



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 11, 2003

Senator Tony Corcoran
900 Court Street NE, S319
Salem, Oregon 97301

Dear Senator Corcoran:

This letter responds to your request for our "informal response" to questions about House Bill 2003 and A-engrossed House Bill 2004. Your questions and our responses are set forth below.

We preface our comments with these statements of the law from Oregon State Police Officers' Assn. v. State of Oregon, 323 Or. 356, 373, 375 (1996), the case that invalidated Ballot Measure 8 (1994):

1. "The statutory pension system and the relationship between the state and its employees clearly established a contractual obligation to provide an undiminished level of benefits[.]"
2. "[O]nce a public employer offers [pension] benefits plan terms to an employee, those terms remain as part of the employment contract so long as the employee continues to work for the employer."

Question No. 1

"HB 2004A contains a 'look back' provision to protect members' benefits in the transition to new actuarial tables. The 'look back' provision in the PERS boards' proposed rule. OAR 459-005-0055, provides for a broader protection of members' benefits. Does the 'look back' provision of HB 2004A adequately protect members' contract rights as well as assure the continued qualification of the PERS plan by the IRS?"

We do not know the answer to this question.

In our view, the existence of a "look back" provision does not affect whether changing actuarial tables impairs members' contract rights. If the Legislative Assembly gave the Public Employees Retirement Board the authority to promise members the use of outdated tables, then members have a contractual right to the outdated tables and the Legislative Assembly cannot update the tables. If the Legislative Assembly did not give the board the authority to promise outdated tables, then the Legislative Assembly may update the tables. Judge Lipscomb concluded that the Legislative Assembly did not give the board the authority to promise outdated tables. If Judge Lipscomb's interpretation of the law is correct, there is no contract right for a look-back provision to protect.

Whether the Internal Revenue Code requires the state to offer a look-back provision (and, if so, what kind) to preserve the deductibility of payments to the Public Employees Retirement Fund is a question more complicated than we have the expertise to answer. We understand that the outside tax expert who advises the board has suggested that the Internal Revenue Code does require the state to offer a look-back provision, and we assume that the look-back provision in the board's proposed rule reflects the expert's advice. We also understand that the board will seek advice from the Internal Revenue Service about any look-back provision that the Legislative Assembly requires.

Question No. 2

"One of the provisions of HOUSE BILL 2003 would provide for the cessation of employee contributions to the PERS plan. The result of the termination of employee contributions would be a lowering in the value of the money match benefit until it disappeared as a form of PERS benefit. Would passage of this provision be a breach or impairment of the contract rights of PERS members?"

Yes. The PERS statutes provide for an employee's contribution (and for the employer to pick up that contribution). An employee, therefore, has a contractual right to the contribution and to the level of benefits that contribution will produce. Any other result would require the Supreme Court to first overrule its decision in Oregon State Police Officers' Assn.

Question No. 3

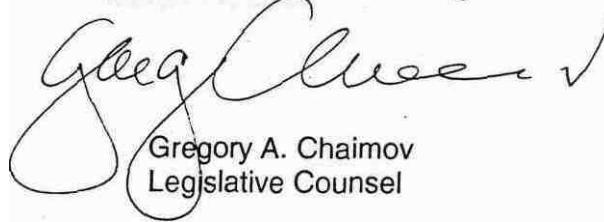
"One of the provisions of HOUSE BILL 2003 provides a method of implementing the recent decision of Circuit Court Judge Paul Lipscomb in Eugene v. PERS, Mario[sic] County Circuit Case No. 99C-20235. In essence the provision calculates the economic impact of PERS actions which Judge Lipscomb ruled were in error. The total value of this adjustment is then deducted from future earnings of the PERS fund as an administrative expense. As a result of this approach some PERS members who received no benefit from the errors identified by Judge Lipscomb would have their future benefits reduced. Assuming that Judge Lipscomb was correct in all of his substantive rulings, would passage of this measure breach or impair the contract rights of PERS members?"

Yes. The actions of the board that Judge Lipscomb ruled to be in error concerned Tier 1 members; the remedy proposed by HOUSE BILL 2003 would use Tier 2 members' earnings. If Judge Lipscomb is correct that the board exceeded its authority when providing for benefits to Tier 1 members, then the Tier 1 members do not have a contract right to those benefits and the Legislative Assembly may eliminate them. Taking an authorized benefit from Tier 2 members would violate Tier 2 members' contract rights—even if the Legislative Assembly took the benefits to remedy a shortfall in another part of the PERS system.

We also caution against the Legislative Assembly's proceeding on the assumption that Judge Lipscomb's rulings are correct. For example, Judge Lipscomb ruled that the board violated PERS statutes by failing to fund a contingency reserve. In our view, whether the board acted contrary to law is a close call, and on appeal a court could decide that the board's decision was appropriate under the circumstances.

In addition, we believe that Judge Lipscomb erred when concluding that the board abused its discretion in allocating 1999 earnings by not fully funding the gain/loss reserve. If the Legislative Assembly implemented remedies based on the assumption that these rulings are correct, and then an appellate decision reverses either of the rulings, the state may find itself in the position of having violated PERS members' contract rights.

Very truly yours,



Gregory A. Chaimov
Legislative Counsel