JUDICIAL RETIREMENT IN NEVADA

BULLETIN No. 48

NEVADA LEGISLATIVE COUNSEL BUREAU

JANUARY 1961

Carson City, Nevada

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F O R E W O R D

The Nevada Legislative Counsel Bureau is a fact-finding organization designed to assist legislators, state officers, and citizens in obtaining the facts concerning the government of the State, proposed legislation, and matters vital to the welfare of the people. The staff will always be non-partisan and non-political; it will not deal in propaganda, take part in any political campaign, nor endorse or oppose any candidates for public office.

The primary purpose of the Counsel Bureau is to assist citizens and officials in obtaining effective state government at a reasonable cost. The plan is to search out facts about government and to render unbiased interpretation of them. Its aim is to cooperate with public officials and to be helpful rather than critical. Your suggestions, comments, and criticisms will greatly aid in accomplishing the object for which we are all working--the promotion of the welfare of the State of Nevada.

P R E F A C E

Although there have been volumes written on the subject of retirement benefits authorized by statute to be paid to public officers and employees, there has been no unanimity of judicial opinion on the legality or constitutionality of such legislation.

During the 1960 Session of the Nevada Legislature, the Senate adopted Senate Resolution No. 12, which memorialized the Legislative Counsel Bureau to execute a study of the present system of retirement and pensions for Justices of the Supreme Court and judges of the district courts, and possible alternative systems. Pursuant to that resolution, a study has been made resulting in the following report and recommendations.

During the course of the study, consideration was given to the judicial retirement systems of other states and the federal government; also to numerous articles in legal periodicals on the general subject of retirement benefits and the motivating reasons therefor, and in addition a study was made of judicial decisions of state and federal courts dealing with various state and federal pension statutes with relation to applicable constitutional provisions.

Such decisions reflect a change in public thinking toward, as well as a judicial concept of, the "raison d'etre" of the entire subject of retirement benefits paid to public officers and employees from public funds, and the constitutionality of statutes establishing such retirement systems and benefits.

This study was confined to a general consideration of retirement systems for the benefit of public officers and employees with particular attention being given to judicial retirement benefits.

Finally, although reference is repeatedly made to retirement systems "for the benefit of public officers and employees," it is patently evident from such a study that the general public is also greatly benefitted thereby because of the attracting to public service of a more dedicated more qualified personnel to better administer all the functions of this highly complicated business we call "government."

The study was undertaken and completed by Harrison W. Call, Legal Analyst for the Nevada Legislative Counsel Bureau. Copies of the study may be obtained without cost from the Nevada Legislative Counsel Bureau, Carson City, Nevada.

J. E. Springmeyer
Legislative Counsel

1960 SESSION

NEVADA LEGISLATURE

SENATE RESOLUTION NO. 12

BY THE COMMITTEE ON JUDICIARY:

Memorializing the Legislative Counsel Bureau to study the retirement and pension system of Justices of the Supreme Court and Judges of the District Court.

WHEREAS, There has been a difference of opinion as to how best to provide pensions for Justices of the Supreme Court and Judges of the District Court; and

WHEREAS, The members of the Senate of the State of Nevada believe that additional information may lead to an equitable solution to the problem; now, therefore be it

RESOLVED BY THE SENATE OF THE STATE OF NEVADA, That the Legislative Counsel Bureau is hereby memorialized to execute a study of the present system of retirement and pensions of Justices of the Supreme Court and Judges of the District Court and possible alternative systems, and to report the results of such study to the 51st Session of the Legislature of the State of Nevada.

JUDICIAL RETIREMENT IN NEVADA

SCOPE OF THE STUDY

The senate resolution by which this study was authorized, requested a study of the present system of retirement benefits for district court judges and supreme court justices of Nevada and "possible alternative systems."

The first mandate, a study of Nevada's system was simple. It consisted of only the reading of two NRS sections.

The second requirement, a study of possible alternative systems, while extremely interesting, was time consuming, as it required, if properly executed, a consideration of all the judicial retirement systems of the United States. In doing this, we followed the following scope and limitations.

1. The constitutional questions involved:

   A. Could the present judicial pensions be challenged as a gift of public funds?

   B. If so could this objection be overcome by a provision of law continuing retiring judges as judicial officers subject to assignment at their request to part-time judicial duty?

   C. Could we provide, as do some states, for the retiring judge to elect to take a percentage (for example 1/2 or 2/3) of the retirement benefit, and upon his or her death, for the surviving spouse to receive the remaining percentage until death?

   D. If the legislature increased the monthly retirement benefit, could those who retired prior to the increase receive the additional benefit?

2. Should our system be amended so as to require a contribution of a salary percentage of all judges eligible to participate?

3. If a contribution is required of participants should the system be extended to include judges of so-called inferior courts; and, if so, should "tacking" of service on the different courts be permitted in order to accumulate the necessary aggregate service?

4. Should the optional retirement at 60 or 65 years of age be coupled with a compulsory retirement provision at an older age?

5. If a contribution is required, should the amount of retirement benefits be increased for services rendered after retirement age and required years of service?

6. If a judge retires for illness, incapacity or because of being defeated should there be a pro rata pension provision or a refund of contributions?

7. Should there be a provision that if, after a minimum period, for example

10 years, a judge should be prevented from further service because of physical or mental disability, he should be entitled to a pro rata pension, as in some systems?

8. If a disability provision is included, should there be a qualifications commission established to determine when disability occurs or ends?

