STATE OF WISCONSIN

Senate Journal

Seventy-Ninth Session

FRIDAY, September 12, 1969.

9:00 o'clock A.M.

The senate met.

The senate was called to order by the clerk.

Upon motion of Senator Roseleip, with unanimous consent, Senator Kendziorski was selected as presiding officer.

Senator Kendziorski in the chair.

The senate stood for a moment of silent prayer.

The calling of the roll was dispensed with, upon motion of Senator Roseleip, with unanimous consent.

INTRODUCTION OF AMENDMENTS

Senate amendment 2 to **Senate Bill 624** offered by Senator LaFave.

INTRODUCTION OF BILLS

Senate Bill 672

Relating to creating a Wisconsin minimum housing standards code and a council on minimum housing standards, vesting rule-making power in the industry, labor and human relations commission, and making an appropriation.

By Senator Schreiber.

Read first time.

To committee on Labor, Taxation, Insurance and Banking.

Senate Bill 673

Relating to registration of architects and engineers.

By Senator Soik, by request of State of Wisconsin Examining Board of Architects and Professional Engineers.

Read first time.

To committee on Governmental and Veterans' Affairs.

COMMITTEE REPORTS

The committee on Transportation reports and recommends:

Senate Bill 605

Relating to funding for the construction of highways.

Passage; Ayes, 3; Noes, 0.

REUBEN LaFAVE,
Chairman.

Senate Bill 605

Upon motion of Senator Roseleip, with unanimous consent, the bill was referred to joint committee on Finance.

The committee on Governmental and Veterans' Affairs reports and recommends:

Senate Bill 553

Relating to registration fees for out-of-state architects and engineers.

Passage; Ayes, 5; Noes, 0.

Senate Bill 595

Relating to purchase of rifles and shotguns in contiguous states.

Passage; Ayes, 5; Noes, 0.

Senate Bill 609

Granting to Brown County a parcel of state-held land lying in the waters of Green Bay.

Passage; Ayes, 5; Noes, 0.

Assembly Bill 30

Relating to reasonable means of access, ingress and egress for handicapped persons to public and mercantile buildings.

Adoption of senate amendment 1; Ayes, 5; Noes, 0; adoption of senate amendment 2; Ayes, 5; Noes, 0 and concurrence as amended; Ayes, 5; Noes, 0.

Assembly Bill 204

Relating to designation of members of the Assembly.

Concurrence; Ayes, 5; Noes, 0.

Assembly Bill 310

Relating to possession of intoxicating liquor by a minor and providing for a penalty.

Concurrence; Ayes, 5; Noes, 0.

Assembly Bill 384

Relating to the power of the public service commission.

Concurrence; Ayes, 5; Noes, 0.

WILLIAM A. DRAHEIM,
Chairman.

REPORT OF JOINT SURVEY COMMITTEE ON TAX EXEMPTIONS

APPENDIX TO SENATE BILL 634

Public Policy Involved

The bill is undesirable as a matter of public policy at this time. Under existing federal law it is not possible to tax the personal property of national banks. This law, then, would have the effect of removing the exemption for state banks while retaining it for national banks.

The Congress is considering a bill which would permit states to tax personal property of national banks. If H.R. 7491 becomes law, it will eliminate the discriminatory features of this bill. Under these conditions, this bill would be desirable as a matter of public policy. There is little

rationale for continuing to exempt banking institutions from tax at a time when the costs of government require the support of all segments of the economy.

Respectfully submitted,

JOINT SURVEY COMMITTEE
ON TAX EXEMPTIONS
CHESTER E. DEMPSEY,
Chairman.
ROBERT O. UEHLING,
Vice-Chairman.

Referred to committee on Labor, Taxation, Insurance and Banking.

PETITIONS AND COMMUNICATIONS

Senate Petition 492

A petition by 100 citizens of Wisconsin requesting the Legislature to vote favorably on **Senate Bill 222** which would restore 35% of the Liquor Tax to the Veterans Trust Fund.

By Senator Roseleip.

To committee on Governmental and Veterans' Affairs.

Senate Petition 493

A petition by 41 citizens of the 17th District favoring a law that would exempt municipal and volunteer Fire Departments from paying a sales tax on property or tickets sold when they are putting on a function for the best interests of their Department.

By Senator Roseleip.

To committee on Labor, Taxation, Insurance and Banking.

Senate Petition 494

A petition by 280 Disabled Veterans of Wisconsin requesting that the senate vote favorably on **Senate Bill 222** which would restore 35% of the Liquor Tax to the Veterans Trust Fund.

By Senator Roseleip.

To committee on Governmental and Veterans' Affairs.

The State of Wisconsin
Department of Justice
Madison

September 5, 1969.

