FILED August 25, 2014 11:58 AM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

EVERICE MORO; TERRI DOMENIGONI; CHARLES CUSTER; JOHN HAWKINS; MICHAEL ARKEN; EUGENE DITTER; JOHN O'KIEF; MICHAEL SMITH; LANE JOHNSON; GREG CLOUSER; BRANDON SILENCE; ALISON VICKERY; and JIN VOEK,

PETITIONERS,

v.

STATE OF OREGON; STATE OF OREGON, by and through the Department of Corrections; LINN COUNTY; CITY OF PORTLAND; CITY OF SALEM; TUALATIN VALLEY FIRE & RESCUE; ESTACADA SCHOOL DISTRICT; OREGON CITY SCHOOL DISTRICT; ONTARIO SCHOOL DISTRICT; BEAVERTON SCHOOL DISTRICT; WEST LINN SCHOOL DISTRICT; BEND SCHOOL DISTRICT; and PUBLIC EMPLOYEES RETIREMENT BOARD,

RESPONDENTS,

and

LEAGUE OF OREGON CITIES; OREGON SCHOOL BOARDS ASSOCIATION; and ASSOCIATION OF OREGON COUNTIES,

INTERVENORS,

and

CENTRAL OREGON IRRIGATION DISTRICT,

INTERVENOR BELOW.

Case No. S061452
(Control)

August, 2014

WAYNE STANLEY JONES,

PETITIONER,

v.

PUBLIC EMPLOYEES RETIREMENT BOARD, ELLEN ROSENBLUM, Attorney General; and JOHN A. KITZHABER, Governor,

RESPONDENTS.

Case No. S061431

MICHAEL D. REYNOLDS,

PETITIONER,

v.

PUBLIC EMPLOYEES RETIREMENT BOARD, State of Oregon; and JOHN A. KITZHABER, Governor, State of Oregon,

RESPONDENTS.

Case No. S061454

GEORGE A. RIEMER,

PETITIONER,

v.

STATE OF OREGON; OREGON GOVERNOR JOHN KITZHABER, OREGON ATTORNEY GENERAL ELLEN ROSENBLUM; OREGON PUBLIC EMPLOYEES RETIREMENT BOARD; and OREGON PUBLIC EMPLOYEES RETIREMENT SYSTEM,

RESPONDENTS.

Case No. S061475

August, 2014

GEORGE A. RIEMER,

PETITIONER,

v.

STATE OF OREGON, OREGON GOVERNOR JOHN KITZHABER, OREGON ATTORNEY GENERAL ELLEN ROSENBLUM; PUBLIC EMPLOYEES RETIREMENT BOARD; and PUBLIC EMPLOYEES RETIREMENT SYSTEM,

RESPONDENTS.

Case No. S061860

RESPONDENT CITY OF PORTLAND'S ANSWERING BRIEF AND EXCERPTS OF RECORD

Appeal from Judicial Review (Original Proceeding)
Oregon Laws 2013, Chapter 53 (Senate Bill 822)
Oregon Laws 2013, Chapter 2 (Special Session) (Senate Bill 861)

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August, 2014

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STATEMENT OF THE CASE

1. NATURE OF THE PROCEEDING AND THE RELIEF SOUGHT

This is an original proceeding, authorized by the 2013 Legislature, through Senate Bill 822 and Senate Bill 861. SB 822 and SB 861 made changes to the COLA and "tax remedy" provisions of the Public Employees Retirement System (PERS). These consolidated petitions challenge the constitutionality of SB 822 and SB 861.[1]

As to the City of Portland, claims are made by one retired employee (Michael Arken) and one current employee (Jin Voeks).[2] Petitioners Arken and Voeks claim that the changes to the COLA in SB 822 and SB 861 impair the obligations of contract in violation of the Oregon and United States constitutions, take their property without compensation in violation of the Oregon Constitution, and breach their PERS contracts. With respect to their breach of contract allegations, petitioners style their claim as a wage claim, and they assert an entitlement to an award of attorney fees under ORS 652.200, and, alternatively, allege an entitlement to recover their attorney fees under the "common fund" doctrine.

