

Memorandum

State of Alaska

Department of Law

TO: Melanie Millhorn
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SUBJECT: Reemployed retirees – effect
of HB 242 (2001) sunset
provision

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I. INTRODUCTION

You have asked about the effect of the “sunset” provision of HB 242, which was enacted in 2001 (ch. 57, SLA 2001). HB 242 amended Public Employees’ Retirement System (PERS) and Teachers’ Retirement System (TRS) statutes to allow certain retirees who returned to work in positions normally covered by the systems to waive coverage under the systems. Therefore they would not be required to contribute to PERS or TRS and they would not accrue additional service credits. However, the reemployment amendments allowed eligible reemployed retirees to continue to receive their retirement benefits while employed.¹ The bill specifically included provisions that repeal these amendments on July 1, 2005.

This memorandum confirms oral advice that, once the re-employment amendments are repealed, the statutes that previously required reemployed retirees and their employers to contribute to the applicable retirement system and terminate retirement benefit payments upon reemployment will apply. Therefore any member who has been receiving retirement benefits while employed by a TRS or PERS employer would, as of July 1, 2005, no longer receive retirement benefits while employed but would again start accruing additional service credits and making contributions to PERS/TRS.

¹ Prior to the enactment of HB 242, under the Public Employees’ Retirement System and Teachers’ Retirement System statutes, if a retiree member returned to PERS/TRS employment, his/her retirement benefits ceased and the member and his/her employer would resume making contributions to PERS/TRS. The member would accrue additional service credits.

II. BACKGROUND

A. Legislative history

Before July 1, 2001, with limited exceptions, the PERS and TRS statutes required employees of PERS employers and teachers hired by TRS employers to participate in the applicable retirement system. AS 14.25.040; AS 39.35.120. The statutes also prohibited payment of retirement benefits to reemployed retirees during the period of reemployment. AS 14.25.043; AS 39.35.150.²

HB 242 was introduced in the 2001 legislative session. Among other things, the bill amended AS 14.25.043, relating to the reemployment of retired TRS members, and AS 39.35.150, relating to the reemployment of retired PERS members. Sections 4 and 8 of HB 242 amended these statutes to provide that if a retired member of TRS or PERS returns to employment, the member could elect to continue to receive retirement benefits during the period of reemployment but would not continue to accrue credited service. AS 14.25.043(b) and AS 39.35.150(b). In addition, no deductions would be made from the member's salary for contributions to his/her retirement system and the employer would make no contributions on behalf of the member. AS 14.25.043(b) and AS 39.35.150(b). This option would only be available to members who took normal

² Prior to HB 242, AS 14.25.043(a) provided:

If a retired member again becomes an active member, benefit payments may not be made during the period of employment. The retirement benefit must be suspended for the entire school year if the teacher is reemployed as an active teacher for a period equivalent to a year of service. During the period of reemployment, deductions from the member's salary will be made in accordance with AS 14.25.050.

AS 39.35.150(a) provided:

If a retired employee subsequently becomes an active member, benefit payments may not be made during the period of reemployment. During the period of reemployment, deductions from the employee's salary shall be made in accordance with AS 39.35.160. Upon subsequent retirement, the retired employee is entitled to receive an additional pension based on the credited service and the average monthly compensation earned during the period of re-employment in accordance with AS 39.35.370.

retirement; a member who participated in an earlier retirement incentive program or took early retirement would not be eligible to take advantage of these amendments. AS 14.25.043(b) and AS 39.35.150(b). The amendments provided that the election was irrevocable during the period of reemployment. AS 14.25.043(b) and AS 39.35.150(b).

With respect to TRS, at section 1 of the bill, the legislature provided that a teacher could only take advantage of the reemployment amendments if the school district or Rural Educational Attendance Area (REAA) had made a declaration of an anticipated shortage of teachers in particular disciplines. AS 14.20.135.

Section 12 of the bill repealed the reemployment amendments as of July 1, 2005. At section 15 of the bill, the legislature reinstated the law as it existed prior to July 1, 2001. Section 13 of the bill required that the administrator of TRS annually report to the legislature on the effects of the bill on the retirement system.

Guy Bell, Director of the Division of Retirement and Benefits (DR&B), and employers and employee organizations testified in support of the reemployment amendment during committee hearings. That testimony explained that the amendments were meant to provide incentives for PERS and TRS retirees to return to work for school districts, the state, and other PERS employers, in order to alleviate workforce shortages and the “brain drain” resulting from retirement of the baby boom generation, among other causes.

