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Constitutional Issues When Altering Public Pension Benefits[1]

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I. INTRODUCTION:

The first decision when faced with a plan amendment is to determine the client's position. In most situations, NAPPA clients will be trying to uphold the amendment and resist challenges. Many plans operate in jurisdictions where legislation is presumed constitutional or where the plan as a State agency or municipal entity is a creature of its enabling legislation and does not have the authority to challenge and/or declare its enabling legislation unconstitutional. Therefore, although there may be exceptions where the plan is a plaintiff (*E.g.* Jones v. Board of Trustees, 910 S.W.2d 710 (Ky. 1995), this Outline's point of view is that a NAPPA member will be trying to give the plan sponsor the most flexibility possible to make plan design changes, usually in the context of defeating a challenge to a plan amendment or drafting plan design changes.

The author views the mantra "it is unconstitutional to reduce pension benefits" as a great oversimplification of a complex area of the law loaded with exceptions, provisos and nuances. It often is possible to craft a "long version" of the question at issue or restate and reorient the contract in a way that is more favorable to the NAPPA client than is the plaintiff's version. A defense against a challenge to changes in pension benefits necessary to achieve IRC qualification status could stress that the underlying contractual promise actually is the ability to participate in a tax qualified plan; that legislative actions to ensure qualified status do not impair the pension contract, but instead protect it; and that the members who have been receiving the advantages of participating in a tax qualified plan implicitly have agreed to any changes necessary to retain qualified status.

This outline does not attempt to develop a 50-state analysis of constitutional law regarding the ability to make pension changes. Instead, general constitutional issues are discussed, in the

[1] This Outline is an update of the Outline presented at the 2009 NAPPA Legal Education Conference. In March 2010, Amy B. Monahan of the University of Minnesota Law School issued a useful analysis of this issue titled "Public Pension Plan Reform: The Legal Framework" It can be accessed at http://ssrn.com/abstract=1573864

hope of providing a framework of analysis and case law as a starting point for further research for colleagues who face benefit design change issues, either as litigators or plan drafters.[2]

II. FEDERAL CONTRACT CLAUSE

Article I, section 10, clause 1 of the United States Constitution states: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." ("Contract Clause")

There is relatively little federal constitutional law on the impairment of public pension contracts. Although the Contract Clause prevents states from impairing contracts with public employees, it does not explicitly state that public pensions are contracts. The Contract Clause will apply only if state law establishes a contractual right. The Contract Clause does not define what pension rights are or interfere with establishing whatever contract terms, if any, the states desire.

This proposition was established by Pennie v. Reis, 22 P. 176, aff'd 132 U.S. 464 (1889). Pennie often is held up as standing for the proposition that public pensions are mere gratuities and expectancies that can be changed at the whim of the state legislature. It has come under much criticism accordingly, but this author believes that a better reading of Pennie is that the Supreme Court was deferring to California by not finding a contract right where California law had not established one. Although there is no recent Supreme Court decision which provides direct guidance for the states on public pension rights, the approach that federal Contract Clause protections are limited to the terms of the contracts as established by the States, can be seen in the Supreme Court's decisions in Dodge v. Board of Educ., 470 U.S. 451, 465-66 (1937) ("Absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'") and United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." United States Trust Co. at 17, n.14.

United States Trust Co. and its progeny set forth several steps to determine if there is an unconstitutional impairment of contract under the Contract Clause. First, it must be determined that a contractual relationship exists under state law. Second, there must be a substantial impairment of the contractual relationship. Third, the law at issue must have a significant and legitimate public purpose. United States Trust Co. emphasizes that the impairment must be both reasonable and necessary. A State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money on other public policy goals.