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[1] SB 822 and SB 861 were enacted, respectively, by Oregon Laws 2013, chapter 53, and by Oregon Laws 2013 (Special Session), chapter 2. Those acts are set out, *infra*, at App-1—App-12.

[2] The caption of this case lists this petitioner as "Jin Voek," but his affidavit gives his name as "Jin Voeks." PER-7. The City will refer to him by the latter name.

Neither Arken nor Voeks, nor any other petitioner, makes any claim against the City of Portland respecting the "tax remedy" provision of SB 822.

This Court appointed a Special Master, the Honorable Stephen Bushong, Circuit Judge, who held a hearing and issued a Report, including Proposed Findings of Fact.

2. QUESTIONS PRESENTED ON APPEAL

With respect to the City of Portland, this case presents the following questions:

A. Do the COLA provisions of SB 822 and/or SB 861 unconstitutionally impair the obligation of any contract between petitioner Arken or petitioner Voeks and the City of Portland?

B. Did the City of Portland unconstitutionally take any property of petitioner Arken or petitioner Voeks through the Oregon Legislature's enactment of SB 822 and/or SB 861?

C. Did the City of Portland breach any contract it had with either petitioner Arken or petitioner Voeks when the Oregon Legislature enacted SB 822 and/or SB 861?

D. Are petitioners' claims with respect to the COLA increases to their pension benefits "wage" claims, for which the Court may award attorney fees under ORS 656.200(2)?

3. SUMMARY OF THE ARGUMENT

Except as more specifically set out in this Brief, the City of Portland accepts and adopts the arguments in the Briefs filed by the State Respondents, the County/School District Respondents, and the League of Oregon Cities.

To the extent the PERS statutes evidence a "contract," the obligor on that contract is the State, and not the City. Petitioners Arken and Voeks have submitted no evidence that the City of Portland ever promised them that PERS or anybody else would always increase their retirement benefits by 2% per year.

In any event, the COLA provisions of ORS 238.360 (2011) and 238A.210 (2011) are not contractual obligations, because there is "nothing indicative of a legislative commitment not to repeal or amend the statute[s] in the future." *Eckles v. State,* 306 Or 380, 391, 760 P2d 846 (1988). To the contrary, the Legislature amended the original COLA provision in the very next session after it first enacted it. Both petitioners Arken and Voeks went to work for the City and became PERS members after the Legislature enacted and amended the COLA provision. To the extent that either petitioner relied on the statutory provision for COLA increases in his ultimate pension benefits at the time he undertook and performed employment for the City, both petitioners must be charged with knowing that, as the Legislature had amended these provisions before they commenced their employment, it retained the authority to amend them in the future.

But there is no evidence that either petitioner was even aware of, much less that either petitioner relied on, the "promise" of statutory COLA increases in ultimately earned pension benefits at the time he undertook or performed employment on behalf of the City. In the absence of reliance, there is no bargained for contractual entitlement to COLA increases.

SB 822 and SB 861 did not substantially impair any obligation to pay COLA increases. Petitioners' arguments and evidence assume that the cost of living always will increase, and always by at least 2%. But, historically, there have been extended periods of deflation, and it certainly is foreseeable that, at some point, the Consumer Price Index could go down. SB 822 and SB 861 eliminate the possibility that such decreases in CPI could cause petitioners' benefits to be reduced, and provide certain COLA increases, irrespective of any changes in CPI. Such legislative smoothing of the COLA does not substantially impair any obligation to pay COLA increases.

Petitioners' claims regarding their current or potential pension benefits are not "wage" claims, and petitioners are not entitled to attorney fees under ORS 656.200(2). The decisions of the Oregon Court of Appeals which have held otherwise are erroneous as a matter of law, because those decisions have not examined ORS in the context of the rest of the wage claim statute. Read in proper context, "wages," for purposes of that statute, is limited to payment for

services rendered, due during the period of employment, and does not include pension benefits payable after retirement.