The legislative history of the sunset provision of HB 242 is not extensive. The bill was introduced on April 10, 2001, and was passed less than a month later, on May 8, 2001. House Finance Committee members first raised the suggestion of a sunset provision for the reemployment amendments at a hearing on April 23, 2001.³ The

³ A similar sunset provision was proposed for TRS reemployment provisions included in SB 149, at an April 20, 2001, Senate Health, Education and Social Services’ committee hearing. The minutes indicate that Division Director Guy Bell testified that he believed “it is a good idea to include a sunset provision so that the legislature can re-evaluate this program in the future.” Vice-Chair Leman “said his intention was to get something into effect that will work this year and next year and then take another look at it.” At the Senate Finance committee hearing on April 25, 2001, the staff to Senator Leman testified that SB 149 provided for an annual report to the legislature regarding the impact of the reemployment of retired teachers on the retirement program itself. He further indicated that the legislation has a sunset clause “in the event the teacher shortage situation changes.” SB 149 was enacted as chapter 58, SLA 2001. SB 149 included a July 1, 2005 sunset date for the TRS retiree reemployment provisions.

minutes of the hearing indicate that the purpose of the sunset provision was to allow the legislature an opportunity to study the effect of allowing retired members to return to employment as provided in the proposed amendments. The minutes of the April 23, 2001, meeting read in pertinent part:

Representative Whitaker asked if thought had been given on the affect [sic] on the entry-level workforce. He noted that new graduates could lose in the choice between experience-retired teachers.

Representative John Davies echoed concerns of Representative Whitaker and noted that *he would propose a 3-year sunset to allow assessment of unintended consequences* (Emphasis added).

The minutes indicate that later in the hearing the committee continued to discuss the sunset provision:

Representative John Davies MOVED to ADOPT Amendment 1. He reiterated that the amendment would provide a 3-year sunset. He expressed support for the legislation but felt that it would be good legislative policy to review the change.

Representative Kott did not object to the sunset provision. He acknowledged that the sunset would require the legislature to review the issue, but felt that any problems would be discovered in the next few years.

Ms. Elgee testified that the amendment would not have an adverse affect [sic] but questioned if 3 years would be sufficient time to review the program.

Representative John Davies stated that he would not object to a longer period.

Co-Chair Williams questioned if a five-year period would be too long.

Representative Kott observed that sunset would fall before the increase in retiring teachers that is expected in the year 2005.

Representative John Davies stated that he would entertain a motion to change the date to 2006.

Vice-Chair Bunde Moved to Amend Amendment 1 by changing the sunset date to the year 2005. There being NO OBJECTION, it was so ordered.

There being NO OBJECTION, Amendment 1 was adopted.

Although the minutes indicate that a sunset date in 2005 was adopted, the published House Finance Committee substitute included provisions that repealed the reemployment provisions effective July 1, 2006.

The Senate Finance Committee discussed the sunset provision on May 4, 2001. The minutes reflect again that the purpose of the sunset provision was to allow the legislature an opportunity to evaluate the effectiveness of the reemployment amendments. The committee hearing minutes read:

Representative Kott indicated the changes in the committee substitute primarily pertain to the TRS benefits. He stated the committee substitute also changes the repeal date of this legislation from five, to four years. *He explained this change was made based upon projections showing the effectiveness of the program in five years.* (Emphasis added.)

During the Senate Finance Committee hearing, the sunset provision for the reemployment amendments was amended from five to four years, to be effective July 1, 2005. This is the version of the bill that was passed by the legislature, and signed by the governor. The sunset provision, section 12, affects only the reemployment amendments discussed above and not other provisions of the bill.⁴

The Department of Law's review of HB 242 for the governor explained the sunset provision as follows:

Both the TRS and the PERS provisions allowing retired rehires to continue to collect their retirement benefits have sunset dates. The relevant provisions are repealed as of July 1, 2005. *Presumably the legislature included this repealer so that it can examine, after four*

⁴ For example, the enhancements to PERS and TRS medical benefit eligibility and changes to the PERS cost-of-living differential provisions do not sunset.

years, whether these provisions are having their intended effects.
(Emphasis added).

B. Division of Retirement and Benefit's Publications and Forms

Information published by DR&B explains to PERS and TRS members the reemployment options under HB 242. The documents that most clearly indicate to members that the reemployment amendments only cover the periods of employment from July 1, 2001 through June 30, 2005, are the waiver forms that DR&B requires members to sign in order to waive PERS/TRS coverage. The "PERS Waiver Option – Reemployed Retiree" form succinctly informs PERS members that the waiver only covers the reemployment periods from July 1, 2001, to June 30, 2005. The PERS waiver form reads:

This waiver covers reemployment periods from July 1, 2001 to June 30, 2005 . . .

