



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WARDEN

March 2, 2015

Statehouse
VIA HAND DELIVERY

Re: H. 100 – Our File No. 15-50730

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House Bill 100 ("H. 100") would amend Idaho Code §§ 59-1342 and 59-1346, which address the computation of retirement benefits. It would amend those sections to remove the legislative exemption (for legislators leaving the Legislature on or after July 1, 2015) from the "split calculation" that applies to other elected and appointed (sometimes referred to as "E/A") officials in the computation of a PERSI retirement benefit when the elected or appointed official was in the office on average less than 20 hours per week (called "part-time service" for the rest of this letter).¹ You have asked whether H.100 might raise constitutional issues in light of art. III, Sec. 23 of the Idaho Constitution.²

As we understand your inquiry, it asks whether the H. 100 runs afoul of the restriction contained in art. III, sec. 23 against legislators setting their own compensation (except to lower their compensation from that otherwise established by the Citizens' Committee by a concurrent resolution enacted by the twenty-fifth legislative day). In previous analyses, this office has superficially addressed these issues, but has not undertaken a comprehensive analysis of this question. This analysis will supersede any prior analysis of this issue.

This question actually raises two questions:

1. Are retirement benefits considered a part of "rate of compensation of the Legislature" for art. III, sec. 23 purposes; and

¹ The legislative exemption from the split calculation was enacted in 1990 with an emergency clause and a retroactive date of July 1, 1985. See 1990 Session Laws ch. 238, p. 738.

² Art. III, sec. 23, as it currently reads, was amended as proposed by H.J. R. No. 6 (S.L. 1976, p. 1217) and ratified at the general election on November 2, 1976.

2. Would legislative alteration of retirement benefits require the approval of the Citizens' Committee under art. III, sec. 23?

“Rate of Compensation” includes both salary and benefits.

Art. III, sec. 23 of the Idaho Constitution addresses the compensation of the Legislature. It provides that the Legislature does not have the authority to establish “the rate of its compensation and expense” and provides that the Citizens' Committee on Legislative Compensation (“Citizens' Committee”) shall establish the rate of compensation and expenses for legislators (subject to rejection by concurrent resolution). Neither compensation, nor rate of compensation with regard to a legislative rate of compensation, is defined by the constitutional provision or by the statute. Compensation is generally defined as being composed of salary plus benefits and any other perks having monetary value offered by an employer. A benefit is anything that is offered that can be assigned a monetary value. This means that any analysis should determine whether a monetary value can be assigned to a benefit. Considering compensation to include more than just salary and expenses is consistent with the approach taken by the Citizens' Committee on Legislation Report, which is attached to this response for your review.

The Citizens' Committee Has Discretion With Regard to Benefits Paid to Legislators.

Art. III, sec. 23 provides:

The legislature shall have no authority to establish the rate of its compensation and expense by law. There is hereby authorized the creation of the citizens committee on legislative compensation, which shall consist of six members, three to be appointed by the governor and three to be appointed by the supreme court, whose terms of office and qualifications shall be as provided by law. Members of the committee shall be citizens of the state of Idaho other than public officials holding an office to which compensation is attached. The committee shall, on or before the last day of November of each even-numbered year, establish the rate of compensation and expenses for services to be rendered by members of the legislature during the two-year period commencing on the first day of December of such year. The compensation and expenses so established shall, on or before such date, be filed with the secretary of state and the state controller. The rates thus established shall be the rates applicable for the two-year period specified unless prior to the twenty-fifth legislative day of the next regular session, by concurrent resolution, the senate and house of representatives shall reject or reduce such rates of compensation and expenses. In the event of rejection, the rates prevailing at the time of the previous session, shall remain in effect.
... (Emphasis added).

One means of interpreting H. 100 is that the amendment to Idaho Code §§ 59-1342 and 59-1346 will address the *computation* of a retirement benefit, not “the rate of compensation” for legislative service “during the two-year period commencing on the first day of December of [even numbered years].” Idaho Code § 59-1342 governs service retirement and Idaho

Code § 59-1346 governs early retirement. As such, these sections provide the applicable multiplier, provide for a minimum benefit, and mandate the method of computation in particular instances, including when an elected or appointed official has both elected or appointed "part-time" service and non-elected or appointed service and the majority of that service is elected or appointed. In such cases, two calculations are required (called a "split calculation"). The retirement benefit from the part-time E/A service is calculated, and a separate calculation is done for the non-E/A service. Idaho Code § 59-1342(5) and § 59-1346(2). Under the current versions of these subsections, members of the Legislature who would otherwise be subject to a split calculation are exempt and only one calculation is done, which in effect treats part-time service as full-time service.³ As a result of the exemption, a legislator may receive a larger monthly retirement benefit than he would receive if he were subject to the split calculation.