4. STATEMENT OF THE FACTS

The City generally accepts the Statement of the Facts in the State Respondents' Answering Brief. As to the claims against the City of Portland, the facts are:

Petitioner Michael Arken retired from employment with the City of Portland effective March 1, 2002, with PERS creditable service of 21 years, 10 months. He has a PERS beneficiary, who is projected to outlive him and to live until 2043. Petitioner Arken submitted an actuarial estimate of the impacts of SB 822 and SB 861 that assumes that every year, from now through 2043, he or his beneficiary would be entitled to the maximum 2% COLA provided under ORS 238.360 (2011). PER-1—PER-6.[3]

Petitioner Jin Voeks became a member of PERS under the Oregon Public Service Retirement Program (OPSRP) in 2011. He has a beneficiary, who is projected to outlive him and to live until 2076. Petitioner Voeks submitted an actuarial estimate of the effects of SB 822 and SB 861 that assumes that he will continue to work for the City of Portland for another 22 years, that for each of

[3] The City of Portland's Excerpts of Record are cited in this Brief as "PER." The State also submitted estimates for petitioners Arken and Voeks, which had slightly different assumptions, but which projected benefits payable to petitioner Arken and his beneficiary through 2042, and to petitioner Voeks and his beneficiary through 2075. PER-17—PER-24.

those 22 years, he will receive a 3.75% pay increase, that he will retire in 2036 (at the age of 53), and that he or his surviving beneficiary would be entitled to the maximum 2% COLA provided under ORS 238A.210 (2011), every year from 2037 through 2076. PER-7—PER-16.

Neither petitioner Arken nor petitioner Voeks submitted any evidence demonstrating: that the City of Portland promised either of them that it would pay 2% increases in their pension benefits for their lives and/or the lives of their beneficiaries; that the Oregon Legislature promised them that it would never amend the method by which COLAs were calculated or paid to PERS retirees or their beneficiaries; or that either of them knew about or relied on the COLA provisions when making their decisions to go to work for the City of Portland. As far as the record discloses, none of those things happened.

ARGUMENT

The City of Portland joins in and adopts the arguments of the State Respondents, the County/School District Respondents, and the League of Oregon Cities, except as set out below. The City offers the following additional argument, specific to the claims of petitioners Arken and Voeks.

A. The City Does Not Have a Statutory Contract with Petitioners.

Before there can be any impairment of a contract or breach of a contract, there first must be a contract. Petitioners have pointed to no ordinance or

charter provision under which the City of Portland promised to pay them 2% COLA adjustments every year on their retirement benefits.

To the extent that *Stovall v. State,* 324 Or 92, 120-25, 922 P2d 646 (1996), held that the City is a promisor of PERS benefits on the basis of its statutory obligation to fund them, it was wrong, for the fundamental reason that *Stovall* failed to identify any charter provision or ordinance by which the City obligated itself to a particular amount or formula for determination or payment of individual retirement benefits.

The underpinning of petitioners' claims is that there is a statutory contract under which they have been promised 2% COLA increases every year on their PERS benefits. That argument, of course, requires petitioners to identify some statute that constitutes such a promise. A statutory contract is a form of unilateral or option contract, under which a legislative body makes an offer that is accepted by partial performance by the promisee. See *Restatement of Contracts* § 45; *Restatement (Second) of Contracts* § 45; *Taylor v. Multnomah County Sheriff's Retirement Board,* 265 Or 445, 452-53, 510 P2d 339 (1973).

While the PERS statutes may create contractual obligations on the part of the State—although, for the reasons set out in the State Respondents', the County/School District Respondents', and LOC's Briefs and as amplified below, they did not do so with respect to the COLA—and while, subject to the

home rule provisions of Oregon Constitution, Article XI, section 2,[4] those statutes may impose ***statutory*** obligations on the City of Portland, the Legislature cannot unilaterally create ***contractual*** obligations between the City of Portland and anybody else.

To the contrary, Section 8-104 of the Charter of the City of Portland provides, "The City of Portland shall not be bound by any contract nor in any way liable thereon, unless the same is authorized by an ordinance and made in writing and signed by some person or persons duly authorized by the Council." Petitioners have identified no enactment by the City Council of the City of Portland that promised them a 2% annual COLA increase in their PERS-mandated pension benefits.