9. If a qualifications commission should be authorized, could it be constitutionally authorized to compel the retirement of a judge, before or after he has acquired the required years of service to retire, for incapacity, wilful neglect of duty, or conduct unbecoming a judicial officer?

BRIEF HISTORY OF COMPENSATED RETIREMENT

What is now accepted as an inherent integral of our social-economic system called variously pensions, retirement benefits or compensated retirement is of comparatively recent origin.

For example, Frederick Lewis Allen, who for many years was editor of Harpers Magazine, wrote just prior to his death in 1954:

> I have been wondering what any of us would have thought if before the crash - let us say in 1928 - he had received an invitation to a large and imposing meeting to discuss economic security for Americans. I think he would have wondered whether he was being coaxed to a meeting of visionary social workers, or radicals or cranks, or all three.

The American Social Security system was not enacted into law until 1935. Most all other public and private retirement benefit programs are of even more recent origin. Until shortly before our social security system came into being, we in America adhered to the positive economic philosophy: that personal prosperity and the ability to retire from active labor before death was purely a matter of personal responsibility; that it was exclusively the obligation of the individual to save enough from his earnings to support himself upon retirement. Those who could not do so were considered improvident "unfortunates" who had "violated the gospel of hard work and thrift." The accepted credo of those days was expressed by one writer in the following words:

> This is a country of boundless prosperity which guarantees an equal chance to everybody. If people don't get ahead it isn't the fault of society. 1/

The same writer contended that society should not provide retirement benefits for those who could not provide for themselves upon retirement because such help "weakens the character of the recipient."

It is interesting to note that more than a half century prior to the expression of these postulates, Bismarck, in Germany, had inaugurated a fairly comprehensive system of social security to protect the people not only from old age unemployment, but also from accident and sickness which prevented labor. The system was financially supported by the employer, the employee and the government.

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1 Middletown in Transition, (Lynd)

Some time later Great Britain set up an old age and unemployment system of benefits similarly supported.

Despite these early day considerations by two great countries for the social welfare of their citizens, America would have none of it until the "crash" and "great depression" shook the economic foundations of America and demonstrated that the doctrine of the "lassez faire" economists was erroneous.

It is of interest to note that by the time the "crash" occurred, all but four of our states had enacted Workmen's Compensation laws, the first one having been adopted in 1911. However, little or no other so-called social economic welfare legislation was considered until the depth of the depression era. During these years of economic stress the federal congress gave increasing attention to the economic well-being of Americans generally and to measures to protect the various groups against the vagaries of economic hazards and chance. The result was the enactment by Congress of a procession of legislation designed to aid and protect the economy of these various groups. For example, the farm price support; federally guaranteed housing mortgages; federal insured bank deposits; and a system of unemployment insurance administered by states under federal standards.

It was in this atmosphere that Congress enacted the social security law of 1935, a nationally administered compulsory system of old age insurance. There was only token opposition to the bill which was a drastic departure from the established thinking of but a year or two prior thereto. It was generally agreed by the great majority of people that the time had come for such social legislation.

Whereas, little thought had been devoted to the problem of pensions for retirement prior to the depression decade, within a few years after its inception, the Congress and practically all state legislatures were subjected to a rash of so-called pension plans. The sponsors had adopted the postulate of de Tocqueville:

> It is not the singular prosperity of the few, but the greater well-being of all that is most pleasing in the sight of the Creator.

The pension advocates all subscribed to the contention that the principal ingredient of the "greater well-being" of all in America was a statutory assurance of economic security when advancing years prevented further labor by the individual, or when periods of economic stress and depression brought unemployment. The end result of the combined efforts of such advocates was unemployment insurance and old age pensions.

A contemporary movement corollary to these social-economic benefits, then little advanced beyond the thinking stage, was the consideration of compensated retirement for public officers and employees. The compensation paid to those who worked for the federal or state governments was pitifully low, much too low to attract highly qualified personnel in numbers sufficient to satisfy the ever-increasing needs and far too low to enable any of such personnel to properly maintain and support their families, educate their children and amass savings in an amount sufficient to support them without additional income. One political wag summed up the general belief by saying that one who entered the public service had to be either a "thief or a philanthropist."

The political science teachers and others interested in government had been striving to attract a better educated and qualified personnel to public service in the government. Comparison of public pay with that paid by private industry demon-

strated a shocking disparity. Furthermore, there was no certainty of continuity in any governmental position. The spoils system of Andrew Jackson was still the accepted mode with the possible exception of the 1920 Federal Civil Service Act. Political economists began to preach for two badly needed changes. One was job security and the other a general increase in pay for the services of governmental personnel. Hand in hand with these proposals was the contention that there must also be a provision for compensated retirement. There had previously been many pension plans (the first one appearing in 1875) adopted by private industry and some labor unions were contending for more. Most of the industrial pension systems established before the economic "crash" soon became insolvent because they were established without actuarial considerations. As private systems for compensated retirement grew in numbers, it became increasingly apparent that, in order to compete successfully in the labor market and attract young, qualified people to a career of public service, the entire economic program for governmental officers and employees had to be revised. Civil service laws and salary increases resulted, but not with any amazing speed. Consideration had to be given to legislation establishing state personnel boards and commissions.

Pensions, as such, were not new; the federal government had long before granted them for service in the armed forces in time of war. These were not really considered pensions for services rendered. Rather, they were looked upon as a grant for heroic service in which the possibility of death or permanent disability was great. There had been a pension plan bill introduced in Congress as early as 1915, but no such legislation was enacted until 1935, unless the Federal Civil Service Act of 1920 be so considered.

