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IN THE CIRCUIT COURT OF THE STATE OF OREGON
IN AND FOR THE COUNTY OF MARION

CITY OF EUGENE, a municipal
corporation,

Petitioner,

v.

No. 99C-12794

STATE OF OREGON, PUBLIC
EMPLOYEES RETIREMENT BOARD,

Respondent.

EXCERPTED TRANSCRIPT OF PROCEEDINGS

-- A TRIAL --

BEFORE THE HONORABLE PAUL J. LIPSCOMB

June 14, 2002

Requested by William F. Gary

1 APPEARANCES

2 WILLIAM F. GARY

3 Harrang, Long, Gary, Rudnick

4 101 East Broadway

5 Suite 400

6 Eugene, OR. 97401

7 (541)485-0220

8 Appearing on behalf of Petitioner

9 .

10 City of Eugene

11 STEPHEN K. BUSHONG

12 Assistant Attorney General

13 Department of Justice

14 1162 Court Street, NE

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16 (503) 378-4400

17 Appearing on behalf of Respondent PERS

18 .

19 GREGORY A. HARTMAN

20 Bennett, Hartman & Reynolds

21 851 Southwest Sixth Avenue

22 Suite 1600

23 Portland, OR 97204-1376

24 (503) 227-4600

25 Appearing on behalf of Intervenors

1 MR. HARTMAN: But are you
2 asking me to -- assuming that you decide that
3 you don't like the 1993 court order relating to
4 actuarial factors, are you asking me to review
5 what contract issues may come into play as you
6 consider what remedy to --

7 THE COURT: Right. And I
8 thought you were pretty clear in signaling to me
9 that you thought that there -- through the
10 witnesses that you thought there would be very
11 substantial obstacles to -- to doing anything
12 with current employees that was inconsistent with
13 the 1993 rule.

14 MR. HARTMAN: That is correct,
15 your Honor, and that certainly is my position.

16 But let me ask you this,
17 because this goes all the way back to your
18 discussion about class actions and so forth and
19 so on. And I understand that as we edged up
20 to the class action issue, that you pull back or
21 encouraged us to pull back or we all agreed that
22 it was prudent to pull back because of a concern
23 that if we began addressing individual's rights,
24 that that probably pushed us in the direction of
25 a class action and all the complications of a

1 class action.

2 And so, I understood that we
3 backed off, somewhat, at that point and decided
4 not to go that route. And I guess I'm -- I'm
5 now concerned, because what I thought you were
6 telling us was -- and let's just assume you
7 don't like the 1993 order -- and I thought --

8 THE COURT: And you can't
9 convince me otherwise, and Mr. Bushong's quite
10 persuasive on many occasions, and so he may.

11 MR. HARTMAN: We'll work on
12 that. But assuming that's the nature of your
13 decision, then you would be sending it back to
14 PERS, obviously, because they have to do whatever
15 it is they have to do.

16 And my assumption was that you
17 would tell them probably in some detail why you
18 thought they didn't get it right the first time.
19 But the issue of once they started thinking
20 about what you told them and thinking about the
21 issue in light of that, then they would
22 initially consider the contract issue and say,
23 for instance, The judge said we have to do or
24 we have to consider X, Y, and Z. Now, can we
25 do that consistent with employee's contract

1 rights? Yes or no in their opinion.

2 And then, assuming someone
3 didn't like their answer, then that issue would
4 either come back to you or be raised in a
5 subsequent suit. So I'm just trying to
6 understand where we're drawing the lines in this
7 case, because I thought we had drawn the line on
8 the side of saying let's let PERS have the first
9 crack at contract rights. Now I hear you saying
10 you'd like me to -- and I -- obviously I have
11 no objection of advising you what my thoughts
12 are on that issue, but I'm just wondering where
13 the line is?

14 Because I do believe that if we
15 were going to get over into an order which would
16 impact individual's contract rights, I would want
17 you to reconsider the class action certification
18 issue --

19 THE COURT: Okay.

20 MR. HARTMAN: -- because we
21 kind of backed away from it.

22 THE COURT: We did.

23 MR. HARTMAN: Okay.

24 THE COURT: And I -- I
25 appreciate your comments in that regard, and I

1 think you're quite right.

2 MR. HARTMAN: I mean --

3 THE COURT: And just in terms -
4 - in general, in terms of addressing remedies.

5 MR. HARTMAN: I'd be happy --
6 I'd be happy to do that, but, again, I'm just
7 reminding the Court of kind of where I thought
8 we were.

9 THE COURT: And I think you're
10 absolutely correct.

11 Anything else, folks?

12 MR. GARY: Can I be heard on
13 that, your Honor?

14 THE COURT: Yeah.

15 MR. GARY: Because I'm not sure
16 that I agree that he's absolutely correct.

17 I don't know -- No. 1, I don't
18 think it's a class action versus a nonclass
19 action issue. The -- the question is: what
20 does the statute require? And the rule becomes
21 important because I don't think anybody disputes
22 that the -- that the rule is -- is different
23 than the way the statute would operate in -- in
24 the normal course to the extent that it says
25 don't apply it if it reduces benefits.

1 Mr. Bushong's defense is we're
2 calculating benefits consistent with the rule.
3 And you have to conclude -- well, you decide
4 whether or not the rule is consistent with the
5 statute.

6 THE COURT: Right. Mr.
7 Hartman's not saying anything different than
8 that.

9 MR. GARY: Well, once you've
10 decided that, then the course of PERS is clear.
11 I don't know that there's room for PERS on
12 remand to say, But we've decided that we're not
13 going to apply the benefits or we're not going
14 to apply the actuarial factors in cases where it
15 has the effect of reducing the monthly benefit
16 for a member. It's hard for me to see how
17 they could do that consistent with a judgment
18 from this court.