The Honorable, the Senate
State Capitol
Madison, Wisconsin 53702

Gentlemen:

In **Senate Resolution** 9 you requested my opinion whether **Senate Joint Resolution 13,** which would amend sec. 26, Art. IV of the constitution to allow "increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system," is such a broad exemption as to purport to give legislative authorization in areas not constitutionally subject to state law, or is so vague as to fail to delimit with sufficient clarity its scope. **Senate Joint Resolution** 13 reads as follows:

"Whereas, at the general session of the legislature in the year 1967 an amendment to the constitution was proposed by **Senate Joint Resolution 41** and agreed to by a majority of the members elected to each of the 2 houses, which amendment reads as follows:

"'(Article IV) Section 26. The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office [except that when any increase or decrease provided by the legislature in the compensation of the justices of the supreme court, or judges of the circuit court shall become effective as to any such justice or judge, it shall become effective from such date as to each of such justices or judges]*. This section shall not apply to increased benefits for ~~teachers~~ *persons who have been or shall be granted benefits of any kind* under a ~~teachers'~~ retirement system when such increased benefits are provided by a legislative act passed on a call of ~~yeas and nays~~

* Bracketed material not part of joint resolution as originally introduced as it was not approved as part of the constitution until the April 1967 election.

ayes and noes by a three-fourths vote of all the members elected to both houses of the legislature.' "

The amendment constitutes an exemption to sec. 26, Art. IV, and its scope is therefore limited by that section as it now exists. The section relates to extra compensation of any "public officer, agent, servant or contractor." Persons covered in each of these aforementioned descriptions have been the subject of numerous court decisions and such decisions provide the framework for determining the scope of the exemption contemplated in the amendment. The amendment is further limited in application to persons entitled to benefits under a retirement system. Thus, **Senate Joint Resolution** 13 cannot be said to be so vague as to fail to delimit its scope with sufficient clarity.

The other question asked is whether the exemption granted by **Senate Joint Resolution 13** is so broad as to purport to give legislative authorization in areas not constitutionally subject to state law. This question appears to raise the issue of whether an expenditure of public funds to increase benefits to previously retired state employees would be an unconstitutional expenditure of public funds for a private purpose. This issue was considered in *State ex rel. Thomson v. Giessel* (1951), 262 Wis. 51 (hereinafter referred to as "the first *Giessel* case"), where the legislature attempted to provide increased retirement benefits to retired teachers. The court found that such increased benefits were clearly extra compensation for services rendered in the past. The court said that this was exactly the sort of extra compensation prohibited by sec. 26, Art. IV. (262 Wis. at 56)

It was also argued in that case that, because the legislation required a payment of $100 by the retired teacher into the general fund, the legislation could be sustained as merely providing for a new contract for new consideration. The Court disagreed, stating (at pp. 62–3) that:

"* * * It appears to us that if the factor of past services and compensation therefor is withdrawn, we have nothing left but a group of people in whom the legislature has become interested and to whom it is willing to sell a life annuity. When the applicants rest their claims on their former service they are entangled with sec. 26, art. IV, Const. When they free themselves from that by relying

only upon the new consideration to support a new contract they put themselves into the class of other private citizens, with former teaching status as an identifying mark only, and the special benefit granted them is a use of public funds for a private interest and, hence, unconstitutional. *State ex rel. Smith v. Annuity & Pension Board* (1942) 241 Wis. 625, 6 N. W. (2d) 676; *Attorney General v. Eau Claire* (1875), 37 Wis. 400, 436. * * *"

The above-quoted language implies that *but for* the prohibition of sec. 26, Art. IV, the legislature could have used "the factor of past services and compensation therefor" as a basis for creating a special classification for retired teachers. The court had previously rejected "gratitude" or "inducement" as a reasonable basis for making such a classification. 262 Wis. at 56–60. Because sec. 26, Art. IV, prohibited a classification based upon past services, there remained no reasonable basis for singling out the retired teachers and the payments constituted an expenditure of public funds for a private purpose (a denial of equal protection).

The proposed amendment would remove the "entanglements" of sec. 26, Art. IV, and permit the legislature to create special classifications of people entitled to increased benefits on the basis of their past services to the state. Such designation of a particular group of persons to be benefited by the statute would not be, in itself, an unconstitutional denial of equal protection. *State ex rel. Thomson v. Giessel* (1953), 265 Wis. 558, 567–8 (Hereinafter referred to as "the second *Giessel* case"); *State ex rel. Holmes v. Krueger* (1955), 271 Wis. 129, 137–8.

The legislature responded to the first *Giessel* case by enacting legislation that provided for the rehiring of retired teachers on a standby basis, and the playing of compensation for such services. This legislation was upheld in *State ex rel. Thomson v. Giessel* (1953), *supra* (the second *Giessel* case), where the court declined to consider the motives of the legislature and found the contracts valid on their face. The legislation was also attacked on the grounds that it constituted an appropriation of public funds for a private purpose according to the first *Giessel* case and the court replied succinctly that:

"* * * The contention is of course based upon the erroneous assumption that the payments prescribed are for serv-

ices previously rendered. We would refuse to assume that the able counsel who represents respondent would maintain that an appropriation made to promote the efficiency of our school system is made for other than a public purpose." (265 Wis. at 568)

One implication of this statement is that, because sec. 26, Art. IV, constitutes a declaration of public policy against expenditures in the nature of extra payments for services previously rendered,* such expenditures presumably would not be for a public purpose even if the constitution did not act to prevent the legislature from making the particular payments in question. Such a presumption would require an *independent* determination of the public purpose question whenever sec. 26, Art. IV, was involved. Furthermore, enactment of the legislature providing for such payments would not be entitled to the usual presumption that the legislature is the proper body to determine what constitutes an expenditure of public funds for a public purpose and that the judiciary should interfere only in cases of clear abuse. 42 Am. Jur. *Public Funds,* pp. 758–9, sec. 57; 81 C.J.S. *States,* p. 1149; sec. 133.

