



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-054

June 17, 2016

The Honorable Bruce Cozart
State Representative
420 Rock Creek Road
Hot Springs National Park, AR 71913

Dear Representative Cozart:

This is in response to your request for my opinion regarding Ark. Code Ann. § 24-10-506, which addresses the purchase of credited service by active members of the Arkansas Local Police and Fire Retirement System (LOPFI).

As background for your specific questions, you refer to a law enforcement officer who “was given purchase amounts to buy the service credit in 2010 per Ark. Code Ann. § 24-10-506, with the understanding that the purchase amounts would never change.” You then ask:

1. Do legislative changes made to Ark. Code Ann. § 24-10-506 after 2010, that create changes in actuarial calculations violate the *ex post facto* clauses of the U.S. Constitution and the Arkansas Constitution?
2. Does a LOPFI representative, who verbally advises a LOPFI member [that] the purchase amounts for buying Other Service Credit will remain the same (under law at the time in 2010), create a legal contract with the member?

RESPONSE

Question 1 - Do legislative changes made to Ark. Code Ann. § 24-10-506 after 2010, that create changes in actuarial calculations violate the ex post facto clauses of the U.S. Constitution and the Arkansas Constitution?

This question appears to be based on a mistaken assumption that the actuarial calculations required by Ark. Code Ann. § 24-10-506 were not part of the statute in 2010. In fact, this change came about in 1999. Act 1455 of 1999 added the following requirement to the other conditions that must be met in order for a member to purchase credited service in LOPFI for prior service covered by a local pension fund:

Provided that the member contributes to the system an amount that is the actuarial equivalent of the value of the credited service to be purchased. This actuarial equivalent would be as of the time of the purchase of credited service and would be determined by the actuary to the system.¹

Contrary to the premise of your first question, therefore, there were no changes to section 24-10-506 after 2010 in connection with the requisite actuarial calculations.² It is consequently unnecessary to respond further to this question.³

Question 2 - Does a LOPFI representative, who verbally advises a LOPFI member [that] the purchase amounts for buying Other Service Credit will remain the same (under law at the time in 2010), create a legal contract with the member?

Because I cannot act as a factfinder in issuing opinions, I cannot test this question's assumption that a LOPFI representative so verbally advised a member.

¹ Acts 1999, No. 1455, §1 (codified at Ark. Code Ann. § 24-10-506(a)(3) (Repl. 2014)).

² I cannot act as a factfinder in the issuance of official opinions, and I consequently cannot address any questions or concerns regarding the actuarial calculation of a particular member's purchase amount.

³ It may nevertheless be helpful to note, generally, that *ex post facto* concerns are only raised when criminal sanctions come into play. *See Garrett v. State*, 347 Ark. 860, 864, 69 S.W.3d 844, 846 (2002) ("In general, 'An *ex post facto* law declares an offense to be punishable in a manner that it was not punishable at the time it was committed, and relates exclusively to criminal proceedings.' *Taylor v. The Governor*, 1 Ark. 21 (1837).").

I can opine, nevertheless, that the answer is “no” because any such verbal advice by a LOPFI representative (even if actually given) must be deemed unauthorized, given the clear requirement under section 24-10-506(a)(3) (beginning in 1999, as discussed above) that the purchase amount be actuarially determined “as of the time of the purchase of credited service.”⁴ This requirement is dictated by prior case law and principles of actuarial soundness. I do not believe the past conduct of a LOPFI representative could impose any contractual obligation on the system that is counter to section 24-10-506(a)(3), and that might prevent the system from remaining actuarially sound.

Sincerely,



LESLIE RUTLEDGE
Attorney General

⁴ See *Arkansas State Highway Commission v. Townsend*, 313 Ark. 702, 706, 858 S.W.2d 66, 69 (1993) (addressing whether the state might be estopped from enforcing statutory directives based upon misstatements of law by Highway Commission employees regarding encroachments on public rights-of-way, and noting that the employees “had no authority to countermand a statutory directive,” and “[w]e have specifically held that a sovereign is not bound by the unauthorized acts of its employees.”) (citations omitted). The logic of this case makes clear that the alleged representations of a LOPFI representative did not and could not create a contract incorporating such representations.