From the beginning, the federal courts have allowed states to reserve the right to modify the contract. If the original terms are agreed to, then there is no impermissible unilateral action by a

[2] The reader is referred to the NCPERS website for a detailed listing of state constitutional contract provisions and a short summary of each state's law. http://www.ncpers.org/Files/News/03152007RetireBenefitProtections.pdf. There have been a number of NAPPA presentations on the issue. Some are: 2008, Constitutional Law? But I'm a Public Pension Lawyer (Scott Miller); 2006 Actuarial Death by Contract Clause?; 2004, New Member Overview (Neither Fish nor Fowl, (Kelly Jenkins); 2004, Actuaries as the Bad News Bearers.

state that results in an impairment of contract. See, *e.g.*, Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 666 (1819) (Story, J. concurring opinion).

III. STATE CONTRACT CLAUSES

State law is where most of the contract impairment action is. State law that determines when the pension contract becomes enforceable and how much is protected.

Most, but not all, states have general contract clauses that are analogous to the federal Contract Clause. Six states (Alaska, Hawaii, Illinois, Louisiana, Michigan and New York) have some form of explicit specific constitutional protection of public employee pension benefits. Other states, such as Connecticut and Delaware do not have state contract clauses. Simply because a state constitution contains a general contract clause, however does not mean that there actually is an immutable pension contract. There still must be a contract and in many cases that contract can be modified in some way or another. Even those states that have explicit constitutional provisions may allow some modification of future benefit. *See, e.g.*, Hammond v. Hoffbeck, 627 P.2d 1052, 1057.). Therefore, when dealing with both state and federal contract clauses, the task is to decide if a contract exists and why, when it was formed, what is protected, who enjoys its protections and how it can be changed, if at all, and under what circumstances.

PRACTICE TIP: If you are not in one of the six states with specific constitutional provisions you may be able to discount or distinguish case law coming out of those states. Baumgardner v. Public Employees Ret. Bd. of the State of Montana, 2007 Mont. Dist. LEXIS 133 (May 21, 2007)

NOTE: Minnesota protects public pension benefits through a promissory estoppel theory. Christensen v. Minneapolis Mun. Employees Ret. Bd., 331 N.W.2d 740 (Minn. 1983). Promissory estoppel often is raised as an alternative theory in contract impairment cases. Because it is not constitutionally based, and because it is so dependent on the laws of the jurisdiction and because it tends to be more relevant in health benefit cases instead of pension cases, it will not be addressed in this Outline due to space concerns.

A. WHY ARE PENSION BENEFITS CONTRACTUAL IN NATURE?

1. Few states now accept the formerly prevalent view that public pensions are mere gratuities able to be revoked at the whim of the sovereign. Although a few states use promissory estoppel or due process when analyzing benefit changes, the majority approach is that pension benefits are contractual in nature and to use contract principles when analyzing propose benefit changes.

2. In most states there is a fairly clear demarcation between the gratuity theory and the contract theory and a seminal case or two where the courts make the change. *E.g.* Shapiro v. Kansas Public Employees Retirement System, 532 P.2d 1081 (Kan. 1975); Bakenhus v. City of Seattle, 48 Wash.2d 695, 296 P.2d 536 (1956); Police Pension and Relief Board of the City and County of Denver, et al. v. McPhail, 39 Colo. 330, 338 P.2d 694 (1959); and, Police Pension and Relief Board of City and County of Denver, et al., v. Bills, et al.,144, 148 Colo. 383, 366 P.2d 581 (1961); City of Frederick v. Quinn, 371 A.2d 724 (Md. Ct. Spec. App. 1977); O'Dea v. Cook, 169 P. 366 (Cal. 1917). These cases usually have a fairly extensive analysis of the reasons the switch is occurring and the reasons

for the change, details that later can get glossed over by the mantra or judicial catchphrases. It is usually worth going back to the source for the reasons, which may be helpful in structuring or defending benefit changes. For instance, if pension benefits are "deferred compensation for current service," they might be more difficult to change than if they are "retirement pay" or "additional compensation." The original public policy approach often can be gleaned from such language as "The respondent has complied with the provisions of his contract. He has given twenty-five years of faithful service, during which time he turned down many other opportunities for employment; and, in the meantime, these opportunities necessarily have diminished." Bakenhus v. City of Seattle, 48 Wash.2d 695, 296 P.2d 536 (1956), or from the language of a more modern case Newport Township v. Margalis, 532 A.2d 1263, 1265 (Pa. Cmwlth. Ct. 1987) (retiree medical benefits are "the fruit of the tree which [the employee] has planted, which he has nurtured with his continuous loyal service and watered with the sweat of his years of dedicated work.")

