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OPINION	:	No. 79-511
	:	
of	:	<u>August 30, 1979</u>
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SUBJECT: PUBLIC EMPLOYEES' RETIREMENT SYSTEM BENEFITS—Members of the Public Employees' Retirement System who are employed by the Los Angeles Unified School District are not entitled to benefits identical to those provided to state employee members without an election and contract amendment.

The Board of Administration of the Public Employees' Retirement System, has requested an opinion on the following question:

Are the members of the Public Employees' Retirement System who are employed by the Los Angeles Unified School District entitled to benefits identical to those provided to state employee members as they may be improved from time to time by the Public Employees' Retirement Law without the necessity of a contract amendment?

CONCLUSION

Members of the Public Employees' Retirement System who are employed by the Los Angeles Unified School District are not entitled to benefits identical to those provided to state employee members. Said employees are subject to the provisions of the Public Employees' Retirement Law pertaining to *local* members, including those which do not

require an election to be made as a condition of their applicability, and, by virtue of the terms of the contract which constitute such an election, those preexisting provisions which are expressly inapplicable in the absence of an election. However, such employees are subject to subsequently enacted provisions pertaining to local members which are expressly inapplicable in the absence of an election, *only* upon an election and contract amendment.

ANALYSIS

We are advised that the Los Angeles Board of Education terminated its coverage for retirement benefits under a local retirement system on behalf of its classified employees and entered into a contract effective June 10, 1957, to provide benefits under the Public Employees' Retirement System. (*Cf.* 32 Ops. Cal. Atty. Gen. 292 (1959).) Section 2 of the contract provides as follows:

“Public Agency shall participate in the State Employees' Retirement System from and after July 1, 1957, making its employees as hereinafter provided, members of said System subject to all provisions of the State Employees' Retirement Law as stated in Part 3, Division 5, Title 2, of the Government Code heretofore or hereafter enacted, *notwithstanding anything in said provisions giving an election to be subject thereto to contracting public agencies*; provided, however, that any amendments hereafter enacted to said Law which would operate to increase the contributions required of, or decrease the benefits to, the employees of Public Agency, shall not be effective for any purpose unless a majority of such employees consent thereto in an election held in the manner provided by section 20457 of said Retirement Law.” (Emphasis added.)

The present inquiry is whether the members of the Public Employees' Retirement System who are employed by the Los Angeles Unified School District are entitled to benefits identical to those provided to state employee members as they may be improved from time to time by the Public Employees' Retirement Law without the necessity of a contract amendment.

We first examine the assumption that the benefits provided to employees of the district are to be determined by reference to the provisions of the Public Employees' Retirement Law pertaining specifically to state members. The two general categories of membership under the Public Employees' Retirement Law (Gov. Code, § 20000 *et seq.*)¹ include “state members” and “local members.” (§ 20013(a).) “Local members” include “school members.” (§ 20013(c) (3).) Section 20019.1 provides as follows:

¹ Hereinafter, all section references are to the Government Code unless otherwise indicated.

“‘School member’ includes all employees of school districts and employees of the county superintendent of schools who are or become members pursuant to Chapter 4.5 (commencing with Section 20580) of this part.

“Except as otherwise expressly provided, all provisions of this part (commencing with Section 20000) which on January 1, 1963, were applicable to members under Chapter 4.5 and *all provisions of this part made applicable to state miscellaneous members after January 1, 1963, shall apply to school members.*” (Emphasis added.)

Section 20019.1 defines the term “school member” as *including* all employees of school districts *who became members pursuant to section 20580* and following, pertaining to compulsory public agency members. Section 20580 provides as follows:

“Every county superintendent of schools shall enter into a contract with the board for the inclusion in this system of (a) all of the employees of the office of county superintendent whose compensation is paid from the county school service fund other than employees electing pursuant to Section 873.1 of the Education Code to continue in membership in a county system; and (b) all of the employees of school districts existing on July 1, 1949, or thereafter formed, within his jurisdiction, *other than school districts which are contracting agencies or which maintain a district, joint district, or other local retirement system*, in respect to service rendered in a status in which they are not eligible for membership in the State Teachers’ Retirement System. The effective date of each such contract shall be not later than July 1, 1949. For the purposes of this part such school district employees shall be considered to be employees of the county superintendent of schools having jurisdiction over the school district by which they are employed and service to the district shall be considered as service to the county superintendent of schools.” (Emphasis added.)