Similarly, the "TRS Waiver Option – Reemployed Retiree" form informs TRS members that the waiver option only applies if the teacher's school district or REAA makes a finding of an anticipated shortage of teachers from July 1, 2001 to June 30, 2005. This TRS form provides:

This waiver is only effective if a school district or Rural Educational Attendance Area (REAA) has made a declaration of a shortage, or an anticipated shortage of qualified teachers in particular disciplines or specialty areas from July 1, 2001 to June 30, 2005. The school district or REAA must pass a written resolution which defines those disciplines or specialty areas. . . .

Other DR&B publications do not specifically address whether a reemployed member may continue reemployment under the amendments after the sunset date. However, these DR&B publications do set out the sunset date for the new reemployment option. For example, an *Employer Newsletter* sent to PERS and TRS employers in the fall of 2001 describes the waiver option:

"Standard Option" or the new "Retiree Reemployment Waiver Option." The new Retiree Reemployment Waiver Option is a result of HB 242 and Senate Bill 149 – legislation passed and signed this last session and effective July 1, 2001, through June 30, 2005.

DR&B's May 2001 *Newsbreak* sent to PERS members describes the requirements for the new option, and states that the option "expires on July 1, 2005."

A document on DR&B's web site entitled "PERS Working After Retirement" describes the waiver option, and explains that "The law is effective July 1, 2001, and ends June 30, 2005." The web site also explains that "Once you file a PERS Waiver Option – Reemployed Retiree form with the Division of Retirement and Benefits, the election is irrevocable for the period of reemployment covered by the waiver."

With respect to TRS, DR&B's *Newsbreak* of October 2001 has a discussion of HB 242. It provides that no new waivers can be filed after June 30, 2005. A document on DR&B's web site entitled "TRS Working After Retirement" describes the waiver option for TRS members. This brochure provides that "[t]he law is effective July 1, 2001, and ends June 30, 2005" and that "the election is irrevocable for the period of reemployment or July 1 of the school year employed."

C. PERS/TRS regulations

Division of Retirement & Benefits adopted PERS emergency regulations on July 2, 2001, which became permanent on September 17, 2001, and TRS emergency regulations on July 2 and July 5, 2001, which became permanent on October 29, 2001. 2 AAC 35.322 (PERS); 2 AAC 36.236 and 36.237 (TRS).⁵ The regulations set out requirements for electing waiver of PERS and TRS coverage by reemployed retirees. The regulations do not address the eligibility of reemployed retirees to continue to receive retirement benefits after the reemployment provisions are repealed on July 1, 2005.

III. DISCUSSION

A. The reemployment provisions and the legislative history of the sunset provision indicate that the legislature did not intend that the reemployment amendments continue to apply to reemployed retirees once the amendments were repealed.

In our opinion, the repeal of the reemployment provisions and reinstatement of the pre-HB 242 statutory language do not evidence an intent of the legislature to allow continuation of any aspect of the retiree reemployment option after June 30, 2005. The

⁵ These regulations appear in the supplement, rather than the main pamphlet for 2 AAC because they were not published in the Alaska Administrative Code until August 2003.

testimony of the legislators demonstrates that they only intended the amendments to be temporary, until repealed on July 1, 2005, because they wanted to assess the impact of the reemployment amendments on the workforce and on the retirement system. During hearings on the bill, Representative John Davies echoed Representative Whitaker's concern that the reemployment amendments would affect new graduates' ability to enter the workforce and proposed a sunset provision to allow "assessment of unintended consequences." The legislative history of SB 149⁶ similarly indicates that the reemployment amendments were an experiment. DR&B director Guy Bell testified that the sunset provision would allow the legislature an opportunity to evaluate the program. Staff to Senator Leman also testified that the annual report, required for TRS under both HB 242 and SB 149, would allow the legislature to study the impact of the reemployment amendments on the retirement system.

Although the bill had broad support from employers and employee organizations, the reemployment amendments to alleviate workforce shortage problems of PERS and TRS employers were new and untested. What is clear is that the legislature included provisions to sunset the reemployment provisions in order to review the changes and assess their efficacy and consequences. If experience with the changes over time revealed that the reemployment amendments were not needed, did not have the intended effect, or had other unintended consequences, the automatic repeal would terminate the effect of the amendments. It does not stand to reason that the legislature intended a program that proved to be unnecessary, ineffective, or detrimental to be perpetuated by unexpressed "grandfather" rights once the amendments were repealed.