In *Stovall,* 324 Or at 124, this Court held, "Regardless of the reason that led local defendants to participate in PERS, local defendants, as participating PERS employers, themselves promised plaintiffs that plaintiffs would receive, at a minimum, the retirement compensation provided in the PERS statutes.

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[4] Oregon Constitution, Article XI, section 2, provides, in pertinent part, "The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon." *LaGrande/Astoria v. PERB,* 281 Or 137, 576 P2d 1204, *adhered to on rehearing,* 284 Or 173, 586 P2d 765 (1978), establishes that, notwithstanding this constitutional provision, the Legislature may impose upon the City laws mandating retirement benefits for its employees, but that is a far cry from establishing that the Legislature may bind the City to contracts without the City's consent.

Plaintiffs accepted that term by working for their employers." The Court did not identify, with respect to the City of Portland, any charter provision, ordinance, or written agreement by which the City purported to make such a promise. It appears merely to have inferred the promise from the City's participation in PERS.

By some feat of jurisprudential legerdemain, *Stovall* concluded that the PERS statutes requiring local employers to fund their employees' benefits created a statutory contract under which local governments were obligated to pay those benefits to their retired employees, but that those statutes did not create a statutory contract between PERS and the participating employers, notwithstanding that it is the Legislature who defines how benefits are calculated, and that it is PERS who determines both the individual benefits payable to retirees and the contributions required from participating employers to fund those benefits, and that it is PERS who makes the actual payments.

But contracts do not appear in a vacuum. There has to be some evidence of an actual agreement on the part of the purportedly contracting parties. Oregon law does not permit imposing implied contracts on the City of Portland, whose charter plainly prohibits them. *Forrester v. City of Hillsboro,* 156 Or 89, 66 P2d 496 (1937). Although the Portland City Charter may admit of contracts formed through "the instrumentality of an offer made by an ordinance and its acceptance by the performance of the desired act," *Winklebleck v. City of*

Portland, 147 Or 226, 238, 31 P2d 637 (1934), there still needs to be some ordinance that makes the supposed offer.

Certainly, petitioners in this case have identified no provision of the Portland City Charter, no ordinance enacted by the City Council, and no agreement signed by any person authorized by the City Council to bind the City of Portland to any agreement, by which the City offered to pay COLA increases on petitioners' pension benefits. While the Legislature may have imposed statutory duties on the City to fund retirement benefits for public employees, and may have made statutory provisions for the manner in which those benefits will be paid to retired public employees, the PERS statutes, by themselves, do not and cannot create contractual obligations between the City and its current or retired employees.

There thus is no basis upon which the City can be liable for impairing the obligations of contract, or for breaching a contract, or on any other basis arising out of the Legislature's determination of how to calculate and pay COLA increases for PERS retirees.

B. There Was No Legislative Promise To Maintain the COLA.

Due respect for the separation of powers, mandated in Article III of the Oregon Constitution, requires this Court to exercise restraint in declaring laws unconstitutional or in otherwise frustrating the judgment of the Legislature in

establishing public policy.[5] Thus, this Court must uphold the constitutionality of legislation unless the constitutional infirmity is "made to appear beyond a reasonable doubt," *State v. Cochran*, 55 Or 157, 179, 104 P 884 (1909), and the Court may not imply the existence of a statutory contract if there is "nothing indicative of a legislative commitment not to repeal or amend the statute in the future." *Eckles v. State,* 306 Or 380, 391, 760 P2d 846 (1988).

The need for such restraint is particularly acute when we are considering the implications of statutes that can affect the financial obligations of the State and its political subdivisions for fifty years or longer. For example, petitioner Voeks was hired by the City of Portland in 2011, does not anticipate retirement before 2036, and, by his own projection, his beneficiary is likely to live until 2076. Before this Court may determine that the Legislature has bound the taxpayers of this State and of its subdivisions for so long a time, petitioners must convince the Court, beyond a reasonable doubt, that the Legislature intended to make such a long-term commitment. This they simply cannot do.