The term used, repeatedly, in art. III, sec. 23 is "rate of compensation." Further, under the terms of sec. 23, the "rate of compensation" is "for services to be rendered by members of the legislature during the two-year period commencing on the first day of December of such year." The language used and the entirety of the process set up by art. III, sec. 23 reflects that the "rate of compensation" refers to compensation for the immediately following two year period, that is, current compensation. See also *Beitelspacher v. Risch*, 105 Idaho 605, 617 (1983) *concurring and dissenting* (Bistline) (setting out, verbatim, provisions from The Statement of Meaning and Purpose of the Proposed Constitutional Amendment Offered by House Joint Resolution Number 6, which provisions state, inter alia, that "[t]he provisions of this amendment would remove the initial salary review from legislative hands and return them to the people").⁴

An argument can be advanced that H. 100 would constitute a change in the benefits received by a legislator, and, therefore, H. 100 would require approval by the Citizens' Committee. There are most likely three ways in which this change could apply to legislators:

³ Subsection (5) in Idaho Code §59-1342 now provides:

(5) If the majority of a member's credited service is as an elected official or as an appointed official, except as a member of the Idaho legislature, and that official was normally in the administrative offices of the employer less than twenty (20) hours per week during the term of office, or was normally not required to be present at any particular work station for the employer twenty (20) hours per week or more during the term of office, that member's initial service retirement allowance shall be the sum of:

- (a) That amount computed under subsection (1) and/or (2) of this section for only those months of service as an elected or an appointed official that are in excess of the months of other credited service, without consideration of any other credited service; and
- (b) That accrued service retirement allowance that is computed from an average monthly salary for salary received during the member's total months of credited service excluding those excess months referenced in subsection (5)(a) of this section.

The initial service retirement allowance of members of the Idaho legislature will be computed under subsection (1) and/or (2) of this section, on the basis of their total months of credited service. Subsection (2) in Idaho Code § 59-1346, with some minor variation because it applies to early retirement, requires the same calculation.

⁴ Considering the preference that the Citizens' Committee have the initial review of legislative rate of compensation, H. 100 may be more appropriately discussed with the Committee to determine if the Committee recommends that the Legislature make a change as contemplated by H. 100.

1. Legislators that prior to their election had accrued full-service time through employment or office holding in another state capacity. Examples of this would be a former school teacher or county clerk who is then elected to office.
2. Legislators who have been in office for a number of years and anticipate transitioning to a full-time position either as an employee or as an elected official.
3. Legislators who have only recently begun service and have no prior service time, or significant legislative service time.

H. 100 could affect the amount of retirement allowance paid to a legislator after he stops work upon retirement if that legislator fits into the “majority of [part-time] service” condition. It would do so by changing the method of computation of a retirement benefit to be paid after the cessation of legislative service. However, it does not affect the rate of compensation paid to a legislator for legislative services rendered during the period December 1, 2014 through November 30, 2016. It makes no change to the salary (or unvouchered expense allowances) as most recently established in May of 2014 by the Citizens’ Committee. Since this change would not result in direct compensation through a change in salary or expenses, the question then becomes whether the exemption from the split in service calculation has any monetary value.

A change in the calculation of service time has a financial value, particularly to legislators who have accrued service time over the course of several years.⁵ Recognizing that the value of the service time changes based upon its calculation, it seems likely that a present value could be assigned to that calculation. In looking at the three scenarios above, there may potentially be three outcomes:

1. A legislator with prior (to being a legislator) service time currently accruing service time would likely be able to show a definitive monetary value based on the change in calculation.
2. A legislator with significant time accrued at the current rate may be able to demonstrate a predicted or hypothetical monetary value based on intended actions. It is unknown whether this predicted injury would be sufficient to establish standing and is beyond the scope of this analysis. This office would likely defend the statute and PERSI in such a circumstance.
3. A legislator without significant time in service would likely be unable to demonstrate a monetary value sufficient to raise a claim.

