the amendment of 1951 and immediately upon becoming employed

since the amendment of 1951. Membership in the Public Employees Retirement System in Silver Bow County, after the effective date of the contract, was, and is a condition of employment.

This raises the question of whether the requirement of membership in the Retirement System violates some constitutional rights of new employees of Silver Bow County. That it does not do so is well established.

In the case of *Pennie vs. Reis*, 132 U. S. 464, 33 L. Ed. 426, 10 S. C. 149, it was held that deductions from a policeman's pay for contributions to a police pension fund were not an unconstitutional taking of property without due process of law.

Pension funds contributed to by the employees as well as by the employers for firemen, policemen, school teachers and other public employees have been in effect for many years, and where they exist by specific statutory authority, they have been consistently upheld; see *Bowler vs. Nagel*, 228 Mich. 434, 200 N. W. 258, 37 A. L. R. 1154 and *Hughes vs. Traeger*, 264 Ill. 612, 106 N. E. 431. In the latter case the Court said:

"The effect of the law was to reduce the salary which the complainant would receive \$2.00 a month, but he was not thereby deprived of his property, for he had no property in his unearned salary."

Under the Public Employees Retirement Act of Montana, the employee members of the Montana System have a vested right in the contributions made to the Retirement System. Under Sections 68-901, 68-1001, 68-1004, 68-1101 and 68-1201, R. C. M., 1947, as amended the employee member, or his beneficiaries are assured the return of contributions made with interest on an actuarial basis, together with the appropriate matching amount paid by the Public employer after the expiration of the period of employment set out in the Act.

It is, therefore, my opinion that the contract between Silver Bow County and the Public Employees Retirement System is a valid, existing contract. Under the Act and the contract, appropriate deductions as prescribed by

the Public Employees Retirement Act must be made as to all employees who elected to come under the System at the time the contract was made and as to all new employees of Silver Bow County as set out in the Public Employees Retirement Act. Deduction of the appropriate contributions as provided in the Public Employees Retirement Act does not contravene any provision of the Constitution of the State of Montana or of the United States.