The 1935 act was enacted at the depth of the depression and because of it. While there was a physical consideration involved in its passage, the real motivating consideration in its enactment was the urgent need to stabilize employment. Therefore, older workers could not afford to retire, and they continued on despite their decreasing capacity to produce. The legislation was needed mainly to bring about the retirement of the older workers in order to furnish jobs to younger, more productive men and women. The contribution of medical science to an increased span of human life complicated the economics of business and industry. There were more men than jobs even in "good times." When drepressions came, the labor force far exceeded available jobs. Hence the enactment of a series of social-economic acts beginning in 1935.

The studies made in all such fields demonstrated the wisdom and need for retirement of public service personnel at all levels. It sometimes seemed a cold, callous view to take toward workers, but it was as inevitable as the ebb and flow of tides. It was simply good business to offer inducement to older people to retire and permit the younger, more able persons to replace them. This was particularly so in the echelons of government where a high degree of intelligence is required, especially in the judiciary.

In considering the judiciary, the matter of compensated retirement had another motivating factor. The salary paid to judges until recent years, was far below the income of most lawyers. Furthermore, the nature of judicial service precluded a judge from the many possibilities for economic advancement the practicing lawyer comes in contact with. In addition, the judge must in the nature of things circumscribe his social freedom. His is the duty of sitting in judgment on the life, liberty and property of people. He, therefore, must be circumspect to a greater degree than the practicing lawyer and deny himself public activity and expression he might otherwise enjoy.

All these factors made it most difficult to attract the highest type of practitioner to the bench, except in a few instances where some dedicated individuals were willing to forego the greater financial rewards for the poorly paid monastic seclusion of judicial chambers, or when some older successful practitioner decided to retire from the practice and spend his declining years on the bench. There being no retirement compensation, few judges could retire at any reasonable age; many stayed on after their mental capabilities had waned.

Thus, it became patently apparent to members of the bar, the bench, and legislators, that if we were to successfully compete for the higher type of intellect and ethics and attract such persons so qualified to the bench, and induce retirement before physical and intellectual impairment occurred, a salary comparable to the successful lawyer and commensurate with the duties and dignity of such high office had to be provided, and also a retirement benefit of sufficient amount to enable the retiring justice to maintain himself and what family he had left, in the economic manner and social status to which he was accustomed before retirement. There were many legal and constitutional barriers standing in the way of the desired result, and some statutes establishing judicial pension systems were declared unconstitutional, mainly on the ground they constituted a violation of the constitutional section prohibiting a gift of public money. The barriers were finally overcome and presently every state, including the two most recently admitted, has enacted a compensated judicial retirement system.

Statistical data will be hereafter set out showing the provisions of the general state judicial retirement systems. It will be noted from these data that there are 18 states, including Nevada, that require no contribution from eligible participants and there is no contribution required of federal judges. In this connection, the reason advanced for not requiring a contribution from participants in judicial retirement systems is that these systems were enacted not primarily to assure economic security to those eligible, but more as an inducement to attract better qualified persons to the judicial service. The contentions have merit, as a consideration of the reasoning will reveal.

There is, perhaps, no other field of endeavor in which so great a disparity exists between the income of judges and that received by lawyers in personal private practice. By this latter term is meant self-employed lawyers in general practice and not those employed in business and industry on a fixed salary.

Whereas almost all other public officers and employees, with the possible exception of doctors and engineers, receive compensation of the approximate equivalent they would receive for comparable service in private industry and business. This is not the case in the legal field.

Repeated studies have shown that the lawyers possessing the qualities of education, intelligence and experience desired in the judiciary will, in most instances, enjoy a financial reward from their legal practice that is far in excess of, or several times over, the salary paid judges. In the long struggle by lawyers and laymen to improve the quality of judges this financial problem was a deterrent. When young men possessing judicial qualifications and vigorous mentality were asked to embark on a judicial career, most were loath to do so because of the economics involved. Only those with independent means or those peculiar individuals having no desire for wordly goods were free from such considerations. It has been only in the last decade or two that special attention has been given this problem. On numerous occasions, very able men, eminently qualified, have accepted judicial appointment only to resign before expiration of the term of appointment upon the sole ground that they could not support their families in the manner desired and provide for a decent

retirement on their judicial salary. Almost invariably these same men enjoy exceptional financial success in the personal practice.

It became increasingly apparent to those seriously interested in improving our judiciary that the financial arrangements had to be materially revised. They became convinced and were able to convince many legislatures that judicial salaries had to be substantially increased and provision made for a respectably compensated retirement system without a diminution of salary.

Reference has been made to the other sacrifices custom and tradition have required judges to make in the matter of circumscribed social and political activity, also the reduced opportunity for financial benefits that a lawyer in practice enjoys, such as obtaining ownership in business and industrial enterprises for services rendered. For these reasons, the sponsors of judicial retirement systems in the states listed immediately hereafter had the plans enacted into law without any requirement for contribution by the participants therein.

The states not requiring contribution are: Alabama, Colorado, Connecticut, Georgia, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, North Carolina, Oklahoma, Rhode Island, Utah and Wyoming, as well as the federal government, in which the judges retire on full pay.

In the other states, the amount of contribution required runs from a low of 1.5% of salary in Arkansas, and 1.65% in Mississippi to a high "up to 10.21% in Vermont" depending on the age upon taking office of the participant.