This means that it is factually specific as to whether a legislator could bring an action claiming that H. 100 violates art. III, sec. 23. Such a claim would require a showing that the change in benefit calculation was one having a monetary value and therefore the conditions of art. III, sec. 23 have not been met—namely, the Citizens’ Committee has not had the

⁵ In this regard, consideration may want to be made of a more equitable statutory resolution of this matter in essence treating the first ten years of legislative service as part time, but each year after ten is accrued as currently in the code. This would recognize those legislators who have devoted a substantial part of their careers to the public service of the State of Idaho. This decision is within the discretion of the Legislature and could involve an amendment to H. 100 or a new piece of legislation.

opportunity to review and approve the change in rates, and the Legislature would also have an opportunity to review and reject or reduce such rates by the 25th day.⁶

If art. III, sec. 23 of the Idaho Constitution were read to preclude the change made in H. 100 based on an interpretation of "rate of compensation" to include a potential retirement benefit, then it would seem that the Legislature would have no authority to legislate in any area that would affect the pension amount of a retired legislator. However, since 1976, there have been a number of legislative changes to the PERSI statutes, which could have increased retirement benefits for retiring legislators, including for example, the split calculation legislative exemption made in 1990 (retroactive to 1985); several increases in the multiplier (including increases effective October 1, 1993, October 1, 1994 and June 30, 2000), and enactment of more favorable early retirement factors (effective July 1, 1980). We are not aware of any argument having been made that these changes were precluded under art. III, sec. 23. Any arguments to the contrary have been removed by the Citizens' Committee's adoption of the benefit and rates as provided for by art. III, sec. 23. In sum the Legislature has the authority to adopt legislation in this area, but application of those provisions to itself is likely contingent on approval of the Citizens' Committee.

As reflected by their minutes and report, the Citizens' Committee discusses two areas in addition to compensation and expenses. Those are requirements for payment and additional benefits. In 2014, the Committee reviewed the Legislature's additional benefits including retirement, medical, dental, and life insurance provisions and by verbal assent agreed to make no changes to section V.⁷ Based upon the changes suggested by H. 100, there is a legitimate question as to whether those changes would also need to be approved by the Citizens' Committee. This office would recommend that the Citizens' Committee approval be requested to avoid any confusion as to the legal effect. This approval is consistent with the conclusion that art. III, sec. 23, by its terms, applies to the amounts to be paid to legislators for, and related to services providing during, the immediately following 2 year period. See http://legislature.idaho.gov/sessioninfo/2014/interim/140506_comp1030AM-Minutes.pdf.

This approval also raises a question with regard to the effective date of H. 100. Based on the above, if the assumption is that the change in calculation of service accrual has a monetary value, the earliest effective date for this legislation would probably be December 1, 2016, assuming approval of the change by the Committee. But this also raises the possibility of alternative scenarios. For example if the Legislature makes this change, but the Committee rejects it, then the rate would likely not go into effect. Or if the Legislature were to adopt H. 100, the Committee approves it, and then the 2017 Legislature, which

⁶ No legal argument likely could be raised if H. 100 were adopted and signed into law prior to the 25th day of the session, and then the benefit rates were reduced as set forth by H. 100 by concurrent resolution as provided for in art. III, sec. 23 by the 25th day of the session. As of the drafting of this analysis, it is the 47th legislative day, well beyond the 25th day for such adjustments.

⁷ It is unknown why the Committee changed from its prior practice of having a motion to approve and instead simply adopted by verbal assent the continuation of benefits. In 2012, the Committee moved the adoption of maintaining the same additional benefits after a brief discussion of them. See Minutes, Citizens' Committee On Legislative Compensation, June 25, 2102, p. 5. This office recommends that the Committee approve all recommendations for rate of compensation and expenses by motion in the future.

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could contain new legislators, were to reject the Committee's recommendation in its entirety in order to preserve the current service calculation with regard to retirement benefits.

It is important to note that it is difficult to opine in this area with any level of certainty. Based upon the above, the most conservative legal counsel that can be offered is that the Legislature possesses the authority to adopt H. 100. But that legislation will likely require approval (which could be as simple as "maintaining the benefits as provided by statute") by the Citizens' Committee and subsequent acceptance by the 2017 Legislature. Equally however, a court may review H. 100 and determine that service accrual has no monetary value, the Citizens' Committee has no oversight and the effective date is July 1, 2015. Two competing approaches are available here, and it is within the Legislature's ambit to determine which has more merit as it weighs adoption of H. 100.

I am happy to discuss the content of this letter more fully if necessary.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Kane", with a long horizontal flourish extending to the right.

BRIAN KANE
Assistant Chief Deputy

BK/tjn

enclosure