

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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I. STATEMENT OF THE CASE

A. Nature of the Action.

This Answering Brief is filed jointly by the State of Oregon on behalf of SAIF Corporation; the Public Employees Retirement Board; and the non-State public employer intervenors (collectively, “respondents”).

The *Whitty* petitioners refer to the Opening Brief in the *Strunk* action, Case No. S50593, for sections A, B, C, E, and F of their Statement of the Case. Therefore, respondents incorporate by reference the Nature of the Action section in their Answering Briefs filed in the *Strunk* action, Case No. S50593.

B. Nature of the Judgment Sought to Be Reviewed.

The *Whitty* petitioners refer to the Opening Brief in the *Strunk* action, Case No. S50593, for sections A, B, C, E, and F of their Statement of the Case. Therefore, respondents incorporate by reference the Nature of the Judgment Sought to Be Reviewed section in their Answering Briefs filed in the *Strunk* action, Case No. S50593.

C. Statutory Basis of Jurisdiction.

The *Whitty* petitioners refer to the Opening Brief in the *Strunk* action, Case No. S50593, for sections A, B, C, E and F of their Statement of the Case. Therefore, respondents incorporate by reference the Statutory Basis of Jurisdiction section in their Answering Briefs filed in the *Strunk* action, Case No. S50593.

D. Timeliness of Petition for Judicial Review.

Respondents accept the *Whitty* petitioners’ statement.

E. Questions Presented on Appeal.

The *Whitty* petitioners refer to the Opening Brief in the *Strunk* action, Case No. S50593, for sections A, B, C, E and F of their Statement of the Case. Therefore,

respondents incorporate by reference the Questions Presented on Appeal section in their Answering Briefs filed in the *Strunk* action, Case No. S50593.

F. Concise Summary of the Argument.

The *Whitty* petitioners refer to the Opening Brief in the *Strunk* action, Case No. S50593, for sections A, B, C, E and F of their Statement of the Case. Therefore, respondents incorporate by reference the Concise Summary of the Argument section in their Answering Briefs filed in the *Strunk* action, Case No. S50593.

G. Summary of the Facts.

The *Whitty* petitioners refer to the Opening Brief in the *Strunk* action, Case No. S50593, as part of their Summary of the Facts. They also provide additional information specific to their claims.

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

In addition, respondents object to the *Whitty* petitioners' statements that they will suffer a precisely quantifiable reduction in the amount of their future PERS benefits. (*Whitty* Petitioners' Opening Brief ("*Whitty* Op Br") at 2-3.) These assertions are 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 Recommended Findings of Fact ("*Special Master's Findings*"), Petitioners' Joint Excerpt of Record ("*JER*") 92.) Respondents also object to the *Whitty* petitioners' assertion that the variable accounts will be eliminated. Contrary to the *Whitty* petitioners' claims, the variable accounts will continue to

earn interest and exist as before; only future contributions to those accounts will be prohibited. (*See, e.g.*, Special Master’s Findings, JER 67 (“Section 3 of HB 2003 provides that, after December 31, 2003, members no longer are permitted to direct contributions to the variable account. Section 3 does not affect contributions credited to member accounts before its effective date.”).)

II. FIRST ASSIGNMENT OF ERROR

Sections 1, 5, 6, 7, and 8 of HB 2003 and HB 2004, 72nd Oregon Legislative Assembly, Reg Sess (2003), do not impair petitioners’ PERS contracts in violation of Article I, section 21, of the Oregon Constitution, nor do they breach those contracts.

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 PERS Reform and Stabilization Act of 2003 (the “Reform Legislation”)¹ 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

¹ 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.

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 his 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.

Respondents rely upon and incorporate by reference their Answering Briefs filed in the *Strunk* action, Case No. S50593. Here, respondents reply directly to the unique arguments presented by the *Whitty* petitioners.

1. The SAIF Employee Handbook and PERS Handbook Do Not Create Contract Rights.

The *Whitty* petitioners are three attorneys employed by the State Accident Insurance Fund (“SAIF”) and are Tier One PERS members. Unlike the petitioners in *Strunk, Evans*, and *Burt*, the *Whitty* petitioners have not limited their claims to allege that, to the extent they have contract rights, those contract rights are based only on (i) the PERS statutes as administered by the Public Employees Retirement Board (“PERB”) pursuant to authority delegated by statute and (ii) the administrative rules and regulations promulgated by PERB. (See *Strunk, Evans*, and *Burt* Stipulation and Order, filed December 29, 2003 and signed January 5, 2004.) Rather, the *Whitty* petitioners also allege that their contract is contained in at least two other sources: the SAIF employee handbook’s brief description of their right to participate in the PERS system; and the PERS handbook. (*Whitty* Op Br at 8.) Based on these sources, the *Whitty* petitioners argue that even if the Reform Legislation passes constitutional muster for other public employees, the SAIF policy and the PERS handbook require PERS to continue to place their 6 percent employee contribution into their “personal account” and that such accounts must be credited not only with the 8 percent guarantee but with higher interest, because PERB’s crediting practices have established a greater expectation. (See, e.g., *Whitty* Op Br at 5.) The *Whitty* petitioners are wrong.