This implication was made explicit in *State ex rel. Holmes v. Krueger* (1955), *supra,* which involved an increase in retirement benefits to retired teachers paid by the city of Milwaukee. The court began by showing that the constitutional prohibitions of sec. 26, Art. IV, did not apply to employees or officers of cities or other municipalities so long as no salaries or funds are paid out of the state treasury. The court felt compelled, however, to meet the objection that such payments would not be for a public purpose. They concluded that the expenditures were for a moral obligation and were, therefore, for a public purpose. Thus, the court was interpreting sec. 26, Art. IV, to constitute both a limitation on legislative power to give extra compensation for services previously rendered and a presumption that any such expenditures are not for a public purpose.

"' * * Sec. 26 of art. IV of the state constitution prohibits the legislature from granting any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into. This declares a wise public policy. * * *'" *Seib v. Racine* (1922), as quoted in *State ex rel. Holmes v. Krueger, supra,* at p. 134.

Sec. 26, Art. IV has since been amended to specifically allow for increased compensation to teachers under a teacher's retirement system, and for changes in judge's salaries during their term. By **Senate Joint Resolution 13**, you intend to expand the exceptions to include all state employees. The constitutional question is, then, whether such an amendment removes only the limitation on legislative authority to make such an expenditure, or whether it constitutes *both* a removal of such limitation *and* a declaration that such an expenditure is for a public purpose. It is my opinion that the latter is correct.

In the first *Giessel* case the court suggested that, in light of the clear constitutional prohibition, the way for the legislature to provide for increased benefits to retired teachers was through the process of constitutional amendment:

"* * * If exceptions are to be made, they should not come from the legislature or the court but from those whose proper function it is to amend the constitution. When the people determined that the times required state participation in the construction of highways, airports, veteran's housing, and the preservation and development of forests, they adopted amendments to the constitution excepting these interests from the terms of sec. 10, art. VIII, which forbade the state to engage in works of internal improvement. *If, now, to underwrite certain contracts against the effects of inflation is deemed, by the people, to be desirable, or if they consider that the cause of public service requires power in the legislature to grant bonuses, apart from compensation, to retired public servants, the road to amending the constitution is well traveled,* * * *." (Emphasis supplied (262 Wis. at 64)

The language italicized above implies that a constitutional amendment allowing for expenditures to increase benefits to retired teachers *would* constitute a declaration by the people that such expenditures are for a desirable public purpose. The court's analogy to the internal improvements clause (sec. 10, Art. VIII, Wis. Const.) supports this interpretation, as exceptions to the internal improvements clause have been held to constitute not only an exemption from the constitutional prohibition but also a declaration that such activities would be a proper governmental function. *State ex rel. La Follette v. Reuter* (1967), 36 Wis. 2d 96, 120, 153 N. W. (2d) 49. It is, therefore, my opinion

that the proposed amendment to sec. 26, Art. IV, contained in **Senate Joint Resolution 13,** would not only remove the limitation on the legislature's power to provide increased benefits to retired state employees but would also constitute a declaration that such expenditures are for a public purpose. Such a declaration could not be conclusively determinative of the public purpose question, which is a judicial doctrine, but would constitute a presumption in favor of the constitutionality of expenditures specifically provided for in the proposed constitutional amendment.

I therefore conclude that **Senate Joint Resolution 13** cannot be said to be so broad as to purport to give legislative authorization in areas not constitutionally subject to state law.

Sincerely yours,

ROBERT W. WARREN,
Attorney General.

CAPTION: Sec. 26, Art. IV, Wis. Const., constitutes both a limitation of legislative power to grant extra compensation, and a presumption that any such expenditure would not be for a public purpose. An amendment that would allow for "increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system," as proposed in **Senate Joint Resolution 13,** would not only remove the limitation on legislative authority to grant such funds, but would also constitute a declaration that such expenditures would be for a public purpose.

Senate Joint Resolution 13 cannot be said to be so vague as to fail to delimit with sufficient clarity its scope or so broad as to purport to give legislative authorization in areas not constitutionally subject to state law.

MOTIONS

Senate Bill 671

Upon request of Senator Swan, Assemblyman L. H. Johnson was added as a co-sponsor to **Senate Bill 671.**

Upon motion of Senator Roseleip the senate adjourned until Tuesday, September 16 at 2:00 P.M.