

GARY K. NELSON, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

February 26, 1969

DEPARTMENT OF LAW OPINION NO. 69-8 (R-54)

REQUESTED BY: MR. LOWELL SUTTON
Administrator, Public Safety
Personnel Retirement System

QUESTION: Does A. R. S. Sec. 38-854.A of the public safety personnel retirement system provide that an employee who has worked under several systems, including the public safety personnel retirement system, prior to his retirement, have the right to elect the best benefits from each of the systems he has worked under or, does it provide that an employee who has worked under several systems, including the public safety personnel retirement system prior to his retirement, has the right to elect benefits under a specific system under which all of his benefits and his widow's benefits then would be computed?

ANSWER: See body of opinion.

A. R. S. Sec. 38-854. A, which provides for a right of election with respect to the prior police pension system and the prior firemen's relief and pension system, provides as follows:

"An employee covered under the prior systems set forth in Secs. 9-912 to 9-934, inclusive, and in Secs. 9-951 to 9-971, inclusive, or prior statutes amended thereby and antecedent thereto, and covered under such prior systems on June 30, 1968, and who becomes a member of this system shall nevertheless retain his right to elect, prior to retirement, benefits under this system or to elect benefits under his prior system for which his service and age make him eligible."

A. R. S. Sec. 38-854. A clearly indicates that the Legislature intended and recognized that an individual policeman or fireman covered under the prior police pension act or prior firemen's relief and pension fund is not obliged to have his eligibility for retirement

benefits and the amount thereof determined only under the public safety personnel retirement system which became effective on July 1, 1968, but has the right to elect to have his eligibility and benefits determined under his prior system if he wishes to do so.

A. R. S. Sec. 38-854, by providing for an election of benefits under an employee's prior system, is in accord with and follows the rule announced by the Arizona Supreme Court in Yeazell v. Copins, 98 Ariz. 109, 402 P. 2d 541 (1965), that the law providing for retirement benefits for a public employee which is in effect at the time of his acceptance of employment becomes a part of the employment contract and that the contract and consequently the retirement benefits cannot be changed by subsequent legislation unless the employee consents to the change. In its opinion, the Court said at 98 Ariz. 117:

"It is evidence from what we have said that appellant had the right to rely on the terms of the legislative enactment of the Police Pension Act of 1937 as it existed at the time he entered the service of the City of Tucson and that the subsequent legislation may not be arbitrarily applied retroactively to impair the contract. Appellant's right to be retired under the Police Pension Act of 1937 existed until he evidenced an intention to be bound by or assented to the modifications provided in the amendment of 1952. The presumption would, of course, be that until appellant exercised his right of election the 1952 amendment was acceptable to him, but once having made an election both he and his widow are forever bound thereby."

After the decision in Yeazell v. Copins, the Court of Appeals in City of Phoenix v. Boerger, 5 Ariz. App. 445, 427 P. 2d 937 (1967), held in part that the failure of firemen pensioners to specify the specific act (either the 1929 act, the 1941 act, or the 1953 act, with respect to the firemen's relief and pension fund) under which they were applying for retirement benefits prior to the decision in Yeazell v. Copins did not prevent the pensioners from subsequently electing benefits under the 1929 act which was in effect at the commencement of their employment even though they had applied for and received benefits under the 1941 act or the 1953 act.

Given the right of an employee to elect benefits under the public safety personnel retirement system or under his prior system for which his service and age make him eligible, in order for a local board to carry out its duties under A. R. S. Sec. 38-847 with respect to the

determination of eligibility for benefits and the amount of benefits, it is necessary that an employee notify the local board of his decision concerning the system under which he elects to have his eligibility for benefits and the amount of his benefits determined.

The police pension fund originally was established in 1937 under Arizona Session Laws 1937, Chapter 40 (1937 Act) which was amended in 1952 under Arizona Session Laws 1952, Chapter 93 (1952 Act) and again in 1968 under Arizona Session Laws 1968, Chapter 85 (1968 Act). A study of the three acts discloses significant differences among the several acts regarding eligibility for benefits, the amounts of benefits and the procedure for determining the amount of benefits and, therefore, the several acts must be considered as mutually exclusive to the extent that they conflict.

The firemen's relief pension fund originally was established in 1929 under Arizona Session Laws 1929, Chapter 86, and subsequently was amended in 1941 under Arizona Session Laws 1941, Chapter 26 (1941 Act), in 1953 under Arizona Session Laws 1953, Chapter 62 (1953 Act) and in 1968 under Arizona Session Laws 1968, Chapter 85 (1968 Act). A study of these acts likewise discloses significant differences among the several acts regarding eligibility for benefits, the amount of benefits, and the procedure for determining the amount of benefits, and therefore, the several acts must be considered as mutually exclusive to the extent that they conflict.