Petitioners have not demonstrated, and the record does not establish, beyond a reasonable doubt or otherwise, that the Legislature intended to

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[5] Oregon Constitution, Article III, section 1, provides: "The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided."

commit never to repeal or amend the statutory provisions relating to COLA adjustments to pension benefits. Steven Rodeman, the Deputy Director of PERS, testified that in all the work he did on this issue, both in the Legislature and in his work for PERS, he did not "come across any piece of paper by which the legislature promised employees . . . that they would not change the method of calculating and paying COLAs." Tr.151 (PER-28). Matthew Larrabee, the State's actuary, testified that, in all the work he did before the Legislature and in preparing for this litigation, he did not see "any piece of paper by which the legislature promised anybody, or in particular [the City's] two plaintiffs Mr. Arken and Mr. Voeks that they would not change the method by which COLAs were calculated." Tr. 105 (PER-27).

Not only is there no provision in the statute itself that constitutes a commitment to maintain a 2% COLA in perpetuity, at the times petitioners Arken and Voeks commenced their employment with the City of Portland, the Legislature already had demonstrated that it had reserved the authority to amend the COLA provisions.

The COLA originally was enacted by Oregon Laws 1971, chapter 738, section 11. The original COLA provided that benefits could increase by as much as 1.5% per year, or decrease by as much as 1.5% per year, depending on changes in the Consumer Price Index, although the benefit never could be reduced below the base amount at which the employee retired. At its very next

session, the Legislature amended that provision so that the increase or decrease could be as much as 2%. Oregon Laws 1973, chapter 695, section 1.

By amending the statute so closely in time to when it first enacted it, the Legislature demonstrated that it had made no "legislative commitment not to repeal or amend the statute in the future." *Eckles,* 306 Or at 391. The 2% COLA is not a term of any statutory contract.

C. Petitioners Did Not Rely on the COLA.

In order to prevail on a claim for a statutory contract, petitioners also must prove that they performed "because of the original offer." *State ex rel Roberts v. Public Finance Co.,* 294 Or 713, 718, 662 P2d 330 (1983). The original *Restatement of Contracts* § 45 explained (emphasis added):

> If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree ***in response thereto***, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time.

The *Restatement (Second) of Contracts* § 45 describes this type of contract as an option contract, rather than as a unilateral contract:

> (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.

> (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

This Court cited both statements of the law with approval in *Taylor,* 265 Or at 452-53. *Restatement (Second) of Contracts* § 71(1) explains that "a performance or return promise must be bargained for," and *Restatement (Second) of Contracts* § 71(2) makes clear that a "performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promise in exchange for that promise."

In other words, in order for the COLA statute to have formed the basis of a statutory contract, petitioners must prove both that the City or the State sought to induce them to work for the City in return for agreeing to provide the COLA increases to the pension benefits they ultimately earned, and that petitioners in fact went to work for the City in exchange for that COLA promise. This, too, they wholly have failed to do.

The affidavits of petitioners Arken and Voeks are utterly devoid of any testimony that they even were aware of, much less that they relied on, the COLA provisions when they went to work for the City of Portland. Before this Court can cabin the lawful exercise of the Legislature's constitutional authority, before it can make the City of Portland answerable for the exercise by the Legislature of that authority, and before it can irrevocably commit the resources

of Oregon taxpayers for the next 30 to 60 years or longer on the basis of a supposed statutory contract, the Court must insist that petitioners prove the formation of that contract. This petitioners have not done, and there is no factual basis for their claim.

D. SB 822 and SB 861 Do Not Impair the COLA.

Petitioners' claims, and their evidence of impact, are based on the assumption that CPI always will go up, and that they always will be entitled to the maximum 2% increase provided under the prior statute. While it is true that, for most of the last century, that has been the economic experience in the United States, it is not a given. From 1920 through 1939, the country saw a prolonged recession. In ten of those twenty years, CPI went down. In seven of those years, it went down by more than 2%. In 1939, CPI was at 65% of what it had been in 1920. Bureau of Labor Statistics, CPI Detailed Report, Data for February 2014, http://www.bls.gov/cpi/cpid1402.pdf, at 87 (App-14).

