

Hon. Nancy Bear Usera  
Commissioner  
Department of Administration

December 14, 1993

663-93-0499

465-3600

Requests for refund of  
JRS contributions by  
Chief Judge Alexander  
Bryner and Chief Justice  
Daniel Moore, Jr.

Charles E. Cole  
Attorney General

You have requested our advice on a question concerning the Judicial Retirement System (JRS). The question is whether two sitting judges, Chief Justice Daniel Moore, Jr. of the Alaska Supreme Court and Chief Judge Alexander Bryner of the Alaska Court of Appeals, are required to pay contributions to the JRS under AS 22.25.011.<sup>1</sup> Although both Chief Justice Moore and Chief Judge Bryner began their current judicial service in 1980 - Chief Justice Moore was appointed to the superior court in that year, and Chief Judge Bryner was appointed to his current post - both had prior judicial service. Because of that prior service, we conclude that neither judge is obligated to pay contributions under AS 22.25.011.

<sup>1</sup>

**Sec. 22.25.011. Contributions.** Each justice and judge appointed after July 1, 1978, shall contribute seven percent of the base annual salary received by the justice or judge to the judicial retirement system. Contributions shall be made for all creditable service under this chapter up to a maximum of 15 years. This contribution is made in the form of a deduction from compensation, and is made even if the compensation paid in cash to the justice or judge is reduced below the minimum prescribed by law. Each justice and judge is considered to consent to the deduction from compensation. Payment of compensation less the deduction constitutes a full discharge of all claims and demands for the services rendered by the justice or judge during the period covered by the payment, except as to the benefits provided for under this chapter. The contributions shall be credited to the judicial retirement funds established in accordance with AS 22.25.048.

Chief Judge Bryner

Chief Judge Bryner served for about two years as a state district court judge in Anchorage in the mid-1970s, resigned to become the United States Attorney for Alaska, and then was appointed in 1980 to the newly-created Court of Appeals.

When Chief Judge Bryner was serving as a district court judge, he was covered by the JRS. He did not have to pay contributions, since until July 1, 1978, judges were not required to pay contributions to the JRS; the Alaska Court System paid the entire JRS contribution. See AS 22.25.011; Hudson v. Johnstone, 660 P.2d 1180 (Alaska 1983).

After Chief Judge Bryner was appointed to the Court of Appeals in 1980, contributions were withheld from his salary. However, in September 1982 his contributions were refunded, because, as the division explained in a letter, it had determined that only judges appointed for the first time after July 1, 1978, were required to make contributions to JRS. In May 1983, though, the division wrote Chief Judge Bryner reversing its previous decision to refund his contributions. The division explained it had overlooked an attorney general's opinion (1982 Inf. Op. Att'y Gen. (May 18; J99-075-82)) that concluded that judges in Chief Judge Bryner's position (with JRS service before and after July 1, 1978, but who were not in JRS on that date) were obligated to make JRS contributions upon their reappointment. Accordingly, an indebtedness was established for the period in which he had paid contributions that were refunded, and for the period after September 1982 during which he had not paid contributions.

Having reviewed this matter, we now believe that the division's initial letter was correct, and that Chief Judge Bryner is not obligated to pay contributions for his Court of Appeals service. We believe that that initial letter correctly recognized that Chief Judge Bryner's situation is controlled by article XII, section 7, of the Alaska Constitution, as construed by State v. Allen, 625 P.2d 844 (Alaska 1981) and Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska 1981). Even though there was a break in service, the division has always recognized that the rights of a retirement system member with such a break "vest" for constitutional purposes when the member first joins the system. In addition, the law seems clear that an increase in the contribution rate of a retirement system member, to be constitutional, must be offset by an increase in the benefits. See Hudson at 1188 (Rabinowitz, J., concurring, expressing the view that the legislature could not have required members of the JRS holding their positions before July 1, 1978, to pay contributions without violating article XII, section 7).

The attorney general's opinion that the division relied on in 1983 erred, in our opinion, in not considering article XII, section 7. It only examined article IV, section 13, of the Alaska Constitution (compensation of justices and judges shall not be diminished during their terms of office). We agree that the JRS contribution requirement of AS 22.25.011 does not violate this provision with regard to Chief Judge Bryner, since his resignation from the district court clearly ended his term in office. But that should not have been the end of the inquiry.

#### Chief Justice Moore

Like Chief Judge Bryner, Chief Justice Moore had service with the Alaska Court System before 1978, having served as a magistrate in 1961 and 1962. Chief Justice Moore's pre-1978 service with the Alaska Court System occurred prior to the creation of the JRS.<sup>2</sup>

Chief Justice Moore was appointed to the superior court in 1980. Chief Justice Moore, like Chief Judge Bryner, would not have to pay retirement contributions for his post-1980 judicial service if he was a member of JRS when it did not require contributions.

In 1967 the legislature enacted AS 22.25.010(f), which, in its current form, provides:

(f) In the computation of service for retirement under this chapter, the time served by a justice or judge of any court is added to the time served, if any, on any other court. All service rendered by a justice or judge, including service as a magistrate or deputy magistrate, before July 1, 1967, shall be included in the computation.

In 1980 the legislature enacted chapter 146, SLA 1980,

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<sup>2</sup> Judges and magistrates were then covered by the Public Employees Retirement System (PERS). Under the act creating the JRS, ch. 102, SLA 1963, magistrates (including those judicial positions later to become district court judges) were not covered. The JRS was not amended to cover district court judges until 1967. Ch. 83, SLA 1967. That act, in section 14, also amended the definition of "employee" in the PERS statutes to exclude district court judges.

section 47 of which provides:

Sec. 47.(a) Notwithstanding AS 22.25.010(f), a person who had credited service under the public employees' retirement system (AS 39.35) as a district judge, as a magistrate, or as a deputy magistrate for service before July 1, 1967, and who has credited service of less than five years under the judicial retirement system (AS 22.25) as a district judge, as a magistrate, or as a deputy magistrate before the effective date of this Act, may have his credited service under the public employees' retirement system and his credited service under the judicial retirement system reinstated as credited service with the public employees' retirement system by

(1) making a written election to receive his retirement coverage and benefits under the public employees' retirement system (AS 39.35) rather than under the judicial retirement system (AS 22.25) before July 1, 1981;

(2) paying to the public employees' retirement system (AS 39.35) the amount of all contributions covering service before July 1, 1967, which were previously refunded to him by that system; and

(3) paying to the public employees' retirement system (AS 39.35) an amount equal to the amount he would have contributed for service rendered on and after July 1, 1967, as a judge, magistrate or deputy magistrate, if the service had been covered under the public employees' retirement system.

(b) A written election made under (a)(1) of this section is irrevocable.

Read together, these two sections provide evidence of legislative intent to provide retroactive JRS membership to persons who served as magistrates or judges prior to the creation of the JRS.

Section 47, chapter 146, SLA 1980, makes clear that anyone who served as a judge, magistrate, or deputy magistrate before 1967 was a member of the JRS, even if they had been members of PERS during their service. In order to reclaim his status as a member of PERS, Chief Justice Moore would have had to opt out of JRS by

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July 1, 1981. He did not exercise this option. Thus, by virtue of his prior judicial service, Chief Justice Moore was a member of JRS during the time it was a noncontributory regime. Therefore, Chief Justice Moore does have a right, under article XII, section 7, to be exempt from the coverage of AS 22.25.011.

If we can be of further assistance, please do not hesitate to ask.

CEC:tg

cc: Robert Libbey  
Deputy Commissioner  
Department of Administration

Robert Stalnaker  
Director, Division of Retirement and Benefits  
Department of Administration