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JERRY L. BENEDICT  
Administrative Director

FEB 04 2002

OPINION COMMITTEE

February 1, 2002

RQ-0505-JC

**By Certified Mail, Return Receipt Requested**

The Honorable John Cornyn  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

FILE # ML-42406-02  
I.D. # 42406

Re: Whether Sections 834.102(b)(2) and 839.102(b)(2), of the Texas Government Code, apply to visiting judges who retired prior to January 1, 2002

Dear Attorney General Cornyn:

I respectfully request your opinion regarding the effect of the amendments to Sections 834.102(b) and 839.102(b), Texas Government Code, passed by the 77<sup>th</sup> Legislature.

The wording of the two sections is nearly identical. Sec. 834.102(b) applies to the Judicial Retirement System Plan I and Sec. 839.102(b) applies to the Judicial Retirement System Plan II. Prior to their amendment by Senate Bill 372, 77<sup>th</sup> Legislature, Regular Session (2001), the sections read as follows:

**Section 834.102(b)**

(b) The retirement system shall increase by 10 percent of the amount of the applicable state salary under Subsection (a) or (d), the annuity of a member who on the effective date of retirement has not been out of judicial office for more than one year.

**Section 839.102(b)**

(b) The retirement system shall increase by 10 percent of the amount of the applicable state salary under Subsection (a) or (c) the annuity of a member who on the effective date of retirement has not been out of judicial office for more than one year.

Senate Bill 372 took effect on January 1, 2002. It amended the sections to read as follows:

Section 834.102(b)

(b) The retirement system shall increase by 10 percent of the amount of the applicable state salary under Subsection (a) or (d) the annuity of a member who on the effective date of retirement:

(1) has not been out of judicial office for more than one year; or

(2) has served as a visiting judge in this state and the first anniversary of the last day of that service has not occurred.

Section 839.102(b)

(b) The retirement system shall increase by 10 percent of the amount of the applicable state salary under Subsection (a) or (c) the annuity of a member who on the effective date of retirement:

(1) has not been out of judicial office for more than one year; or

(2) has served as a visiting judge in this state and the first anniversary of the last day of that service has not occurred.

The amendment to the statutes can be interpreted to direct the retirement system to increase by 10% the annuities of visiting judges who have already retired and are currently receiving an annuity as long as they retired within one year of serving as visiting judges. Several retired judges who did retire within one year of serving as visiting judges believed that their annuities would increase by 10% effective January 1, 2002.

However, the Judicial Retirement System (System), a division of the Employees Retirement System, interprets Sections 834.102(b)(2) and 839.102(b)(2) to apply only to visiting judges who *retire after January 1, 2002*. The System does not interpret them as an amendment to the annuity amount that members who meet the requirements (e.g. visiting judges who retired within one year of serving as a visiting judge) are entitled to receive effective January 1, 2002, regardless of the date of their retirement.

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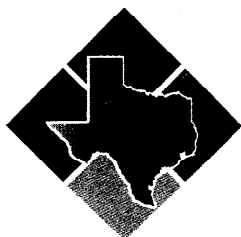
We would appreciate your opinion as to whether the 10% increase in Sections 834.102(b)(2) and 839.102(b)(2) applies to visiting judges who retired prior to January 1, 2002, and within one year of serving as visiting judge, or whether it only applies to visiting judges who retire after January 1, 2002.

Sincerely,



Jerry L. Benedict  
Administrative Director

cc: Presiding Judges, Administrative Judicial Regions



**EMPLOYEES  
RETIREMENT  
SYSTEM OF TEXAS**

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The Honorable John Cornyn  
Attorney General, State of Texas  
Opinion Committee  
Price Daniel Building  
209 West 14th Street  
Austin, Texas 78701

*Via Hand Delivery*

FILE # RD-0505-JC  
I.D. # 42443

*— SC*

Re: Opinion Request Regarding Application of 10 percent Annuity  
Enhancements to Members of the Judicial Retirement System of Texas -  
Plan One and Plan Two.

Dear General Cornyn:

The Employees Retirement System of Texas ("ERS") respectfully requests an opinion regarding the application of a bill enacted in the 77<sup>th</sup> Texas Legislature, Regular Session ("Session"). The issue concerns how ERS is to administer certain aspects of judicial retirement benefits under Chapters 834 and 839, Government Code, as amended this Session by Senate Bill 372 ("S.B. 372"). Specifically, ERS requests an opinion regarding the prospective application of §§834.102(b) and 839.102(b), Government Code.