FURTHER CONSIDERATION OF CONTRIBUTION

Early pension plans of both government and private industry were not the formal thoroughly studied plans of more recent years and were mainly of the noncontributory type. From 1930 to 1940, the contributory type of plan became more numerous in private industry, largely for the reason that employers were fighting to survive in a depression era and simply could not afford to pay the full cost of pension plans.

In the decade following, business experienced perhaps the greatest period of profit in our history. With the increase of profits came increased taxes, largely because of war needs. The employer attitude changed materially for two reasons; one was because of tax advantage, and the other was because the noncontributory pension was a substantial "fringe benefit", many kinds of which were then being asked from business and industry. Such was not the case in public employment. There were far more public retirement plans contributory in character than noncontributory. There were easily understood reasons for the difference between the financing of private and public plans.

If the employer paid all the cost of a plan, he deducted the entire amount from his taxes, which otherwise would have been added to his taxes. The public employer had no taxes, and therefore had no ability to shift the burden. Furthermore, the private plans came about, usually, from the pressure applied by very well-organized employee groups.

On the other hand, public employees had no powerful employee organizations and usually came, figuratively speaking, "with their hats in their hands", asking for some of the consideration given employees in private industry. These requests came in greatest numbers during a period when various citizens groups were asking for new

and extended governmental services, which, if granted, would greatly increase general fund expenditures. The proponents of public retirement plans had to make concessions that private employees did not have to make in order to keep the cost of such plans to a minimum the legislature would accept. As a result, almost all general employee proponents at the outset agreed to make contributions in order to obtain executive and legislative acceptance; many early plans were vetoed.

On the other hand, judges as a group did not sponsor the proposals for compensated retirement for themselves. These plans and substantial salary increases were urged by bar associations and groups of lay citizens, when it became increasingly difficult to get the better qualified legal personnel to seek or accept judicial appointment. These proposals were urged for adoption by outstanding citizens, other than judges, who realized the vital and pressing need for a financial readjustment in the judicial branch of government. Hence, the number of noncontributory judicial retirement systems.

THE NEVADA PROBLEM

Presently, and since 1949, district and supreme court judges in this state can retire at 60 years of age after 20 years service on the district court and supreme court bench on a pension of 2/3 of the salary received as a judge at the time of his retirement.

A district or supreme court judge may also retire on a pension of 1/3 of his salary, at 60 years of age after 12 years of judicial service. The period of service required for retirement may be partly as a district judge and partly as a supreme court justice.

At present, there are 3 supreme court justices and 15 district judges. The district judges receive an annual salary of $15,000, while the supreme court justices receive $18,000.

While actuarial soundness is not the only consideration requiring a contribution by participants in a public pension plan, it is a prime factor. In attempts to fund a retirement plan at its inception on an actuarial basis, many factors complicate the problem, and often make it not feasible if really not impossible.

In cases where the system is adopted as completely new, there is always the added and very difficult task of funding the system for the prior service of all eligibles. This requires a computation of age, years of prior service, sex and the mortality tables of life expectancy. Unless this is done expertly there is an actual deficiency from the beginning because of this unfunded liability. If there is a large number of eligibles close to the retirement age at the inception of a system, the funding of the system for the prior service would approximate a prohibitive amount.

Let us ignore the problem of an unfunded liability for prior service, and consider only the reserve fund necessary at the inception of a necessary reserve fund established on an actuarial basis for each 60 year old member of the supreme court who has served the required number of years for maximum benefits. Recalling that such a person receives a salary of $18,000 and is entitled to 2/3 thereof for 20 years judicial service on the supreme court or an aggregate of 20 years service on the supreme and district courts, the judge would retire on a pension of $12,000 a year.

According to the legally accepted mortality tables he has a life expectancy of 13 years. It must be assumed then as a fact in the computation that the judge will live at least 13 years after retirement. Thus his years of expectancy (13) times his annuity ($12,000) equals $156,000. So it is readily seen that for each supreme court justice of 60 years of age with 20 years service, at the time of his retirement would have to be provided for by a reserve of $156,000 in the pension fund.

If we consider the need for contributions to the fund to accumulate such a reserve, each year of the 20 year service (ignoring interest and other accruals to the fund) there would have to be paid into the fund the sum of $7,800. To accomplish this, both the state and the judge would be required to pay into the fund $325 each month. This amount is 21.5% of the judge's salary, and it is more than double the highest contribution required in the entire United States. It is also more than 4 times the highest contribution believed proper by pension system actuaries.

If we would apply the California percentage of salary contribution which is $2\frac{1}{2}\%$ of the judges salary, it would amount to only $37.50 per month or $450 per year. It is quickly seen that on such a program the judge participant would have to keep paying for almost 175 years.

These computations have been made in order to demonstrate the utter impossibility of trying to achieve anything comparable to actuarial soundness in a pension plan having so few eligibles. The total number of judges eligible to participate in the judicial retirement system of Nevada is 18. With such an extremely small number of eligible participants, it simply is not economically feasible nor advisable to require member contribution. Far better to consider the amounts paid, not retirement benefits or pensions, but as deferred salary payments for previous service.

As to the amount of retirement benefits in other states, it varies in most cases; some states even have a different stated amount to be paid to different classes of judges instead of a percentage of salary.

DETERMINATION OF ELIGIBILITY

The minimum age required for retirement eligibility varies from 80 in Louisiana to "any age" in 18 states for retirement at full salary. In Colorado there is an 80 year age provision with 30 years judicial service.

Some states have availed themselves of a compulsory retirement age requirement. For example, in Wisconsin and Minnesota if a judge does not retire at the stated age required for retirement, he forfeits all right to pension benefits. In Maine, a judge must retire before his 71st birthday, and only seven years of service are required. In Michigan a judge must be under 70 when last appointed or elected.