It is eminently foreseeable, however likely it may or may not be, that the economy could see another prolonged period of recession in our lifetimes. Under ORS 238.360 (2011) and 238A.210 (2011), prior to their amendment by SB 822 and SB 861, petitioners, in that event, would have seen reductions in their pensions. SB 822 and SB 861 eliminated that possibility, because the Legislature untethered the COLA from CPI, established permanent increases

based on the level of benefits, and eliminated the provision for reductions when CPI goes down.

The actual impact, if any, of SB 822 and SB 861 on petitioners is wholly speculative, affecting only the potential increase (and, as has been said, eliminating any potential for decrease) in their benefits, depending on the actual performance of the economy over the coming years. But SB 822 and SB 861 do not have any impact at all on what this Court has described as the fundamental PERS statutory promise. Petitioner Arken, who was a PERS member prior to August 29, 2003, will continue to "receive a service retirement allowance calculated under the formula [whether full formula or Money Match] yielding the highest pension amount." *Strunk v. PERS,* 338 Or 145, 193, 108 P3d 1058 (2005); petitioner Voeks, who was not a PERS member prior to August 29, 2003, will receive what the Legislature promised him, namely, the defined contribution benefit established under ORS 238A.400. SB 822 and SB 861 do not significantly or substantially impair the obligations of the PERS contract.

E. Pension Benefits Are Not "Wages."

ORS 652.200(2) only entitles a party to attorney's fees "in any action for the collection of wages." An employee may bring an action for unpaid wages under either ORS 652.120 or ORS 652.615. *Allen v. County of Jackson County*, 191 Or App 185, 201, 82 P3d 628 (2003), citing *Allen v. County of Jackson,*

169 Or App 116, 134, 7 P3d 739 (2001). "Wages," for purposes of ORS 652.610(3), comprises the total pecuniary compensation owed to an employee for services; "wages" are "'compensation' for services provided by an employee to his employer." *Allen,* 191 Or App at 200, citing *Walker v. American Optical Corp.,* 265 Or 327, 333, 509 P2d 439 (1973). Similarly, for purposes of ORS 652.200, "wages" means "any compensation for an employe[e]'s services." *Kantor v. Boise Cascade Corp.,* 75 Or App 698, 709, 708 P2d 356 (1985), *rev den,* 300 Or 506, 713 P2d 1058 (1986). Only when an employer/employee relationship exists does a "wage" claim become viable.

In *Kantor*, the Oregon Court of Appeals held that pension benefits were "wages" for purposes of the attorney fee provision of the wage claim statute, ORS 652.200(2). This Court should disavow that holding, because the Court of Appeals did not apply the correct methodology for interpretation of statutes. Specifically, the Court of Appeals did not examine the text of ORS 652.200(2) in the context of the rest of the wage claim statute. *PGE v. BOLI,* 317 Or 606, 611, 859 P2d 1143 (1993) ("[A]t the first level of analysis, the court considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes.").

To the contrary, instead of looking at ORS 652.200(2) in the context of ORS 652.140 to determine what the Legislature meant by "wages" payable to employees upon retirement, the Court dismissed the relevance of ORS 652.140

because "[p]laintiff does not base his claim for attorney fees on that statute. He relies solely on ORS 652.200(2)." *Kantor,* 75 Or App at 711. But read in context, not only of ORS 652.140, but also of ORS 652.190, the meaning of "wages" under ORS 652.200(2) clearly is limited to payment for services rendered, due during the period of employment, and does not include pension benefits payable after retirement.

ORS 652.140 provides, in pertinent part (emphasis added):

> (1) When an employer discharges an employee or when employment is terminated by mutual agreement, all ***wages earned and unpaid at the time of the discharge or termination become due and payable not later than the end of the first business day after the discharge or termination.***
>
> (2)(a) When an employee who does not have a contract for a definite period quits employment, all ***wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment.***

ORS 652.190 provides (emphasis added):

> All wages earned by an employee, not exceeding $10,000, shall, upon the employee's death, become due and payable to the employee's surviving spouse, or if there is no surviving spouse, the dependent children, or their guardians or the conservators of their estates, in equal shares, to the same extent as if the wages had been earned by such surviving spouse or dependent children. As used in this section, ***"wages" means compensation of employees based on time worked or output of production and includes every form of remuneration payable for a given period to an individual for personal***

services.