The legislature could have provided reemployed retirees with grandfather rights to both be employed and continue to receive retirement benefits after June 30, 2005, if it had intended to do so. An obvious example of this would be a simple clause exempting retirees who were reemployed under the program on June 30, 2005, from the repeal. Another example is that, instead of repealing the reemployment amendments, the legislature could have specifically established June 30, 2005, as the deadline for reemployment and execution of a waiver of coverage in order for a retiree to participate in the program.

⁶ SB 149 is discussed at fn. 3. SB 149 did not address reemployment of PERS members, but contained the basically the same reemployment amendments for TRS members that were contained in HB 242. SB 149 was enacted as chapter 58, SLA 2001.

B. Article XII, section 7 of the Alaska Constitution does not give reemployed retired employees a contract right to receive retirement benefits while employed with a PERS/TRS employer after June 30, 2005.

A reemployed retiree might argue that he/she has a contract right under the Alaska Constitution, article XII, section 7 to continue reemployment under the amendments after June 30, 2005. We do not believe such an argument would prevail. To the extent the reemployment amendments provide any member with contractual rights under Alaska Constitution, article XII, section 7, the sunset provision constitutes part of the contract, extinguishing any right that a retired member may have had under the reemployment amendments.

Article XII, section 7, of the Alaska Constitution provides that:

Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

Hammond v. Allen, 625 P.2d 844 (Alaska 1981), addressed whether the repeal by referendum of the Elected Public Officers' Retirement System ("EPORS") extinguished elected officers' contractual rights under EPORS. Under legislation enacted in 1975, all legislators, the governor, and the lieutenant governor were removed from PERS and placed in the newly-established EPORS, which provided significantly enhanced benefits compared to PERS.⁷ The referendum was filed before the legislation took effect, but the vote on the referendum occurred after the effective date of the legislation.⁸ The state argued that the filing of the referendum constituted an *implicit* condition subsequent in the contract between the state and the participants of EPORS, therefore justifying extinguishing a duty under the contract. 625 P.2d at 848. Therefore, the state argued that public officers serving during the time that EPORS was in effect had no right to retirement benefits under EPORS when they retired after the effective date of the repeal.

⁷ In *Hammond v. Allen*, 625 P.2d 844, 847 (Alaska 1981) the state conceded "that the contractual rights of members of public employee retirement systems are 'vested.'"

⁸ The referendum to repeal EPORS was filed in September 1975. The law became effective January 1, 1976. In August 1976, the entire act was repealed in a referendum election.

The court disagreed. The court stated that any condition subsequent must be expressed or implicit and that it was not certain that EPORS would be repealed.⁹ The court wrote:

The Restatement defines “condition subsequent” as a condition which, if it occurs, “will extinguish a duty to make compensation for breach of contract after the breach has occurred.” If the repeal of ch. 205, SLA 1975, operates as such a condition in this case, it would justify the State in breaching the contract we have determined is in existence and extinguish any duties the State would have otherwise had to make payments under that act. Because conditions subsequent have the effect of causing a forfeiture of contract rights that are otherwise due and enforceable, they are not favored by the law. *Generally speaking, “the intent to create a condition subsequent must appear expressly or by clear implication” if such a condition is to be found.* [Citations omitted]

In the present case there is no express condition subsequent contained in the contract between appellees and the State of Alaska. Appellant's position, then, is that such a condition exists “by clear implication.” We note first that in Alaska the referendum operates as a repeal, . . . and that for that reason, appellant's argument seems to run directly counter to the provisions of AS 01.10.100(a). Under that statute, “(t)he repeal ... of any law does not release or extinguish any . . . liability incurred or right accruing or accrued under such law.” Further, we share appellees' apprehension that finding a condition subsequent to be implicit in the contract under consideration would undermine article XII, Section 7. *We believe that if the possibility of repeal of a law could function as an implicit condition subsequent to a contract formed under that law, the protection of contract rights afforded by article XII, section 7, would be seriously eroded.*

625 P.2d at 848.

⁹ The court also found that AS 01.10.100, regarding the effect of repealing a statute, did not extinguish the *vested* rights of the elected public officials to their benefits. As discussed *infra*, HB 242 does not provide the reemployed retirees with vested rights.