Statistical data prepared by the Institute of Judicial Administration in 1956 show judicial retirement is compulsory in the following states at the following ages: 70 years in Connecticut, Idaho, Kansas, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, Ohio, Vermont and Wisconsin; 75 years of age in Virginia and Washington; Maine requires retirement at 71, and South Carolina at 72.

There has been strong argument and vigorous opposition to compulsory retirement, based mainly upon the contention that such a law would often deprive the state of the services of outstanding jurists who, although of retirement age, possessed vigorous

mental and physical abilities and were capable of many more years of excellent judicial service. In most such cases, the judge has many years of judicial experience behind him - a prime asset. If forced by law to retire, he will usually be replaced by a judicial novice, often forced on the appointing authority by purely political considerations. Individual cases furnish little proof in support of a proposition. However, it is a simple matter to cite many outstanding jurists who served many years after such retirement ages. The outstanding example is Justice Holmes who served 29 years on the United States Supreme Court, having also served 23 years as Justice and Chief Justice of the Supreme Court of Massachusetts, and who retired at the age of 90 still possessed of an incisive and vigorous mind. Almost any judge or lawyer of experience can cite many such cases. It is submitted that compulsory retirement is not the answer to the problem of an aged, mentally or physically infirm judge, but rather a statutory or constitutional provision authorizing the summary removal thereof by a commission, after a hearing and findings based on sufficient evidence, with the right to a judicial review by the Supreme Court. It has also been proposed that there by a commission authorized to effect a summary suspension, but the hearing to determine if the suspension should be followed by permant removal should be by the Supreme Court. It is suggested that in the great majority of cases such a judge would prefer to avoid the embarrassment of a formal hearing and abide by the commission's decision.

While this subject is not in its entirety germane to this study, it is connected with a judicial retirement study. Many states have provided for retirement compensation for disability in judicial systems even after little or no service. There are several, however (including Nevada), that have no statutory provision whatever on the subject. In many such states, the only method of removal of an incompetent judge, whether so rendered by physical or mental informity or otherwise, is by the cumbersome, time-consuming process of legislative impeachment. It is suggested that this problem alone demands early consideration.

Returning again to the retirement provisions, the minimum years of service required for retirement vary greatly in the different states. Maryland, for instance, has no minimum requirement whatever, and as stated above, required no contribution.

In Nevada there is no provision for retirement for disability, while in the following states disabled judges may retire at any age with the indicated years of service: Oregon, 6; South Carolina, 7; North Carolina, 8; Arizona, Florida, New Hampshire, South Dakota, Tennessee and Washington, 10; Illinois, Minnesota (Supreme Court), and Utah, 12; Kentucky and Minnesota (District Court), 15. In Arkansas, an "elected" judge may retire "during any term of service", and in New Jersey, disabled judges may retire at 3/4 of their salary regardless of the number of years they have served.

It is difficult to enumerate the minimum years of service required of any number of states for the reason that most states have several options or pension plans, each with different qualification requirements for age and service, with different annuities for each plan. For example, in Georgie, a judge may retire at 65 if he has served 20 years; further, if he is 70, he may retire with but 10 years service.

Whereas in Colorado, with 10 years of service, he may retire at 65 but must have 20 to retire at 75. However, to state it otherwise, a judge may continue serving until 75 and his annuity would be $1,000 more than if he had retired at 65; he may also retire at 80 with 30 years service for an additional $1,000 pension, This provision has been included in many retirement plans and results in continued experienced service beyond the minimum age at which retirement is permitted. In systems requiring contribution, it is only fair and equitable to allow greater retirement benefits for a longer period of service. The same argument does not hold true for

systems that do not require contribution from participants.

All teachers retirement systems studied require contribution and most of them use the extra benefit provision for an extra period of service. However, many of the teacher retirement plans are of long standing and belie the statement made early in this report that compensated retirement for public employees is of comparatively recent vintage. Teachers were really the early pioneers in the retirement pension field, and as early as 1913 California teachers were responsible for the passage of a statewide act providing for the payment of retirement salaries to public school teachers. From that year down to date, virtually every legislature has had several, often many, bills introduced dealing with the teachers' retirement system. Little or no comparison can be made to such or any retirement plans other than for judges with regard to the present study.

AMOUNT OF RETIREMENT BENEFITS

Under this heading it would appear to be unrealistic to make any comparison with the more populous states having a considerable number of eligibles or participants.

In many instances, it is difficult to determine if the retirement benefit is comparable to ours because of the complex formulae used to determine the amount of the annuity.

Three states - Tennessee, Virginia and Vermont (for 30 years service) - allow retirement on full pay. Pennsylvania is a state with a difficult formula, but a maximum benefit of 80% is allowed. As heretofore stated, all federal judges retire on full pay, and make no contribution. 6 states allow retirement on 3/4 pay and 8 others allow 2/3 of the salary.

In several states there are constitutional provisions which prohibit a legislative grant of pensions to retiring public officers and employees. In these states pension statutes were held to be unconstitutional. In such states, the constitutional objections were subsequently avoided by having retiring judges serve as supernumerary or part-time judges assigned occasionally to serve as active judges. However this provision presents problems. For example, should such a "part-time" judge be permitted also to be a "part-time" lawyer? There are strong reasons why he shouldn't.

