

**NATIONAL CONFERENCE ON PUBLIC EMPLOYEE
RETIREMENT SYSTEMS**

**PUBLIC SAFETY EMPLOYEES PENSION AND
BENEFITS CONFERENCE**

New Orleans, Louisiana
October 10, 2012

**CURRENT ISSUES FACING PUBLIC EMPLOYEE
RETIREMENT SYSTEMS, THEIR MEMBERS,
AND PLAN SPONSORS**

Presented by: Stuart A. Kaufman, Esquire

RECENT TRENDS IN PENSION LITIGATION

A. What Happened in the past Year?

In 2010 and 2011, a number of states lowered or eliminated cost-of-living provisions in an effort to improve the funding level of financially-stressed retirement systems. The reductions were challenged by members and retirees as impairing the obligation of contract and depriving members of their property rights without due process of law. In a pair of detailed trial court decisions issued in June 2011, courts in Minnesota and Colorado

rejected the constitutional challenge. The third challenge in South Dakota met the same fate in 2012.

The Minnesota case, *Swanson v. PERA*, was decided using an analysis of Minnesota's promissory estoppel theory which calls for a balancing of legitimate state interests and the rights and expectations of retired plan members. In finding that the reduction of the COLA was not unconstitutional, the court noted that the legislative history of the COLA provisions indicated that it was intended to be a variable and, therefore, amendable provision. At the same time, however, the court made it clear that the base benefit was not subject to alteration based on constitutional contract and property principles.

Reaching the same result for surprisingly similar reasons, a Colorado trial court rejected a challenge to a Colorado law altering the COLA provisions of the state retirement system. The court found that the COLA had been an ever-changing process, unlike the base retirement which the court found to be protected from diminution or impairment.

In the 2011 Legislature, at least 18 states considered similar reductions in COLA benefits alone. The most highly publicized were reductions by the Rhode Island, New Jersey and Florida Legislatures. The New Jersey and Rhode Island provisions are particularly controversial in that it creates a committee to decide if the COLA should be reinstated once the retirement plan meets a certain funding benchmark. Challenges in New Jersey have thus far been unsuccessful, with a federal court refusing to hear constitutional claims because it viewed the matter as an action for damages against a state, which is forbidden by individuals in a federal court under the 11th Amendment of the U.S. Constitution.

In December, 2011, a Florida trial court joined sister courts, Arizona and New Hampshire, in striking down changes to employee contribution rates and reductions in COLAs. The Florida Legislature appealed and the case, *Scott v. Williams*, was argued on September 7th, having been "fast tracked" past the middle level appeals court as a question of great public importance. The Florida Retirement System, which lacks an independent board of trustees, is taking no role in the litigation.

In May, a California appellate court upheld dismissal of a case which voided a pension benefit which was not enacted in accordance with the City Charter. Because the benefit was not properly enacted, it was held not to create any contract rights and retroactive invalidation of the benefit did not violate the constitutional rights of participants, nor did it create a grounds for estoppel and detrimental reliance. *San Diego City Firefighters Local 145 v. Board of Administration*, 141 Cal. Rptr. 3d 860 (Cal. App. 2012).

In mid-August, 2012, the Michigan Court of Appeals in *AFT Michigan v. State*, ___N.W.2d___, 2012 WL 3537789 (Mich. App. 2012), determined that a Michigan law requiring that public school districts withhold 3% of employee wages as an employer contribution was unconstitutional. The court found that the law violated the contracts clause, was a taking of private property without just compensation, and a violation of substantive due process. Essentially, the court held that the employees had a property right in the salary that had been earned which the state wrongly took to pay its own obligations. The state has asked the Michigan Supreme Court to review the matter.

Louisiana Retired Employees Association is currently challenging the recently enacted cash balance tiers of LASERS and TRSL based on the failure of the Legislature to adopt the measures by the constitutionally required 2/3 vote. The issue at litigation will likely address the meaning of "cost" and whether the Legislature may ignore its statutorily-designated auditor's report in favor of an actuarial report which provides the desired result.

California enacted wide ranging changes to retirement benefits for future employees. The law presents as many questions as it does answers and possess significant challenges for systems which now must manage an additional tier of benefits.

Most recently, a federal court in Baltimore struck down a City ordinance reducing benefits for both active and retired members of the police and fire pension plan. The court found that the city could prospectively alter benefits for active members, as long as they were not yet eligible to retire (which in Baltimore is when members vest). The court disapproved the elimination of a COLA based on reserved earnings which was replaced by a COLA from 0% to 2% depending on age. The court found that change

was not “reasonable and necessary” to preserve public welfare. But, because the court found the provisions of the ordinance could be treated separately, the entire ordinance was struck down. *Cherry v. Baltimore*, U.S. District Court, September 20, 2012.

B. What’s on the Horizon?

1. *City of Houston v. Houston Firefighters’ Pension Fund*

The City has sued the Board of Trustees to obtain access to membership data to prepare a competing actuarial valuation to support efforts to reduce retirement benefits and close the current defined benefit plan. The Board has refused citing state confidentiality laws. Pending cross motions for summary judgment.