First, the language of the PERS statutes does not reflect a legislative intent to delegate to an administrative agency—either PERB or SAIF—the power to bind future legislatures. Nor have the *Whitty* petitioners identified any such language. In any event, any such purported delegation of the power to trump the Legislative Assembly’s authority to enact future legislation would itself be unconstitutional. Article IV, section 1, of the Oregon Constitution vests the legislative power of the state in the Legislative Assembly (and in the people themselves, acting through the initiative and referendum), and “the Assembly cannot

delegate its power to make law” to anyone, including an executive agency. *State v. Sargent*, 252 Or 579, 580, 449 P2d 845 (1969). For that reason, an administrative rule that is “within the scope of an agency’s or official’s general authority,” may nonetheless be invalid if it “depart[s] from a legal standard expressed or implied in the particular law being administered, or contravene[s] some other applicable statute.” *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984). This Court’s reference to “some other applicable statute” must include future statutes; otherwise, an agency would hold veto power of the Legislative Assembly.² Because the Legislative Assembly could not constitutionally provide PERB or SAIF with the authority to preclude future legislative action, petitioners’ argument that the SAIF and PERB handbooks set policy for all time should be rejected.

Second, even if the Legislative Assembly had delegated such an extraordinary power to PERB, there can be no credible claim that the Legislative Assembly delegated to *PERS staff* or *SAIF* the power to bind future legislatures by preparing handbooks.³ In fact, the *PERS* handbook upon which the *Whitty* petitioners rely contains express disclosures or statements of limitation as to the value of those documents. For example, the 2001 Member’s Handbook contained the following language:

“This handbook is not a legal reference and is not a complete statement of the laws or *PERS* administrative rules. In any conflict between this handbook and Oregon laws or

² The Court of Appeals has similarly recognized that when subsequent legislation contradicts a prior administrative rule, that rule is repealed by implication. *See, e.g., Vier v. SOSCF*, 159 Or App 369, 375, 977 P2d 425 (1999) (“when an agency discovers that its adopted rules are inconsistent with legislative directives, the agency may, and in fact must, amend, repeal, or otherwise modify those rules properly to implement legislative policy”); *Merrick v. Board of Higher Education*, 103 Or App 328, 333, 797 P2d 388 (1990).

³ The *PERS* statutes do not include an express or implied delegation to SAIF of any authority as to *PERS* or its members.

administrative rules, the laws and administrative rules shall prevail.

“* * * * *

“Specific responsibilities for administering PERS are defined in statute. The Oregon Legislature has reserved to itself the rights to: establish conditions of membership; set benefits; and establish requirements for funding.” (Ex 67 at 1 (2001 PERS Member’s Handbook).)

Third, the *Whitty* petitioners overstate the meaning of the SAIF employee handbook provision. Contrary to their assertion, the SAIF policy does not promise anything more than the ability to participate in PERS like all other state employees. It states that “[e]ligible SAIF employees participate in an established and secure retirement program through the Public Employee Retirement System.” It then provides a brief description of the employee and employer contribution requirements, refers the participants to the PERS handbook and Web site, and provides the PERS phone number for “complete details” and “more information.” (Dep Ex 24 to Ex 401 (Ulsted deposition testimony).)⁴ Nothing in the policy suggests that SAIF employees are entitled to benefits that are different from those available to any other PERS members. Moreover, even if such language existed in the SAIF handbook (and it does not), it could not bind PERS to a certain level of future benefits. Nowhere do the PERS statutes authorize SAIF to set PERS’ crediting and benefit policy, as noted above. Oregon courts routinely have held that PERB cannot provide benefits that are not authorized by law, regardless of the information that may have been provided to a member before his or her retirement. *See, e.g., Wilkinson v. PERB*, 188 Or App 97, 103, 69 P3d 1266 (2003) (because PERS must operate in compliance with its statutes, it cannot distribute funds in any contrary manner, regardless of PERS’ alleged representations to

member). This logic applies with even greater force to SAIF, an agency wholly unrelated to PERS.

Accordingly, to the extent a contract exists, the *Whitty* petitioners are subject to the same contract as all Tier One members and their claims should be denied for the reasons contained in respondents' Answering Briefs filed in the *Strunk* action, Case No. S50593.

2. Respondents' Defenses Apply to the *Whitty* Petitioners.

Should this Court determine that the Reform Legislation was impaired and reach the issue of respondents' affirmative defense—that the legislation was reasonable and necessary to serve an important public purpose—petitioners argue that this defense should not apply to them, because “SAIF does not receive general fund tax revenues” and “there is no evidence that SAIF is unable to pay the obligation of the retirement contract benefits it promised its employees.” (*Whitty* Op Br at 8.) This logic is wrong, and their argument misses the point.

The *Whitty* petitioners assume that the money SAIF contributes to PERS is segregated from all other PERS funds and that, while the rest of the system may be in peril, SAIF's funds are not. Yet SAIF is just one of many state government employers that contributed to a broken and unsustainable PERS system. (Special Master's Findings, JER 47-56.) PERS's problems have no relation to SAIF's funding. Critically, the purpose of the Reform Legislation is to fix those problems. (Special Master's Findings, JER 73-77, 82-83); *see also* Preamble, HB 2003 (“this * * * Act is intended to reform and stabilize PERS”). The *Whitty* petitioners' focus on SAIF's funding misses this key point.⁵ Consequently, respondents' affirmative defense arguments stated in full in their Answering Briefs filed in

⁴ As noted above, the PERS handbook refers readers to the PERS statutes and regulations for a legal description of the system. The same is true of the PERS Web site. (*See, e.g.*, Ex 374 PERS' Web Calculator.)

⁵ Moreover, SAIF has no more ability than any other entity to create funds to pay for spiraling PERS costs.

the *Strunk* action, Case No. S50593, and the *Sartain* matter, Case No. S50686, apply equally to the *Whitty* petitioners and are incorporated herein by reference.

III. CONCLUSION

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

DATED: June ____, 2004.

Respectfully submitted,

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