

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Consolidated Public
Employees Retirement System (PERS)
Litigation

Case Names and Numbers

Strunk (S50593) (Control)
Burt (S50647)
Dahlin (S50645)
Evans (S50532)
Petrillo (S50687)
Sartain (S50686)
Whitty (S50685)

Respondents' Joint Answering Brief

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STATEMENT OF THE CASE

A. Nature of the Action.

This Answering Brief is filed jointly by the State of Oregon, its agencies and related entities; and the Public Employees Retirement Board (collectively, “respondents”).

Respondents accept the *Burt* petitioners’ statement. In addition, because the *Burt* petitioners “largely adopt,” (*Burt* Opening Brief (“Op Br”) at 1), the statements made in the *Strunk* Opening Brief, Case No. S50593, respondents incorporate by reference the Nature of the Action in the Answering Briefs filed in the *Strunk* action.

B. Nature of the Judgment Sought to Be Reviewed.

Because the *Burt* petitioners adopt the Nature of the Judgment Sought to be Reviewed as stated in the Opening Brief filed in the *Strunk* action, Case No. S50593, respondents incorporate by reference the Nature of the Judgment Sought to be Reviewed in the Answering Briefs filed in the *Strunk* action, Case No. S50593.

C. Statutory Basis of Jurisdiction.

Because the *Burt* petitioners adopt the Statutory Basis of Jurisdiction as stated in the Opening Brief filed in the *Strunk* action, Case No. S50593, respondents incorporate by reference the Statutory Basis of Jurisdiction in the Answering Briefs filed in the *Strunk* action, Case No. S50593.

D. Timeliness of Petition for Judicial Review.

Respondents accept the *Burt* petitioners’ statement.

E. Questions Presented on Appeal.

Because the *Burt* petitioners adopt the Questions Presented on Appeal as stated in the Opening Brief filed in the *Strunk* action, Case No. S50593, respondents incorporate by

reference the Questions Presented on Appeal in the Answering Briefs filed in the *Strunk* action, Case No. S50593.

F. Concise Summary of the Argument.

Because the *Burt* petitioners adopt the Concise Summary of the Argument as stated in the Opening Brief filed in the *Strunk* action, Case No. S50593, respondents incorporate by reference the Concise Summary of the Argument in the Answering Briefs filed in the *Strunk* action, Case No. S50593.

G. Summary of the Facts.

The *Burt* petitioners adopt the Summary of the Facts as stated in the Opening Brief filed in the *Strunk* action, Case No. S50593. They also provide additional information specific to their claims.

Respondents, therefore, incorporate by reference the Summary of the Facts in the Answering Briefs filed in the *Strunk* action, Case No. S50593.

Turning to the additional facts specific to the *Burt* petitioners, respondents do not accept that the retirement benefits of the *Burt* petitioners will be reduced by Or Laws 2003, chapter 67, section 14b(1)(b) (“HB 2003”),¹ because there is no certainty that section 14b(1)(b) will ever be triggered. (Special Master’s Recommended Findings of Fact (“Special Master’s Findings”), Petitioners’ Joint Excerpt of Record (“JER”) 69.) If the *City of Eugene* settlement agreement is upheld, section 14b(1)(b) will be inoperative. (Special Master’s Findings, JER 69.)

¹ The PERS Reform and Stabilization Act of 2003 (the “Reform Legislation”), HB 2003, *et seq.*, 72nd Or Legislative Assembly, Reg Sess (2003), is now codified at Or Laws 2003, ch 67, ch 68, *as amended by* Or Laws 2003, ch 625. For simplicity, the State of Oregon will refer to specific provisions of the Reform Legislation by their bill designations throughout its briefing before this Court, because petitioners have done so in their briefing and because the Special Master’s Recommended Findings of Fact refer to the Reform Legislation in that manner.

Respondents accept that the *Burt* petitioners have restated certain estimated projected future PERS benefits reported in the Special Master’s Findings. (Special Master’s Findings, JER 98-103.) Respondents also accept that the *Burt* petitioners may find that their projected future PERS benefits do not reach the pre-Reform Legislation levels if the Reform Legislation is upheld. (*Id.*) However, these projected future impacts on the *Burt* petitioners’ projected future PERS benefits are not damage calculations but rather speculation based on imprecise presumptions. (Hearing Transcript (“Tr”), Vol. 3 at 259:22-260:5, Vol. 4 at 35:17-36:20 (Creveling)). As the Special Master noted, “Both actuaries used assumptions concerning salary growth and retirement dates and other factors to arrive at their estimates. The estimates are contingent; actual benefits cannot be calculated with precision until retirement.” (Special Master’s Findings, JER 92.)

II. FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR AND GENERAL ARGUMENTS

A. Preservation of Error.

Because this Court has original jurisdiction over petitioners’ claims, there are no preservation-of-error issues.

B. Standard of Review.

The Reform Legislation granted this Court original jurisdiction to determine whether it breaches any contract between PERS members and their employers or violates any constitutional provision. Or Laws 2003, ch 67, § 37, ch 68, § 5, *as amended by* Or Laws 2003, ch 625, §§ 17-17a. The Reform Legislation is presumed to be constitutional. *Ivancie v. Thornton*, 250 Or 550, 559, 443 P2d 612 (1968) (“Unconstitutionality is not to be presumed nor lightly to be declared.”). Because the Court has original jurisdiction, it has the responsibility to determine the facts and to apply the law. The Court appointed Judge David V. Brewer as Special Master to help it determine those facts. (Order, dated

October 15, 2003.) The Special Master conducted an extensive evidentiary hearing and issued detailed Recommended Findings of Fact pursuant to the Court's instructions.

The Court may review the Special Master's Findings de novo. *State ex rel Oregon State Bar v. Lenske*, 284 Or 23, 26, 584 P2d 759 (1978). However, when the Special Master's Findings are unchallenged, the Court should accept those findings as the recommendation of the Court officer who has most carefully examined the facts during a six-month process. Petitioners, like respondents, have the responsibility of identifying those facts with which they disagree and the reasons for their disagreement. Respondents have identified a few disagreements with the Special Master's Findings. Petitioners, however, generally do not challenge the Special Master's Findings nor do they identify contrary evidence in the record. They have therefore waived their ability to challenge the Special Master's Findings in the future. *See Naito v. Naito*, 125 Or App 231, 864 P2d 1346 (1993) (failure to timely object to special master and the special master's report waives party's ability to do so afterward). Consequently, except for the few disagreements noted by respondents, the Court should adopt the Special Master's Findings in full, as well as those supplemental facts from the record identified by respondents that are consistent with the Special Master's Findings.

C. Argument.

Because the *Burt* petitioners adopt the Argument set forth in the Opening Brief filed in the *Strunk* action, Case No. S50593, respondents incorporate by reference the Argument section in the Answering Briefs filed in the *Strunk* action, Case No. S50593.

III. CONCLUSION

For the foregoing reasons, as well as those enumerated in respondents' Answering Briefs filed in the *Strunk* action, Case No. S50593, the Court should find in favor of respondents, ruling against the *Burt* petitioners' claims in their Petition.

DATED: June ____, 2004.

Respectfully submitted,

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