**I. BACKGROUND AND ISSUE**

At issue is ERS' interpretation of the prospective application of §§834.102 and 839.102, Government Code, as amended by the 77th Legislature in S.B. 372 (Act of May 26, 2001, 77th Leg., R.S., ch. 1240, §§3, 6; 2001 Texas Gen. Laws 2924, 2925) (enclosed). The statutes in question provide enhanced judicial annuities for timely retirement by members of the state judicial retirement systems (i.e., Judicial Retirement System of Texas Plan One ("JRS-I") and Judicial Retirement System of Texas Plan Two ("JRS-II")).

The most recent amendments to these statutes now provide that the annuity of a member shall be increased by 10 percent if the member, on the effective date of retirement, (1) has not been out of judicial office for more than one year; or (2) performed visiting judge services less than one year prior to his retirement. The amended statutes appear to speak to two prior Attorney General Opinions (Op. Tex. Att'y Gen. No. LO-93-81 (1993), and Op. Tex. Att'y Gen. No. H-1149 (1978)). These opinions had indicated that retired visiting judges did not retire from "judicial office" for the purpose of annuity enhancement under the old law.

Section 7 of S.B. 372 states that the Act takes effect January 1, 2002. There is no indication that the Act should have any retrospective effect. Therefore, ERS has determined that the recent amendments enhance the annuities of eligible JRS-I and JRS-II members who retire from judicial service after January 1, 2002. However, some retired judges have suggested that the annuity enhancement should apply retrospectively to any state judge who retired from service as a visiting judge, regardless of the date of retirement.

ERS bases its interpretation on applicable law indicating that statutes are presumptively prospective and not retrospective in effect unless expressly made retrospective. Tex. Gov't Code Ann. §311.022 (Vernon 1998). ERS interprets the law to require that any former judge seeking the benefit of the 10 percent annuity enhancement must retire no earlier than January 1, 2002, because the new laws specifically take effect on January 1, 2002, appear to be expressly prospective in effect and are not apparently retrospective. Compare, Russell v. Board of Trustees of Firemen, Policemen and Fire Alarm Operator's Pension Fund of Dallas, 968 F.2d 489 (5th Cir. 1992), cert. denied 113 S.Ct. 1266 (amendment for additional spousal life benefits in pension plan does not apply retroactively to spouse whose benefits had been terminated due to remarriage prior to the amendment).

Finally, the amended laws appear to apply solely to current members of JRS-I and JRS-II who apply for retirement, and not to former judges who may already be retired.

The retirement system shall increase by 10 percent of the amount of the applicable state salary . . . the annuity of a member who on the effective date of retirement . . .

Tex. Gov't Code §§834.102(b), 839.102(b) (Vernon Supp. 2002) (emphasis added).

Note that "membership" in JRS-I and JRS-II terminates upon a judge's retirement. Tex. Gov't Code §§832.003(2), 837.002(2) (Vernon 1994). The statutory amendments apply to "members" based on circumstances that are viewed on the effective date of the member's retirement.

## II. QUESTIONS PRESENTED

ERS has interpreted the statutes in question to provide enhanced annuity benefits only to those judges who retire after January 1, 2002, the effective date of the amendments. In light of the issues addressed in this request, ERS respectfully requests that the Attorney General answer the following questions:

1. Are former state judges who retired from judicial service prior to January 1, 2002 (from either Judicial Retirement System of Texas Plan One or Judicial Retirement System of Texas Plan Two) entitled to a retroactive 10 percent enhancement of their judicial retirement benefits as described in Tex. Gov't Code §§834.102(b) and 839.102(b)?
2. If the Attorney General determines that the statutes are effective retrospectively, then when is the enhancement payable? Is it payable with the first annuity payment after January 1, 2002, or is it payable retroactively to the effective date of the individual's retirement?

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### III. CONCLUSION

In response to comments from retired judges regarding enhanced annuity benefits, ERS seeks your opinion as to the proper administration of §§834.102(b) and 839.102(b), Government Code, consistent with the laws and Constitution of the state of Texas.

Please let me know if I may provide additional information.

Sincerely,



SHEILA W. BECKETT  
Executive Director

SWB/JBK/ab

Enclosure

cc: The Honorable Gonzalo Barrientos, Texas Senate  
The Honorable John A. Longoria, Texas House of Representatives  
The Honorable Thomas R. Phillips, Texas Supreme Court  
The Honorable Pat Priest, P.O. Box 460771, San Antonio, Texas 78246  
Mr. Jerry Benedict, Texas Office of Court Administration  
Ms. Carole Keeton Rylander, Office of the Comptroller  
Mr. Stephen R. Collins, Texas Legislative Council