SENATE . . . . No. 407

The Commonwealth of Massachusetts.

CORRESPONDENCE BETWEEN COUNSEL OF THE TWO BRANCHES OF THE GENERAL COURT, AND THE ATTORNEY GENERAL, RELATIVE TO THE CONSTITUTIONALITY OF CERTAIN BILLS.

OFFICES OF THE COUNSEL TO THE SENATE AND
COUNSEL TO THE HOUSE OF REPRESENTATIVES, May 26, 1926.

Hon. WELLINGTON WELLS, *President of the Senate, State House, Boston, Mass.*

SIR: — We have the honor to transmit herewith a copy of the communication to the Attorney General, dated May 28, 1926, requesting him, as authorized by you, to reconsider for reasons set forth therein, his opinion ruling unconstitutional Senate bills Nos. 307 and 317, and also a copy of the Attorney General's reply thereto and of subsequent correspondence in relation to the subject matter.

Very respectfully,

WILLIAM E. DORMAN,
Counsel to the Senate.

HENRY D. WIGGIN,
Counsel to the House of Representatives.

Inclosures.

The Commonwealth of Massachusetts.

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, May 24, 1926.

WILLIAM E. DORMAN, Esq., *Counsel to the Senate*, and HENRY D. WIGGIN, Esq., *Counsel to the House of Representatives*.

DEAR SIRS: — I acknowledge receipt of your joint communication of May 28th in which you state that you are authorized by the President of the Senate to request me to reconsider my opinion rendered to the Senate under date of May 3, 1926, and printed as Senate document No. 383, to the effect that Senate bills No. 307 and No. 317 would, if enacted into law, be unconstitutional, for reasons set out at some length in your letter.

1. Your first ground of objection to the opinion relates to that part which calls attention to the omission in Senate Bill No. 307 to except special justices of district courts from the provisions of the bill. You say that my statement overlooks the provisions of St. 1921, c. 413, and St. 1923, c. 479, § 3, amending G. L., c. 32, § 65, and is therefore "indisputably erroneous".

G. L., c. 32, § 65, relates to pensions for justices of certain district courts. By the amendment it is provided that "sections twenty to twenty-five, inclusive, shall not apply to the justices of any such district court". These are the sections which relate to the county retirement system. It is true that this provision was not noticed in the opinion and was first brought to my attention after the opinion was rendered. I do not, however, agree with your conclusion that the statement in the opinion is indisputably erroneous. Under the decision in *O'Connell* v. *Retirement Board of the City of Boston* the term "employees", as used in a similar retirement act, did not include public officials. Justices of district courts, therefore, were not within the purview of the county retirement law at the time when G. L., c. 32, § 65, was amended. The amendment, of course, makes it perfectly plain that the justices of district courts referred to in section 65, for whom a pension is provided,

are to receive no further benefits under the county retirement system. The amendment to that system, however, proposed by Senate Bill No. 307, vitally changes the previous law by making it applicable, generally speaking, to all officials or public officers whose compensation is paid by the county. It is indisputably true that a justice of a district court is such a public official. It follows, therefore, that the provisions of St. 1921, c. 413, and St. 1923, c. 479, § 3, are necessarily inconsistent with the provisions of Senate Bill No. 307 in that respect. Our court has several times declared that "when the Legislature has dealt in a comprehensive way with an entire subject, the general principle is that previous conflicting provisions of the law are not continued in force." *Warr* v. *Collector of Taxes of Taunton*, 234 Mass. 279, 282. See also *Doyle* v. *Kirby*, 184 Mass. 409; *Wilson* v. *Head*, 184 Mass. 515; *Commonwealth* v. *Commissioner of Banks*, 240 Mass. 244, 250.

My opinion therefore remains unchanged that the provisions of Senate Bill No. 307 in that respect are unconstitutional, that the bill, however, would not be held wholly invalid on that account but would be construed as not applicable to justices of district courts, but that the bill must, nevertheless, be regarded as defective in its omission to exclude justices of district courts from its provisions requiring retirement at seventy.

2. You object also to my conclusion that Senate bills No. 307 and No. 317 would be unconstitutional because of the discriminations pointed out in the opinion, and suggest that the fact that the persons discriminated against are public officers or employees gives the State a right of regulation free from the constitutional guaranty of equal protection of the laws.

You say that none of the cases cited by me relates to legislation affecting public officers or employees. Apparently you have not observed the case of *Brown* v. *Russell*, 166 Mass. 14, which I cited, which does relate precisely to legislation affecting public officers or employees. The statutes considered there related to the Civil Service, and the court held that provisions purporting to give an absolute preference to veterans in obtaining public office or

employment were unconstitutional. In that case the distinction between a public office and an employment was adverted to. It has been frequently cited with approval by our court.