Another difficulty in determining the amount of pension in each state is caused by the fact that the amount of the pension is not 2/3 or other percentage of the salary received by the retired judge upon retiring, but is a percentage of the salary paid to a judge of the same court not yet retired. In this way, the retired judge's benefit increases or decreases with the salary adjustments of active judges.

In the other states not mentioned above, there are a variety of amounts paid as pensions, some exceeding $30,000, the amount being determined by taking a percentage of average salary over a base period of 5 or 10 years multiplied by the number of years of service.

In some states where the "part-time" judge fiction is used, the pensions are not large. For example, in Alabama the amount varies from a low of $4,000 to a high of $6,000. This appears to be a result of making the part-time fiction appear realistic.

There is a small number of states which have extremely low pensions. For in-

stance, Indiana has a maximum of $4,000; Colorado ranges from $3,000 to a maximum of $5,000; and Utah allows only $4,200, which includes social security benefits.

Nevada's judicial pension system was first enacted in 1937, at which time the retirement age was fixed at 70 years, and the amount of the pension was set at the same percentage of salary as at present. However, the amount of the salary then paid each justice was $7,500, which had been increased from $6,500 at the 1928 Special Session of the Legislature. The percentage factor has remained the same from the inception of the plan. However, the salaries were increased as follows: 1945 - $8,000; 1951 - $10,000; 1953 - $15,000.

In 1957, by Chapter 328, it was provided that after the expiration of the term of office of each justice, he or his successor in office would receive a salary of $18,000. The delaying provision was necessary because of the constitutional provisions forbidding salaries of officials to be increased during a term of office (Nevada Constitution, Article XV, Section 9). However, the constitutional inhibition was circumvented by providing a sufficient amount of salary for each justice for ex officio services as Statute Revision Commission to provide each one with a combined annual salary of $18,000.

This procedure has often been used throughout the states, and has been sustained by the courts. The law is clear, however, and well established by decisions of supreme courts that wherever ex officio duties are added to the regular duties of an office with no provision for salary, none is permitted. It is within the fiscal powers of a legislature to provide additional salary for additional duties so long as the additional duties are not considered customarily or traditionally a part of the regular duties of the office to which the official was appointed or elected.

The ex officio portion of the salary would seem to present a problem in connection with the amount of retirement benefit. This problem arises because of the provisions of NRS 2.060, subsection 1, which is the section providing for the retirement of supreme court justices and the amount of the pension which each retiring justice is entitled to receive. The relevant portion of the section in question reads as follows:

> Any justice of the supreme court. . .(after 20 years of judicial service on the supreme court, or on the supreme and district court) shall, after such service of 20 years, and after reaching the age of 60 years, be entitled to and shall receive annually from the State of Nevada, as a pension during the remainder of his life, a sum of money equal in amount to two-thirds the sum received as salary for his judicial services during the last year thereof. . . (Emphasis added.)

The problem mentioned is presented by the phrase "two-thirds the sum received as salary for his judicial services during the last year thereof. . ." (Emphasis again added.)

Thus there is presented a question of statutory construction which, among other things, involves the meaning of "judicial services" and the legislative intent in using the term. The problem stated is:

> Did the legislature in the use of the term "salary for judicial services" intend to exclude from consideration salary received for any other services other than judicial?

In all problems of statutory construction there are well-established judicial rules or guides for interpretation or construction which are of almost universal acceptance.

The rule of supreme importance is the intent of the legislature. Crawford, a recognized authority, in his work "Statutory Construction," at page 244, section 158, says:

> The object or purpose of all construction or interpretation is to ascertain the intention of the lawmakers and to make it effective. (Citing numerous cases.)

He further states, at page 259:

> . . .effect and meaning must be given to every part of the statute which is being subjected to the process of construction - to every section, sentence, clause, phrase and word.

It is to be noted that the legislative intent sought is the intent existing at the time the statute under consideration was enacted (See ibid., page 258.) In every case, the first source from which legislative intent is to be sought is the words of the statute. If the words convey a clearly-understood meaning involving no absurdity, and there is no conflict or contradiction within the statute, "then that meaning must be accepted." (Lake Co. vs. Rollins, 130 U.S. 662)

Further, technical terms or words in a statute are presumed to have been used in their technical sense, and this rule must be applied to legal terms or words. Thus, in the present case, we must consider the words "judicial" and "judicial services" in their technical and special sense and meaning in legal phraseology. For, the word under particular consideration, "judicial," has been repeatedly interpreted judicially and has a definite, recognized meaning in the jurisprudence of the English speaking world.

Lastly, there is a maxim used in construction, that the inclusion of an express term or thing indicates an intent to exclude all others.

In order to apply these aids of construction to our present problem, it is necessary first to examine some legal definitions of the word "judicial."

In Bouvier's Law Dictionary, the term "judicial function" is stated as meaning:

> The term is used to describe generally those modes of action which appertain to the judiciary as a department of organized government, and through and by means of which it accomplishes its purposes and exercises its peculiar powers.

The word "judicial" is defined in Black's Law Dictionary as:

> Belonging to the office of a judge; as judicial authority.
>
> Relating to or connected with the administration of justice; as a judicial officer.
>
> Having the character of judgment or formal legal procedure; as a judicial officer.

In an Idaho case, State vs. Freitag, 27 Pac. (2nd), page, the court quoted from Webster's Dictionary the definition of "judicial" as:

> Of or pertaining or appropriate to the administration of justice, or courts of justice, or a judge thereof, or the proceedings therein; as judicial power, judicial proceedings; distinguished from legislative, executive, administrative, ministerial.