19 Now, it may well be, and I
20 think Mr. Hartman is correct to this extent,
21 that at that point some member who is -- who
22 feels aggrieved by that, some, you know, 10-
23 year member who says, Gee, I'm entitled to have
24 my benefits calculated on the basis of these
25 former actuarial tables whose interests have not

1 been adjudicated in this proceeding may have a
2 right, if they can figure out a way to get it
3 in front of the Court and that's fine.

4 But I -- I don't know that you
5 can you avoid --

6 THE COURT: -- some 10-year
7 employee who's now approaching age 50, for
8 example?

9 MR. GARY: Potentially, yeah.
10 Just as an example.

11 It may -- it may amount to
12 nothing. I don't know what -- exactly Mr.
13 Hartman's trying to accomplish. And I don't
14 know what --

15 THE COURT: I think he was just
16 trying to remind me that we probably can't be
17 too aggressive about what we try and tell --
18 what kind of instructions we try and give the
19 Board an remand, assuming that this case gets
20 remanded to the Board.

21 MR. GARY: The difficulty I
22 have, then, is, you know, you could make your
23 order as broad as simply saying, I find these
24 errors. You know, you've failed to fund a
25 contingency reserve account, I'm remanding it to

1 you to fix it, and give them no guidance.

2 THE COURT: I think -- I think
3 the statute requires more than that.

4 MR. GARY: I do, too.

5 THE COURT: Both you guys have
6 dealt with it far more than I have.

7 MR. GARY: That's -- that's why
8 I'm suggesting to you that the -- the kind of
9 line that Mr. Hartman is trying to draw, I
10 understand his reasons for wanting to do it, may
11 not be that easy to draw.

12 And if -- and we'll have much
13 more discussion about this before we're done, I'm
14 sure, when you get to the end of the day if
15 your conclusion is that our claim is correct
16 with regard to mortality factors, you know, my
17 position is going to be that it isn't necessary
18 for you to certificate a class in order to grant
19 that kind of relief and to deal with the
20 question of whether -- whether updating the
21 mortality factors would be a breach of contract.

22 THE COURT: I think you're
23 right, because anybody who is aggrieved by what
24 the Board did to fix it, whether they applied
25 your suggested fix or some other fix, the

1 aggrieved party would have a right to access
2 judicial relief for that purpose.

3 The -- the long-term difficulty
4 is the potential for inconsistent results in the
5 two cases and that's -- that's a concern to me,
6 also.

7 MR. GARY: Not to mention the
8 fact that we get to start back at square one
9 and -- and relitigate issues, but -- you know,
10 that isn't the most efficient way to handle
11 things.

12 But it probably is going to be
13 easier to have a discussion about this kind of
14 level of practicality when we know exactly what
15 --

16 THE COURT: Which way we're
17 going.

18 MR. GARY: -- your Honor's
19 conclusion --

20 THE COURT: I just wanted Mr.
21 Hartman to be clearer about his breach of
22 contract issues that he has been in the past.
23 And I'm not --

24 MR. HARTMAN: And I will do
25 that, your Honor. And I agree with Mr. Gary.

1 I think drawing a line is tricky because I
2 understand we weren't going to litigate
3 everything in this case, but I certainly agree
4 with Mr. Gary. It's kind of hard to draw a
5 precise line and say we'll go right here.

6 THE COURT: I think what we
7 were trying to do is -- is not bring in the
8 world at too early a stage in this litigation,
9 but do nothing that would not only -- not only
10 not impair somebody's future legal rights, but
11 not practically make it more difficult for them,
12 either.

13 MR. HARTMAN: Correct. That's
14 very well said, that's exactly what I was
15 concerned about.

16 MR. BUSHONG: Can I be heard on
17 this?

18 THE COURT: You bet.

19 MR. BUSHONG: And maybe my
20 understanding is off base on this, but the way I
21 understand the contract rights issue and the way
22 I've argued it in our trial brief is that it
23 goes to the question of the validity of the rule
24 itself, which is a question for you to decide.

25 And if, in our view, the

1 Board's determination that it needed to adopt
2 this rule, had the authority to adopt this rule,
3 and adopted is rule which it believed was
4 consistent with these contract rights, then the
5 rule's valid. If it's not, then the rule is
6 invalid. And then --

7 THE COURT: There's no class
8 aspects to that.

9 MR. BUSHONG: There's no class
10 aspects to that, right. And I -- I don't -- I
11 don't think any -- any member who wanted to
12 claim some contract right based on that rule
13 would be precluded from making that argument and
14 could raise it in the future. That was my
15 understanding.

16 THE COURT: Okay.

17 MR. BUSHONG: Okay.

18 And I guess my last question is
19 do you -- the written briefs that we're going to
20 be submitting, do you want further briefing on
21 the issues that you've already decided on summary
22 judgment and what sort of remedy there needs to
23 be on that?

24 THE COURT: No, I've reread the
25 -- a brief on what sort of remedy you propose -

1 -

2 MR. BUSHONG: Remedy you do.

3 But not the merits.

4 THE COURT: I've reread the
5 opinion, and I'm of the same mind, still.

6 MR. BUSHONG: That was my
7 assumption as well, but -- okay.

8 THE COURT: Thank-you, all, very
9 much. I really appreciate the professional way
10 in which you folks have conducted this
11 litigation, the extensive assistance that you
12 have been able to deliver to me in your briefs.
13 It's really been a pleasure working with you,
14 and, as odd as it might seem, I look forward to
15 seeing you again.

16 MR. BUSHONG: Thank-you.

17 MR. GARY: Thank-you, your
18 Honor.

19 MR. HARTMAN: Thank-you.

20 (End of proceedings.)

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