Hence, school employees are divided into three categories: (1) those employed by school districts who are compulsory public agency members pursuant to section 20580, (2) those employed by school districts which are contracting agencies, and (3) those employed by school districts which maintain a district, joint district, or other local retirement system. Section 20580 expressly excludes school employees who fall within the second and third categories.

The question presented is whether the term “school member” which includes school employees in the first category also includes those in the second category. Depending upon the context in which it appears, the term “includes” may be a word of enlargement (*Atlantic Oil Co. v. County of Los Angeles* (1968) 69 Cal. 2d 585, 596) or a word of limitation (*Coast Oyster Co. v. Perluss* (1963) 218 Cal. App. 2d 492, 501). The paramount consideration is, of course, the intention of the Legislature. (*Id.*) In this regard, it is noted that the term “school member” is not otherwise defined; the sole reference in section 20019.1 is to school employees in the first category. If the term “includes” were interpreted as a word of enlargement, then the parameters of the term “school member” would, unlike all the other definitions contained in sections 20003 through 20041, remain unspecified. Under these circumstances, the application of the maxim “*expressio unius est exclusio alterius*” is appropriate. Under this rule of statutory construction, the enumeration of one or more items within a statute implies the exclusion of other items within the enumerated class. (62 Ops. Cal. Atty. Gen. 126, 129, 133 (1979).) The maxim will not, of course, be utilized to contradict an intention of the Legislature which is otherwise apparent. (*Williams v. Los Angeles Metropolitan Transit Authority* (1968) 68 Cal. 2d 599, 603.) In our view, however, the maxim is consistent with the legislative intent to include within the term “school member” only those employees who became members pursuant to section 20580, and to exclude those employed by school districts which are contracting agencies. This legislative intent is further indicated by the separate and distinct definition of the term “contracting agency.” Thus, a “contracting agency” is any public agency which has elected to have all or any part of its employees become members of the retirement system and which has contracted with the Board of Administration for that purpose. (§ 20010; *cf.* 36 Ops. Cal. Atty. Gen. 73, 75 (1960); 12 Ops. Cal. Atty. Gen. 72, 73 (1948).) The reference to “any public agency” necessarily includes school districts which have contracted with the Board, in the absence of any contrary expression. All such contracting agencies, without distinction, are subject to the specific provisions hereinbelow set forth.

Based on this statutory scheme it cannot be concluded that school employees of contracting agencies, who did not become members under section 20580, are “school members” within the meaning of section 20019.1. Since the Los Angeles Unified School District is a contracting agency within the purview of section 20010, section 20019.1, providing that the provisions of the Public Employees’ Retirement Law made applicable to state members after January 1, 1963, shall apply to school members, does not apply to employees of the district.

Employees of a contracting agency are local members. (§§ 20013 (c) (1). 20018, 20019.) Section 20493 provides as follows:

“Any contract heretofore or hereafter entered into shall subject the contracting agency and its employees to all provisions of this part and all

amendments thereto applicable to members, local miscellaneous members, or local safety members except such as are expressly inapplicable to a contracting agency unless and until it elects to be subject to such provision.”

In view of the foregoing, it is apparent that the benefits provided to employees of the district are to be determined by reference to the provisions of the Public Employees’ Retirement Law which pertain to members generally, or to local miscellaneous members or local safety members specifically. Thus, we rephrase the inquiry for purposes of further analysis as follows: are employees of the district entitled to benefits identical to those provided to members generally (including local members) or to local members specifically as they may be improved from time to time by the Public Employees’ Retirement Law without the necessity of a contract amendment?

It is clear that those provisions which do not require an election as a condition of applicability are binding upon a contracting agency and its employees without the necessity of a contract amendment. (§ 20493.) The issue remains whether the employees of the district are subject to those provisions which are expressly inapplicable to a contracting agency “unless and until it elects to be subject to such provisions.” Specifically, does section 2 of the contract under consideration providing that the employees of the district shall be subject, except as otherwise provided, to all provisions² of the Public Employees Retirement Law “heretofore or hereafter enacted, notwithstanding anything in said provisions giving an election to be subject thereto to contracting agencies,” constitute an election within the meaning of section 20493?