2. *FOP v. City of Miami*

Florida recognizes employee collective bargaining as a fundamental constitutional right. A provision of the state public employee bargaining law allows a unilateral alteration of contract rights when a financially urgent situation exists. Financial urgency is not statutorily defined. Police union challenging both facial and “as applied” constitutionality.

3. *Alabama Suits*

State judges filed a challenge to a 40% increase in employee contributions in state court. City employees in Gadsden filed a comparable suit in federal court.

4. *Miami Beach pension*

Under the City Charter, a referendum is required to change pension benefits. The city imposed a collective bargaining agreement resulting in adverse changes. The Florida appeals court held that the bargaining law trumped the earlier requirement for a referendum. *City of Miami Beach v. Board of Trustees*, 91 So.3d 237 (Fla. 3d DCA 2012)

5. *Idaho Education Ass'n v. State*

Challenge filed in state court to repeal of early retirement incentive and shortening of all collective bargaining agreements.

6. *Maine Ass'n of Retirees v. Board of Trustees*

Federal suit filed challenging reduction in COLA benefits.

7. *Ohio pension cases*

Suits filed in both state and federal courts challenging massive reduction in pension and COLA benefits in Cincinnati.

8. *Rhode Island Retirees Ass'n v. Chaffee*

State court challenge filed to reductions on final average salary, extended retirement age, suspension of COLA and movement of current workers to hybrid plan.

9. *Duncan v. TVA Retirement System*

Federal court challenge filed to pension accumulation.

10. *Texas Pension reform - Second Battle of the Alamo*

Texas legislators and municipal officials have vowed to take decisive action to cut retirement benefits. DROP and benefit spiking are key issues. Likely to bring first interpretation of 2003 constitutional guarantee of vested benefits provision in Article XVI, Section 66 of State Constitution.

11. *Stockton Bankruptcy*

In a preliminary decision, a California federal bankruptcy court ruled that Stockton's retirees and employees must take a reduction in accrued post-retirement health care benefits as part of the bankruptcy reorganization plan. The court has yet to reach the larger battle between the insurer for the municipal bonds and CalPERS, which provides retirement benefits to employees. The

insurer is claiming that CalPERS must suffer a loss on the same basis as any other creditor. CalPERS responded that it has no authority to lower required contributions or to unilaterally reduced benefits. This will most assuredly create a significant state law versus federal issue.

C. Highlights of the Legislative Actions Around the Country¹

Alabama Act 377

Created a new tier for employees hired after 1/1/13 with lower employee contributions; highest 5 year average rather than highest 3 years; extended retirement age by 2 years; eliminated 25 year normal retirement; and lowered multipliers for both safety and non-safety employees by 15%.

California AB 340

New tier for persons hired on or after 1/1/13. Employees will pay 50% of normal cost; Changes retirement age by 2 years; requires highest 3 year AFC; limits benefits to 415 limit; limits benefits to base pay; limits post retirement employment; prohibits purchase of airtime and retroactive application of benefit increases. Prohibits employers from taking contribution holidays. Contributions may not be less than full normal cost. Added a felony forfeiture provision.

Kansas Chapter 171, laws of 2012

Closed DB plans to new members and created a hybrid cash balance DB plan. Guaranteed investment return; no risk of member to the market; lifetime annuity based on account balance.

¹ Material for this Section was drawn from Snell, "Highlights of State Pension Reform," National Conference of State Legislatures and from various system websites.

Louisiana Chapter 483, Laws of 2012

Closed certain classes of LASERS and TRSL to current plan. Created a Hybrid cash balance DB tier with guaranteed investment return; no market risk to members; and lifetime annuity based on account balance or partial lump sum with reduced annuity.

New York Chapter 18, Laws of 2012

Created a new tier for state and New York City retirement plans effective 1/1/13. Tiered contributions of 3%-6% depending on salary. Multiplier tiered to encourage 30 years of service; 5 year AFC; increased retirement age by one year.

South Carolina Act 278

Increased current member contributions; Extended retirement ages for new hires; eliminated service only retirement; increased vesting to 8 years; Caps COLA at \$500 per year.

Virginia Act 702

Establishes hybrid DB-DC plan for new hires (except public safety). 1% DB multiplier and 5% employee contribution to DC plan with partial employer match. Age and other plan factor for retirement are unchanged.

Virginia Act 822

Requires increase in employee contributions, to be offset by mandated salary increases equal to the amount of the contribution increase.

Wyoming Chapter 107, Laws of 2012

Prohibits COLA until System fully funded. Current COLA discretionary.

Wyoming Chapter 108, Laws of 2012

Applies to person hired on or after 9/1/2012; increases retirement age; lowers multiplier by 10% for all except firefighters; increases FAC from 3 years to 5 years.

IF YOU HAVE ANY QUESTIONS OR COMMENTS CONCERNING THIS PRESENTATION, CONTACT STUART A. KAUFMAN, KLAUSNER, KAUFMAN, JENSEN & LEVINSON, 10059 NW 1ST COURT, PLANTATION, FLORIDA 33324, (954) 916-1202, FAX (954) 916-1232, WEBSITE, www.robertdklausner.com.