PRACTICE TIP. Newport Township is a medical benefits case. Care needs to be taken when using medical benefits cases as the nature of the benefits and contracts differ. Medical technology continually changes and becomes more expensive. Additionally, the courts tend not to focus on the differences between pension benefits and health benefits. It is not unusual to see the generic term "retirement benefits" applied to annuitant health benefits. *See*, Larsen v. Senate of the Commonwealth of Pennsylvania, et al., 154 F.2d 82 (1998). Medical benefits often do not have the same degree of protection as pension benefits and rarely have greater.

3. Themes and concepts to look for:

a. The Cliff Vesting Legacy. Many of the early cases arose in situations involving employees with 20 or 25 year cliff vesting. Retirement Board of Allegheny County v. McGovern, 315 Pa. 161, 174 A. 400 (1934); Police Pension and Relief Board of City and County of Denver, et al., v. Bills, et al., 148 Colo. 383, 366 P.2d 581 (1961); Baker v. Retirement Board of Allegheny County, 374 Pa. 165, 97 A.2d 231 (1953). Cliff vesting pension benefits present a different situation from accrual based pension benefits. Accrual based pension benefits make the connection between benefits being earned each year concurrent with the performance of service and making member contributions more apparent. The ability to change future accrual rates, so long as already accrued benefits are left intact, seems more commonsensical and palatable. If pensions are a form of additional compensation (along with salary, health benefits and fringe benefits, all of which often can be changed prospectively), then why can't pension benefits be changed as part of the total compensation package? Courts seem more resistant to allowing changes where cliff vesting is involved and more apt to find a constitutionally enforceable implied promise that if at the time of commencement of work an employee worked X years, then Y benefits would be received.

PRACTICE TIP. When examining precedent and deciding cases, the courts do not seem to pay much attention to the distinction between cliff vesting and accrual based benefit structures and have uncritically grafted cliff vesting doctrines to accrual based fact patterns.

b. Does your jurisdiction have an anti-gratuity clause in its constitution? If so, then almost by default there needs to be a contract component to pension benefits. O'Dea v. Cook, 176 Cal. 659, 169 P. 366 (Cal. 1917); Bakenhus v. City of Seattle, 48 Wash.2d 695, 296 P.2d 536 (1956).

c. The form and nature of the contract. Pension contracts can be expressed or implied, and bilateral or unilateral contracts in which a promise made on one side is accepted by performance on the other. What, if any, consideration is required? Does the case law focus on whether or not member contributions are made? Or is the consideration for the contract and benefits mere service? In Florida Sheriffs Association v. Department of Administration, 408 So. 2d 1033 (Fla. 1981) the mere fact that employees contributed to the pension fund would not prevent plan amendments. Although early Pennsylvania cases suggested that employees had contract rights if they made contributions to the pension system, the current view is that contract rights form regardless of contributions, and that service as a public employee is sufficient consideration for the pension promise. American Federation of State, County, and Municipal Employees, AFL-CIO v. Commonwealth, 80 Pa. Commonwealth Ct. 611, 472 A.2d 746 (1984), aff'd 505 Pa. 369, 479 A.2d 962 (1984). In Arkansas, benefits are guaranteed to the extent that they involve accruals resulting from member contributions. Otherwise, they can be modified without unconstitutional impairment. In Colorado pensions are part of the public employee's compensation due under the employment contract, particularly where the pension is funded, at least in part, by employee contributions. City Of Aurora v. Ackman, 738 P.2d 796 (Colo.App. 1987).

d. Are pension terms part and parcel of a larger employment contract or is there a separate independent pension contract that sits above the employment contract? The courts tend to use "pension contract" and "employment contract" interchangeably, but the better view seems to be that the pension provisions are dependent on and part of the employment contract. If this can be established, a more precise analysis can be made, usually to the favor of the NAPPA client.