I am aware of the principle of the cases which you cite. Some of them are referred to in an opinion rendered by me to the speaker of the House of Representatives on January 25, 1924. Atty. Gen. Rep., 1924, pp. 25, 26. The statement of this principle by Mr. Justice Sutherland in *Adkins* v. *Children's Hospital*, 261 U. S. 525, 547, is that statutes relating to contracts for the performance of public work depend for their validity upon "the right of the government to prescribe the conditions upon which it will permit work of a public character to be done for it, or, in the case of a state, for its municipalities". This principle, it seems to me, is inapplicable to the provisions of the retirement system referred to in my opinion, as it was to the Civil Service statutes in *Brown* v. *Russell*. See *Lee* v. *Lynn*, 223 Mass. 109; *Corliss* v. *Civil Service Commissioners*, 242 Mass. 61, 65.

3. I do not agree with your view that the discrimination contained in the bills rests upon a substantial difference. This subject is discussed in my opinion. I have nothing to add to it except to point out that the class discriminated against includes not only those who have taken affirmative action but those who have failed to take action. See for example St. 1922, c. 521, § 5.

The features of the two bills to which I called attention in my opinion to the Senate are easily changed so as to remove what seemed to me to be the constitutional objection expressed in my letter. With respect to the Boston retirement bill a draft of amendment has been prepared, to which no objection has been made and which I believe has been approved by every one. As to Senate Bill No. 307, a draft of amendment was submitted to me by Senator Kidder which seemed to me to be entirely proper and to remove all constitutional objections.

Very truly yours,

JAY R. BENTON,
Attorney General.

OFFICES OF THE COUNSEL TO THE SENATE AND
COUNSEL TO THE HOUSE OF REPRESENTATIVES, May 26, 1926.

Hon. JAY R. BENTON, *Attorney General, State House.*

DEAR SIR: — We acknowledge receipt of your communication of the 24th instant, relative to the constitutionality of Senate bills No. 307 and No. 317.

We have no desire to prolong the argument, inasmuch as we realize that you have the final word on the subject, at least until the question is submitted to the justices as it is likely to be in connection with similar legislation at the next session affecting the state retirement system, but we beg to direct your attention to certain unsupportable statements in your said letter.

1. As to the status of district court justices in connection with §§ 20–25 of chapter 32 as amended. What you set forth as to implied repeals on page 2 of your said letter would have some relevancy, though slight, if section one of Senate Bill No. 307 were a detached, independent provision and not an amendment to the same chapter 32 which already contains a provision exempting the justices from the county retirement sections. It would be faulty drafting to incorporate into said chapter 32 an exception of a class already excepted. The distinction is illustrated by your own suggestion which is resulting in the insertion of the words "if otherwise eligible" in the new section being added to said Senate Bill No. 307. This new section is not a part of §§ 20–25 of chapter 32. If it were, the last sentence of paragraph (3) of § 22 of chapter 32 would apply, and the insertion of said words would be superfluous. Accordingly, we must insist that the relative part of your opinion is indisputably erroneous and will advise the Legislature not to insert in the new definition of "employee" in said Senate Bill No. 307 words excepting justices when they are already as unmistakably excepted as the English language and well established canons of interpretation can make them.

2. We did take note of the case of *Brown* v. *Russell*, 166 Mass. 14, which in no particular refers to the Fourteenth

Amendment or discrimination thereunder, but to certain clauses in the state constitution guaranteeing to all an equal right to enter public service. It does not touch the present issue.

3. There was only one class alleged by you to be discriminated against in the county bill (Senate, No. 307) and this class comprised those who had stated that they did "not wish to join the system." The other class supposed to be unjustly treated (in Senate, No. 317) is said by the administrator of the Boston retirement system to be non-existent. Here there would seem to be room for the application of the principle, — "de minimus non curat lex." If the bills involve discrimination sufficiently unreasonable to overcome the presumption of constitutionality, we beg to direct your attention to the redraft of Senate Bill No. 317, which is reported to have received your assent, but which, because of its alleged unfair discrimination is being modified to insure executive approval.

Very respectfully,

WILLIAM E. DORMAN,
Counsel to the Senate.

HENRY D. WIGGIN,
Counsel to the House of Representatives.

OFFICES OF THE COUNSEL TO THE SENATE AND
COUNSEL TO THE HOUSE OF REPRESENTATIVES, May 28, 1926.

Hon. JAY R. BENTON, *Attorney General, State House.*

DEAR SIR: — We are authorized by the President of the Senate to request you to reconsider your opinion rendered to the Senate under date of May 3, 1926, and printed as Senate Document No. 383, to the effect that Senate bills 307 and 317 would, if enacted into law, be unconstitutional, in view of the following considerations.

