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August 26, 2005

BY FAX AND MAIL: 503-598-0561



Paul Cleary
Executive Director
Public Employees Retirement System
PO Box 23700
Tigard, OR 97281-3700

Re: Implementation of 1999 Earnings Recalculation for Retirees
Our File No. 5415-260

Dear Paul:

I understand with the dismissal of the appeal in the *City of Eugene* case that the PERS board intends at its upcoming September 23 meeting to take action on issues relating to the redistribution of 1999 income. Although your website makes it clear that no particular plan of action has, as yet, been adopted, it also contains information showing the potential for substantial cutbacks for current retirees as well as potential invoices for overpayment. The purpose of this letter, which I am sending on behalf of the PERS Coalition, is to point out that any action by the PERS board to reduce the benefits of so-called window retirees (April 2000 through April 2004) would be inconsistent with the analysis of the Supreme Court in the *Strunk* case. This letter is limited to reviewing the rights of the window retirees as articulated in the *Strunk* case; it is not meant to address the rights of other retirees or non-retired PERS members. We continue to study issues relating to those members and will communicate our thoughts to the board at the appropriate time.

Prior to reviewing *Strunk* it is important to note that nothing in Judge Lipscomb's judgment compels the PERS board to take any specific action in regard to PERS retirees. In his opinion Judge Lipscomb acknowledged the existence of ORS 238.715 but nonetheless expressed great concern about whether it would be legally permissible for the PERS board to attempt to modify the benefits of PERS retirees. In addition there is nothing in the Settlement Agreement between *City of Eugene* plaintiffs and the PERS board which

requires the PERS board to take any particular action in regard to retirees. The failure of the Settlement Agreement to reference any change in retiree benefits leads to the logical conclusion that the parties agreed to settle the *City of Eugene* litigation on the basis of the remedies set out in the Agreement and that no further action was contemplated. However, as discussed below, it is not necessary for the board to review either Judge Lipscomb's opinion or its own Settlement Agreement as the rights of the window retirees were defined by the 2003 legislature as explained in the majority opinion in *Strunk*.

In *Strunk* petitioners argued that the 2003 legislative enactment which took away COLA increases from window retirees was either a breach or an impairment of the individual members' contract rights. 338 Or at 218-219. In response the major argument made by the respondents was that no contract rights could adhere to benefits which were based on an improper crediting to members' individual accounts. *Id.* at 219. In support of that position the respondents referenced ORS 238.715, which they argued gave the PERS board a broad right to recover benefits based on over-crediting. *Id.*

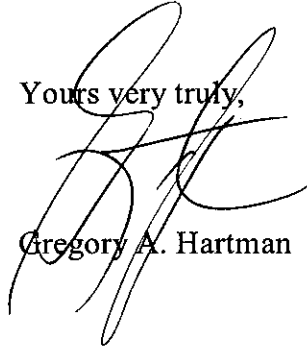
After first holding that the COLA promise contained in ORS 238.360 was contractual, the court went on to hold, after citing ORS 238.715, that the COLA promise does not extend to erroneous overpayments included in a member's service retirement allowance that the member was not entitled to receive. 338 Or at 222. However the court then pointed out that ORS 238.715 had no application to the window retirees as the legislature itself had determined a new "fixed" service retirement allowance for these particular retirees. *Id.* at 223. Since this new "fixed" retirement allowance was determined by the legislature, no argument could be made that this was a retirement allowance to which the member was not entitled. *Id.* Put another way, once the legislature had provided for this new "fixed" retirement allowance, ORS 238.715 had no relevance. The court went on to hold that this new "fixed" service retirement allowance as determined by the legislature came within the scope of the COLA promise and therefore window retirees were entitled not only to the "fixed" service retirement but any COLA which would have attached to that retirement benefit. *Id.* As a result the court declared void the language in the statute which said that COLA would not be applied to the new fixed service retirement allowance. *Id.* at 225.

As the PERS board deals with the issue of the appropriate steps to take in regard to window retirees, it should be clear that any action the board takes must be consistent with this "fixed" retirement allowance granted to window retirees. The only action available to the board is the continuation of the "fixed" service retirement amount and, in addition, whatever COLA increases should have been paid. It should be clear that ORS 238.715 cannot be applied to the window retirees, given the analysis in the *Strunk* opinion. As pointed out above, there is nothing in either the Lipscomb judgment or the Settlement Agreement which would lead to a contrary conclusion. Most importantly, even if there were language in either the Lipscomb judgment or alternatively in the Settlement Agreement requiring some other course of action, the PERS board is required to follow the mandate of the 2003 legislature as interpreted by the *Strunk* court.

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After you've had a chance to review this material if you should have any additional questions or require any additional information from our office, do not hesitate to contact me.

Yours very truly,

A handwritten signature in black ink, appearing to be 'G. Hartman', written over the typed name.

Gregory A. Hartman

GAH:kaj

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cc: Clients (email only)
Joe Malkin
Keith Kutler
Bill Gary