ORS 652.200(2) provides (emphasis added):

> In any action for the collection of wages, if it is shown that the wages were not paid for a period of 48 hours, excluding Saturdays, Sundays and holidays, ***after the wages became due and payable***, the court shall, upon entering judgment for the plaintiff, include in the judgment, in addition to the costs and disbursements otherwise prescribed by statute, a reasonable sum for attorney fees at trial and on appeal for prosecuting the action, unless it appears that the employee has willfully violated the contract of employment or unless the court finds that the plaintiff's attorney unreasonably failed to give written notice of the wage claim to the employer before filing the action.

A claim for which attorney fees are recoverable under ORS 652.200(2), is a claim for "wages," as that term is used in ORS 652.110 to 652.200. ORS 652.200(2) authorizes attorney fees in claims in which wages were not paid within 48 hours after they "became due and payable." When "wages" become "due and payable" to employees who leave employment is governed by ORS 652.140. By the plain language of ORS 652.140, "wages" payable to an employee who voluntarily leaves employment are those sums which the employee has earned and which are payable immediately, and does not include pension benefits payable over time, after retirement.

As ORS 652.140 and 652.190 demonstrate, "wages" means remuneration for services provided to an employer during a discrete period of time, for which payment is due on or before the termination of the employment relation. The

award which the petitioners seek is the payment of a retirement benefit pursuant to a retirement plan qualified under Internal Revenue Code Section 401(a), not wages from an employer. The PERS system and trust is not an "employer" for purposes of ORS Chapter 652 and the payments are not "wages" because they are not part of the pecuniary compensation owed to an employee by an employer.

PERS retirement benefits, including any applicable COLA increases, are owed to retirees, who by definition are former employees. For example, petitioner Arken terminated his employment with the City in 2002, and has been receiving benefit payments (including COLA increases), not wages, from the PERS system since then. Petitioner Voeks, on the other hand, will not be due any COLA increases unless he retires as a qualifying PERS member, and then only on his benefits as a retiree, not on his wages as an employee.

As this Court previously noted, PERS is a "trust fund, separate and distinct from the General Fund." *Strunk v. PERB,* 341 Or 175, 184, 139 P3d 956 (2006). Once petitioner Arken retired, the City of Portland, as his former employer, had no control over the issuance of retirement benefit checks coming out of a trust fund administered by PERS. Similarly, as long as the City of Portland satisfies its contribution requirements on behalf of its current employee petitioner Voeks, there will be no employer action that invokes the

"wage" claim statutes because petitioner Voeks will have received all pecuniary compensation the City owes as his employer.

A claim for pension benefits is not a wage claim under ORS 652.110 to 652.200, and ORS 652.200(2) does not authorize the imposition of an attorney fee award in a case of this nature.

CONCLUSION

There is no statutory contract between the City of Portland and petitioners. There is no statutory contract under which anybody has promised to pay in perpetuity annual 2% COLA increases on petitioners' retirement benefits. The Legislature never promised that it would not amend or repeal the COLA, and, in any event, petitioners have not established that they relied on the COLA when they made their decisions to work for the City of Portland. The changes made to the COLA by SB 822 and SB 861 do not substantially impair the basic promise of PERS.

In short, there is no unconstitutional impairment of any contract, nor any other basis upon which petitioners are entitled to any relief.

Respectfully submitted,

s/ Harry Auerbach

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CERTIFICATE OF COMPLIANCE

Pursuant to ORAP 5.05, I certify that the word count of this brief is 5,101, and the size of the type is not smaller than 14 point for both the text of the brief and the footnotes.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing RESPONDENT CITY OF PORTLAND'S ANSWERING BRIEF AND SUPPLEMENTAL EXCERPT OF RECORD with the State Court Administrator, Appellate Court Records Section, 1163 State Street, Salem, OR 97301, on August 25, 2014.

I further certify that the foregoing RESPONDENT CITY OF PORTLAND'S ANSWERING BRIEF AND SUPPLEMENTAL EXCERPT OF RECORD will be served electronically and/or by First Class Mail on August 25, 2014, on the following individuals:

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