Finally, in Words and Phrases, Volume 23, page 254, in defining by comparison, the writer refers again to Webster as follows:

> Webster defines "executive" as "qualifying for, or pertaining to the execution of the laws"; "legislative" being applied to the order, or organs, or government which makes the law; "judicial" to that which interprets and applies the laws; "administrative" to that which carries them into effect.

Thus we have several definitions, all having been determined and applied by courts, so that the technical and legally-accepted meaning of the term "judicial" is clear to us. While the term "judicial services" was not expressly mentioned, it is submitted that the terms "judicial act" and "judicial function" are synonymous.

If we apply the other rules of construction stated above, we must conclude the meaning to be clear and unambiguous; also, by the so-called rule of exclusion, we must assume that when the legislature stated the pension was to be 2/3 of the salary the retiring justice received for his "judicial services," there was an implied negation that salary for any other services was to be used in determining the amount of pension to which a justice is entitled.

It is to be noted that when the pension statute was first enacted, the only services rendered by judges were judicial services. From this it might be contended that, this being so, there was no thought or intent to limit the amount of pension to a percentage of salary paid only for judicial services; that it just didn't occur to the legislature that any but judicial services would ever be rendered by judges.

However, when the ex officio salary was provided for the justices, the legislature was charged with knowledge of the law, and must be presumed to have enacted the ex officio salary statute with full knowledge of NRS 2.060 (see Hill vs. Thomas, 70 Nev., page 405). Furthermore, Section 2.060 was amended in 1960 (Statutes of Nevada 1960, page 397) two years after the enactment of the ex officio salary statute. By the 1960 amendment to NRS 2.060, a major change was made in the minimum number of years required for a 1/3 pension. The number of years required was reduced from 15 to 12. To do this, the entire subsection was rewritten and the term "judicial services" was again used in the newly-enacted section. Thus we are faced with the conclusion, as a principle of statutory construction, that the legislature, when enacting the amendment to the pension law; i.e., NRS 2.060, was thoroughly cognizant of the fact that the justices received salaries for two kinds of services - the one judicial and the other administrative. The conclusion therefore is forced on us that the legislature considered all the factors and again limited the amount of retirement benefit to 2/3 and 1/3 respectively of the salary received for judicial services only.

CONSTITUTIONAL QUESTIONS

In preparing an outline for this study, and a scope of the study, there were

numerous legal questions which seemed to be perplexing - some extremely so. A very thorough study of decisions of the Supreme Court of Nevada and of the United States, as well as the decisions of other states, has dispelled any fears that there are any constitutional objections that may imperil the validity of the retirement plan under consideration in this study. As stated above, every state in the Union now has in effect a judicial retirement plan enacted by the legislature.

The first question that seemed to be disturbing at the outset was:

> Does the act granting a pension from the general fund violate Article VIII, Section 9, of the Nevada Constitution?

That section prohibits the state from donating or loaning its money or credit. It reads as follows:

> Sect. 9. The state shall not donate or loan money or its credit, subscribe to or be interested in the stock of any company, association, or corporation, except corporations formed for educational or charitable purposes.

It is to be noted that no mention is made in the section of a prohibition of a donation to individuals, but the prohibition is limited to donations or loans to "any company, association, or corporation."

In many such provisions, in other state constitutions, the word "individual" is included in the prohibition. (See Article IV, Section 47, Constitution of Missouri.)

This section of our constitution quoted above, was given thorough study and consideration by the Attorney General of Nevada with respect to a question somewhat akin to the one here considered, and the circumstances were as follows:

Governor Sparks died during his second term in 1908. The legislature, by an act passed March 31, 1908 (Statutes of Nevada 1909, page 328) appropriated the sum of $10,430.15 for the relief of his widow. The exact sum was the amount of money Governor Sparks would have received had he served the balance of the term for which he was last elected.

The State Controller, having doubts of the constitutionality of the appropriation, asked for and received the Attorney General's Opinion. In that opinion, the Attorney G neral, in a well-reasoned discourse, sustained with numerous court decisions of this and other states, held the appropriation to be valid and within the legislative power to make.

In the course of the opinion, in considering Article VIII, Section 9, the author said:

> It seems to me that if the framers of the constitution had intended to expressly prohibit the state from donating money to such individuals as it deemed deserving of aid where the consideration was founded in public gratitude, or as a reward for any other purpose if thought proper for the public welfare, appropriate language expressing such an intention would have been employeed. . .

He thereafter pointed out that the word "individuals" has been omitted, and

rules, after stating a rule of construction, that the framers did not intend to prohibit gifts to individuals for a public purpose.

Later in the opinion, there is a quotation from a leading Massachusetts case, Opinion of the Justices (175 Mass. 599, 49 LRS 564), in which the court held that where the public good will be served by an appropriation to an individual, the grant is valid. In the opinion, the court said:

> Ordinarily, a gift of money to an individual would be an appropriation of public funds to private uses, which could not be justified by law.

Then, a little later:

> It is hardly less clear that, when a public purpose can be carried out or helped by spending public money, the power of the legislature is not curtailed or destroyed by the fact that the money is paid to private persons who had no previous claim to it of any kind.

In sustaining appropriations for public pension plans, courts have held them valid on the following additional reasons:

> A pension in its true sense is a prospective award or deferred compensation for service not fully recompensed when rendered. (Bergerman vs. Murphy, 105 NYS (2nd) 642.)

> A pension is compensation for services rendered, the payment of which is deferred until after completion or rendition of services to induce long-continued and faithful service. (Sahl vs. LWA., 30 NYS (2nd) 608.)