Our review of the legislative history of the police pension act and the firemen's relief and pension fund from their inception to the enactment of the public safety personnel retirement system, in the light of *Yeazell v. Copins*, supra, and *City of Phoenix v. Boerger*, supra, indicates that the legislative enactments recognize one continuing police pension fund and one continuing firemen's relief and pension fund which now are combined and continued in the public safety personnel retirement system fund, but that in determining an employee's eligibility for benefits and the amount thereof based upon his employment contract and his right to elect to accept or reject an amendment to his employment contract by legislation enacted subsequent to his acceptance of employment, the law recognizes several distinct systems. Furthermore, our review discloses nothing to indicate that an employee has the right to accept legislative modification of his employment contract as to some but not all of the provisions contained in specific legislation if the employee elects to have his eligibility for benefits and the amount of benefits determined to any extent under such legislation.

Opinion No. 69-8 (R-54)
February 26, 1969
Page Four

Based upon the foregoing, it is our opinion that A. R. S. Sec. 38-854 provides that an employee who has worked under several systems, including the public safety personnel retirement system, prior to his retirement has the right to elect benefits under one specific system under which he has worked, and all of his benefits and his widow's benefits would then be computed under the specific system elected.

The following hypothetical example will serve to illustrate the effect of the foregoing opinion: Assume that a policeman who became employed on July 1, 1940 desires to retire on January 31, 1969, at the age of 53 years, and receive immediately regular retirement benefits.

At the time of his acceptance of employment, the 1937 police pension act was in effect and formed a part of his contract. The policeman also would have been employed after the adoption of the 1952 Act and the 1968 Act and, therefore, would have the right to have his eligibility for benefits and the amount thereof determined under either the 1937 Act or the 1952 Act or the 1968 Act.

An examination of the 1968 Act discloses that the policeman would not be eligible to receive normal retirement benefits as of January 31, 1969, because at age 53 he would not have attained the age prescribed under A. R. S. Sec. 38-842. 16 which provides:

"'Normal retirement date' means the first day of the calendar month immediately following an employee's fifty-fifth birthday and his completion of twenty-five years of service, or his sixty-fifth birthday and his completion of fifteen years of service whichever is later. "

Therefore, in order to retire on January 31, 1969 with eligibility for immediate benefits, the policeman would be required to elect to have his eligibility for benefits and the amount thereof determined under either the 1937 Act or the 1952 Act. Having been employed for approximately 28 years, the policeman would be eligible to retire on January 31, 1969, and receive immediate pension benefits under either act.

If the policeman elected to be retired under the 1937 Act, his eligibility for benefits and the amount would be determined under A. C. A. Sec. 16-18-8(b) (1939) which provides:

"(b) Any member of the police department who has served such department twenty [20] years in the aggregate may, upon application, be retired, and

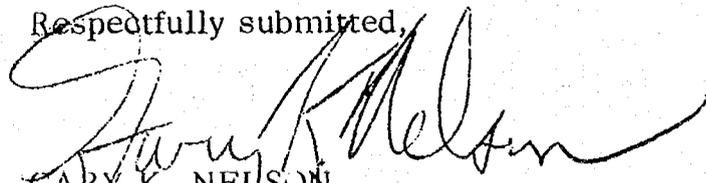
shall be paid, during his lifetime, a monthly pension equal to one-half of the compensation received by him for a period of not less than one [1] year prior to the date of application for retirement. In the absence of an application for retirement the board may, when it deems such action to be for the best interest of the department, on its own motion propose any such member for retirement, and upon the certificate of the city physician that the said member is physically unfit for further police service, he shall be retired, and shall thereafter receive the pension prescribed in this paragraph. "

If the policeman elected to be retired under the 1952 Act, his eligibility for benefits and the amount would be determined under the following portions of A. R. S. Sec. 9-925:

"A. A member of the police department whose membership began prior to July 1, 1952 and who serves the department twenty years in the aggregate may, upon application, be retired, and shall be paid during his lifetime a monthly pension equal to fifty per cent of the average monthly compensation received by him during the period of five years immediately prior to the date of application for retirement. . . . "

"B. In the case of a member of the police department continuing in active service after the date when he is eligible to make application for retirement under the provisions of this section, upon his retirement the percentage of his average monthly compensation applicable in computing his monthly pension shall be increased by two per cent for each full year of service beyond the date when he was eligible to make application for retirement, but in no case shall the percentage of his average monthly compensation applicable in computing his monthly pension exceed sixty per cent. . . . "

Respectfully submitted,



GARY K. NELSON
The Attorney General