The repeal of the reemployment amendments contained in HB 242 is distinguishable from the referendum that repealed EPORS. The “condition subsequent” – the repeal of the reemployment amendments and reinstatement of the ban on payment of benefits to persons working for employers covered by PERS or TRS – is expressly provided for in HB 242, which is supported by the committee minutes.

C. HB 242 does not provide the reemployed retirees with a vested right to continued employment under the terms of the amendments. Therefore the repeal of the reemployment amendments extinguished any rights that reemployed retirees had under those amendments.

In prior court decisions, the court has held that public employees have a “vested right” to pension benefits that were available to them during their employment. Consequently, reemployed retirees may argue that they have a “vested right” to the reemployment amendments, even after June 30, 2005. However, it is our opinion that they do not have a vested right to take advantage of the reemployment amendments after June 30, 2005.

AS 01.10.100 pertains to the effect of a repeal of a statute on existing rights. AS 01.10.100 provides in pertinent part:

Effect of repeals or amendments.

(a) The repeal or amendment of a law does not release or extinguish any penalty, forfeiture, or liability incurred or right accruing or accrued under that law, unless the repealing or amending act so provides expressly. The law shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of the right, penalty, forfeiture, or liability.

(b) The expiration of a temporary law does not release or extinguish a penalty, forfeiture, or liability incurred or right accruing or accrued under that law unless the temporary law so provides expressly, and that law shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of the penalty, forfeiture, or liability or right accruing or accrued.

The court has held that a “right” under AS 01.10.100 means a “vested right” that is protected from state action under the Fourteenth Amendment of the United States Constitution and article I, section 7, of the Alaska Constitution. *Alaska Pub. Util. Comm’n. v. Chugach Elec. Ass’n*, 580 P.2d 687 (Alaska 1978), *overruled on other grounds* by *City & Borough of Juneau v. Thibodeau*, 595 P.2d 626 (Alaska 1979).

Based on the legislative history of HB 242, we conclude that the legislature did not intend to give reemployed retirees a right to continue receiving pension benefits while employed after June 30, 2005. As discussed above, the legislature wanted to reevaluate the effectiveness of the reemployment amendments before it decided to continue the application of those provisions beyond June 30, 2005. Therefore, reemployed retirees should have no expectation that the reemployment amendment would continue to apply to them after June 30, 2005.

Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska 1981) is distinguishable from the situation that HB 242 presents. In *Hammond v. Hoffbeck*, the court ruled that employees have vested rights to pension benefits in PERS on employment and enrollment in PERS.¹⁰ Subsequent amendments to PERS that diminished the benefits of some members could not constitutionally be applied to those members. In the instant case, there is no subsequent amendment; rather, the sunset provisions are part of the same act that established the reemployment program. Since the sunset provisions constitute an integral part of the contractual right, application of the sunset provisions will not diminish benefits. Moreover, after June 30, 2005, reemployed retirees can still receive their pension benefits if they leave employment with a PERS or TRS employer or they can resume membership in PERS and TRS and begin accruing additional rights and benefits.

D. A study should be conducted to assess whether the reemployment of retired members has been effective.

Since the amendments will sunset on July 1, 2005, DR&B may want to conduct a study to determine whether the reemployment amendments have been effective in alleviating workforce shortage, have saved employers money, and have not been a cost burden to PERS or TRS. The DR&B can then make recommendations to the legislature.

¹⁰ As discussed above in footnote 9, in *Hammond v. Allen*, the court also relied on AS 01.10.100. In that case, public officials worked during the period that EPORS was in effect. There was no certainty that it was going to be repealed. Therefore, under the *Hoffbeck* decision, the public officials had a vested retirement benefit and therefore were entitled to benefits under EPORS when they retired.

The legislature will then have an opportunity to decide whether to continue the program after June 30, 2005, to make changes to the program, or to allow it to sunset.

IV. CONCLUSION

In summary, based on the statutory language and legislative history, it is our opinion that once the reemployment amendments sunset on July 1, 2005, reemployed retirees can no longer receive retirement benefits while employed by a PERS or TRS employer. If they continue employment with a PERS or TRS employer, they must begin making contributions. We understand that some reemployed retirees have contacted DR&B inquiring whether they can continue to receive retirement benefits and remain employed with a PERS/TERS employer after June 30, 2005. We recommend that the DR&B provide written notification to all reemployed retirees that, absent legislative action, they no longer will continue to receive retirement benefits from PERS or TRS after June 30, 2005 if they continue employment. We also recommend that the DR&B consider conducting a study on the effectiveness of the amendments and providing a report to the legislature in order that the legislature can decide whether to continue this program.

TNS/VBR/kmh/rca