1. On page 4 of the opinion, as printed in Senate, No. 383, appears the following: —

"Justices of district courts are paid by the counties, and, therefore, come within the terms of the provisions of the bill. As to them, the provisions are plainly unconstitutional, being in direct violation of Mass. Const., c. III, art. I. If the bill were enacted in its present form, however, it would not be held to be wholly invalid on that account, but the court would, in my judgment, apply the principle that the statute must be interpreted as intended to apply only to that class of persons to whom it would be constitutionally applicable. *Attorney General* v. *Electric Storage Battery Co.*, 188 Mass. 239; *Baltic Mining Co.* v. *Commonwealth*, 207 Mass. 381, 390. The bill, however, must, I think, be regarded as defective for this reason."

This statement overlooks the fact that section 65 of chapter 32 of the General Laws, as amended by chapter 413 of the Acts of 1921 and by section 3 of chapter 479 of the Acts of 1923, provides that sections 20–25, inclusive, shall not apply to the justices of any such district court. This statement, therefore, is indisputably erroneous.

2. The only other ground on which the constitutionality of the two bills above named is attacked is that set forth on page 5 of Senate, No. 383, namely, that the bills are discriminatory to such an extent as to violate the equality clause of the Fourteenth Amendment to the Federal Constitution.

It is respectfully submitted that none of the cases cited sustain this conclusion. None of them relate to legislation affecting public officers or employees. It seems to be well established that the control exercisable by a state over its

own instrumentalities and agencies, whether they consist of political subdivisions, municipal corporations, officers, employees or contractors on public works, is not referable to its regulating or police power but to its power as proprietor, that is to say, the power of the proprietor of a business "to prescribe the methods in accordance with which it shall be conducted" (see *Opinion of the Justices*, 208 Mass. 619–623); and this proprietary authority is not generally subject to those restraints which limit the exercise of its ordinary governmental powers. Accordingly, it may regulate the hours of labor of public employees and employees engaged on public works, and may impose a minimum wage affecting public employment, free from the restrictions controlling its action in respect to private industry. *Opinion of the Justices*, 208 Mass. 619; *Atkins* v. *U. S.*, 191 U. S. 207; *People* v. *Crane*, 214 N. Y. 154, (holding it to be a denial of equal protection of the laws for the state to bar an alien from right to trade and labor, but not to be a denial when the government in its capacity as proprietor bars aliens from public employment or employment on public works, citing *United States* v. *Martin*, 94 U. S. 400); *Ellis* v. *United States*, 206 U. S. 246; *Sweeten* v. *State*, 122 Md. 634; *State* v. *Livingstone Concrete Mfg. Co.*, 34 Mont. 570; *Milwaukee* v. *Raulf*, 164 Wis. 172; *Wagner* v. *Milwaukee*, 266 U. S. 485; *Adkins* v. *Children's Hospital*, 261 U. S. 525 (where Justice Sutherland referred to statutes imposing a minimum wage on public works as supportable "not upon the right to condition private contracts but upon the right of the government to prescribe the condition upon which it will permit a work of a public character to be done for it"); *Prof. Felix Frankfurter*, 29 Harvard Law Review, note p. 353; *People* v. *Metz*, 192 N. Y. 148; (wherein it was contended that the eight-hour law, because it discriminated between certain kinds of public employees, violated the Fourteenth Amendment. The court, after pointing out the classification was not arbitrary or capricious, said: "We have thus considered the subject of discrimination along the line of discussion adopted by counsel, but we regard it as of slight importance in this case, because in the legislation in question the state was dealing with its own creations and could discriminate as it saw fit").

3. Such alleged discrimination as the bills make rests upon a substantial difference. Because the bills do not entitle a class of employees who have *affirmatively* declared that they did "*not wish* to join the *association*" (see the particular form of language of G. L., ch. 32, § 22, par. (1) and ch. 521 of the Acts of 1922, § 5, par. 1) to change their minds and come in, in contradistinction to those who had a chance to express the same wish and did not, it is said to involve an unreasonable distinction. Whether we like it or not is not material. The real question is whether or not it is arbitrary. We respectfully submit that it is not.

This somewhat unusual request is made in view of the fact that the approach of prorogation renders it out of the question to seek an opinion of the Justices of the Supreme Judicial Court upon the important issues raised in your opinion.

The matters involved, however, are of great concern to the Legislature, as they have an important bearing upon other matters affecting legislative policy.

Very respectfully,

WILLIAM E. DORMAN,
Counsel to the Senate.

HENRY D. WIGGIN,
Counsel to the House of Representatives.