Section 20490 provides in part that a contract made after the effective date of a provision giving an election may include provisions effecting such an election of the contracting agency. With respect, however, to a contract made prior to the effective date of a provision giving an election, section 20461.5³ provides as follows:

“Whenever by any provision of law an election is given to contracting agencies to subject themselves and their employees to provisions of this part otherwise not applicable to contracting agencies and their employees, and no other means of making such election is expressly *provided any contracting agency may make such election by amendment to its contract with the board*

² The term “all provisions” of the Law may only be viewed as a reference to those provisions made applicable to contract members (§ 20493); the term may not be literally construed to incorporate provisions which are exclusive of local or contract members (e.g., §§ 21365.6, 21400), thus effectively countervailing the statutory scheme.

³ Both section 20490 (Stats. 1945, ch. 1201, § 3) and section 20461.5 (Stats. 1949, ch. 298, § 11) were enacted prior to the execution of the subject contract.

approved in the manner provided for the approval of the contracts including an election among the employees affected unless the amendment only adds benefits without affecting members' contributions, in which case such election among the employees is not required. The amendment shall specify the date upon which the agency and its employees shall become subject to the said provisions. Any such election so made by amendment to the contract shall be irrevocable until the contract is terminated. From and after the date specified in the amendment to the contract said provisions, as they are in effect at the time of election and as they may be amended in the future, shall apply to the contracting agency and to its employees, and the rights, privileges, duties, liabilities, and responsibilities of the contracting agency and of each of its employees included in this system shall be governed thereby." (Emphasis added.)

Hence, an election by a contracting agency to subject itself and its employees to provisions not otherwise applicable to such an agency and its employees may be made only by inclusion within the contract itself of provisions effecting such an election with respect to pre-existing provisions (§ 20490), or by amendment to the contract in the case of subsequent enactments (§ 20461.5).

Section 2 of the contract may be fairly interpreted as effecting an election with respect to pre-existing provisions which require an election to be made. (§ 20490.) However, section 2 purports to encompass all provisions, including subsequent enactments, whether or not any such provision requires an election. (E.g., § 21385.) Section 20490 provides in pertinent part:

"The contract may include any provisions *consistent with this part* and necessary in the administration of this system as it affects the public agency and its employees." (Emphasis added.)

The purported incorporation of all subsequent enactments is clearly inconsistent with the Public Employees' Retirement Law. Section 20461.5 plainly requires that where an election is given to a contracting agency to subject itself and its employees to a provision which is not otherwise applicable and no other means of making such election is expressly provided, such an election may be made *by amendment to its contract* with the Board of Administration approved in the manner provided for the approval contracts. Where a public agency contracts with the Public Employees' Retirement System pursuant to section 20450, it submits to the statutory scheme which governs that contract. (57 Ops. Cal. Atty. Gen. 7, 10 (1974).) Nothing in the Public Employees' Retirement Law authorizes a contract to incorporate subsequently enacted provisions requiring an election to be made, in the absence of such an election and amendment. On the contrary, section 20490 authorizes

such an incorporation only with respect to provisions which antedate the contract.

A public agency which is a creature of and derives its powers from the Legislature may exercise only such powers which have been expressly granted to it or which may be fairly implied from such granted powers. (52 Ops. Cal. Atty. Gen. 25, 26 (1969); 61 Ops. Cal. Atty. Gen. 335, 338 (1978).) The Board of Administration lacked authority to approve or agree to section 2 of the subject contract insofar as it pertains to future legislation. Except to the extent that section 2 operates to effect an election with respect to pre-existing provisions which require an election to be made, it is without force or effect.

In summary, members of the Public Employees' Retirement System who are employed by the Los Angeles Unified School District are not entitled to benefits identical to those provided to state employee members. Said employees are subject to the provisions of the Public Employees' Retirement Law applicable to members, local miscellaneous members, or local safety members which do not require an election to be made.⁴ Said employees are subject to such pre-existing provisions which are expressly inapplicable in the absence of an election. Said employees are subject to such provisions which are subsequently enacted and which are expressly inapplicable in the absence of an election only upon such election and contract amendment.

⁴ The inquiry and this analysis pertain to benefits "as they may be improved from time to time." It is noted that section 2 contains the further proviso that "any amendments here, after enacted to said Law which would operate to increase the contributions required of, or decrease the benefits to, the employees of Public Agency, shall not be effective for any purpose unless a majority of such employees consent thereto in an election. . . ." This provision purports to require an election even as to those subsequent enactments which are mandatory and unconditional. The validity of this provision does not fall within the scope of the present inquiry, and we express no opinion with respect thereto.