> A pension is in nature of compensation for previous services, for which full and adequate compensation was not received at time of rendition thereof, and does not constitute "extra compensation" prohibited by constitution to public officers, agents or servants after rendition of services. (McFarlane vs. Hotz, (Ill.) 82 NE 2nd 650.)

So also, in Voorhees vs. City of Miami (Fla.) 199 So. 313, the court said:

> Generally laws establishing a pension system for municipal employees are sustained as valid on ground that pensions are in nature of compensation for services previously rendered and for which pay was withheld to induce long-continued and faithful service, and pensions are not regarded in nature of increased compensation to public servants nor as involving a "gift" of money within constitutional prohibitions.

It has been pointed out above that there are some state constitutions that expressly prohibit the granting of pensions. Kentucky and Arkansas are among such states. When pension statutes were first enacted in such states, they were held unconstitutional. Later these states avoided the constitutional provision by creating an office of supernumerary or part-time judge, subject to assignment as hearing commissioners or part-time judges when needed. These statutes have all been sustained.

To be able to participate in a public pension system, a person must be in the employ of the agency of government for which the plan is enacted at the time of the enactment. To state it conversely:

> Statutes which attempt to grant pensions to persons who, at the time of enactment, have retired, are by the great weight of authority held to be unconstitutional. (142 ALR, page 939.)

However, the courts now, with few if any exceptions, hold that if a person has what is termed a "pensionable status" he may enjoy the benefit of a statute increasing the amount of pension. By "pensionable status" is meant any person having the right to participate, or actually participating, in a retirement plan.

As indicated above, some states provide for future increases by providing that the amount of pension is set as a certain percentage of the salary paid to the successor or successors of the retired person to the office from which he retired. Thus, no matter how long a person has retired, his pension will be increased whenever the salary for the office from which he retired is increased.

PARTICIPATION IN PUBLIC EMPLOYEES RETIREMENT SYSTEM

Section 286.305 of NRS provides that judges of the supreme and district courts may become members of the public employees retirement system in the manner provided therein.

Judicial service prior to July 1, 1960, may not be credited toward retirement unless a justice or judge desiring to participate shall pay into the retirement system fund all sums he would have contributed had he been a member from July 1, 1948, to the date he elects to become a member of the employees system. Upon the payment by the judge of such sums, the state becomes obligated to pay all public employer contributions for judges "electing to redeem such prior service."

Subsection 3 of the NRS section 286.305 prohibits a judge or justice from participating in both the employees' and the judges' retirement systems' benefits. The judge who joins the employee system may, when he becomes eligible for retirement, elect to withdraw from the employees' retirement fund the amount there credited to him, and accept instead the retirement benefit provided in either NRS 3.090 or 2.060 to which he is entitled.

At the time NRS 286.305 was enacted, and ever since 1947, NRS 286.310 was in effect, which latter section provides that no "employee" who is a member of, or eligible for, a membership in a retirement system established by a public employer prior to July 1, 1948, may not become a member of the public employees' retirement system until the previously established system is integrated with the employees system in the manner provided by Chapter 286. This would appear to preclude a judge or justice participating in the public employees' system until the judicial system was integrated with the employees system.

However, it may be that a judge or justice may not be considered an "employee" as that word is used in NRS 286.310. Also, it can be properly contended that, since NRS 286.305 was enacted several years after the passage of NRS 286.310, the legislature intended that the section last in point of time should control, which is an accepted rule of construction. It would appear to be reasonable to assume the intent was "notwithstanding the provisions of NRS 286.310" in the enactment of NRS 286.305.

Information received indicates that three district judges and one former district judge have heretofore elected to join the public employees' retirement system, and two district judges have retired since July 1, 1960.

The opportunity for judges and justices to join the employees retirement system permits such persons who leave the judicial service but continue in some other branch of public service to avail themselves of such judicial service in accumulating the aggregate number of years necessary for retirement. It is a benefit to the state as it aids in attracting to the judiciary some qualified persons who might otherwise be unwilling to so serve.

For example, many lawyers thoroughly qualified for the bench may be serving the state in other legal capacities and have considerable, or at least some, prior service toward retirement. The uncertainty of reelection to the judicial office might deter some very desirable persons from accepting judicial appointment. This is not a point of minor consideration. Let us consider a lawyer highly qualified for judicial service who has served the state for 10 or more years and is offered a judicial years of prior service which he has acquired toward retirement. However, this deterrent has been removed by the enactment of NRS 386.305, and if such an appointee were defeated for, or did not seek reelection after a term or more, he could return to his former or other service without a hiatus occurring in his service toward retirement.

It is suggested that the section is in accord with the concept which motivated the enactment of pension statutes.

CONCLUSIONS

After a rather extensive study of the entire subject of public pension systems and discussions with actuarial experts in pension systems, it does not appear advisable or in any way feasible to effect any change presently in our judicial retirement system. There simply isn't a sufficient number of eligible participants to furnish a base of sufficient extent to establish a contributive system with any reasonable actuarial soundness.

In a discussion had with a highly-respected actuary in the public pension field, it was pointed out that, if any substantial portion of a participant's salary is deducted, the purpose of pensions is defeated. This is because such large deductions would reduce the present income of the eligible to such an extent that he would leave the system rather than be attracted to it and remain in it. It is one thing to prepare for a compensated retirement, but a more pressing thing is to earn a sufficient amount for your immediate needs.

It is respectfully suggested that no change be made in the existing judicial retirement system of Nevada.