e. Agency: A benefit reduction impaired contracts between the Commonwealth and school employees because the employment contract is between school employees and the independent school districts. The constitution places the responsibility of providing public education on the legislature. Local school districts are mere agents of the Commonwealth to which the legislature has delegated authority to fulfill the state's responsibility to provide public education. As an agent of the state, a school district contracts on behalf of the Commonwealth with its employees for retirement system membership. Pennsylvania Federation of Teachers v. School District of Philadelphia, 80 Pa. Commonwealth Ct. 608, 472 A.2d 749 (1984), aff'd 506 Pa. 196, 484 A.2d 751 (1984).

B. IF PENSION BENEFITS ARE CONTRACTUAL IN NATURE, THEN WHERE ARE THE PROTECTED CONTRACT TERMS FOUND?

PRACTICE TIP: Unless there are expressed terms either creating the contract right or reserving the right to make changes, the courts are forced to deduce whether a contract exists, its extent and what can be changed. Plan designers and drafters can anticipate many issues and grant flexibility to the plan sponsor if the plan contains reservation of rights provisions. Otherwise, the courts and not the plan sponsor will be making these important decisions.

1. Statutes and ordinances? In almost all states where contract rights exist, the terms of the contract are found in the enabling legislation. O'Dea v. Public School Employes' Retirement Board,

66 Dauphin 58, 88 D&C 593 (1954) (The retirement code and its amendments establishing the retirement system are incorporated into and constitute the essential provisions of a member's contract.) Note that terms of the pension contract can be found in non-pension statutes.

2. Interpretative materials, regulations and policies and handbooks? An employee handbook issued by a Commonwealth agency is not a legislative action and cannot be considered a contract guaranteeing a property right in employment unless the legislature has so provided. Imdorf v. Public School Employes' Retirement System, 162 Pa. Commonwealth Ct. 367, 638 A.2d 502 (1994). Lawrence v. Town of Irondequoit, 246 F.Supp.2d 150 (W.D.N.Y. 2002) (manual was ambiguous, permitting introduction of extrinsic evidence, because it did not expressly reserve the right to change retiree medical benefits after retirement). Bernstein v. Commonwealth of Pennsylvania, 617 A.2d 55, 411-12 (Pa. Comwlth Ct. 1992) (employee manual does not create a contract right unless the legislature has so provided). (These last two cases are health benefit cases.)

3. Case law. Only an enactment by the legislature, and not a judicial determination, can violate the contracts clause. Burns v. Public School Employees' Retirement Board, 853 A.2d 1146 (2004), alloc. den. 581 Pa. 701, 864 A.2d 1205 (2004).

4. Administrative interpretations. Where there is no change in the law, but only a quasi-judicial determination by the retirement system, no unconstitutional impairment of contract is stated. Burns v. Public School Employees' Retirement Board, 853 A.2d 1146 (2004), alloc. den. 581 Pa. 701, 864 A.2d 1205 (2004).

5. Collective bargaining agreements. When pension benefits can be established through collective bargain or binding arbitration, the contract literally can be the contract.

6. Common law. When pension forfeiture statutes were enacted, they were found to violate existing contracts when the court concluded that there was not an implied term of faithful performance of duties. In Bellomini v. State Employees' Retirement Board, 498 Pa. 204, 445 A.2d 737 (1982) the dissenting opinion thought that the majority has abridged the unquestionable authority of the General Assembly to codify a longstanding and salutary principal of common law.

PRACTICE TIP: It seems apparent that there are actually two different levels of contracts at work in the pension field. There is the "Big" statutory contract that operates on the constitutional level, which is the subject of this outline. But there also is the specific benefit application and payment terms contract that is involved in the ministerial operations of the plans used to transition members from active employees to annuitants and that operates at the quotidian level. *E.g.* Estate of McGovern v. State Employes' Retirement Board, 85 Pa. Commonwealth Ct. 50, 481 A.2d 981 (1984), rev. 512 Pa. 377, 517 A.2d 523 (1986); Krill v. Public School Employes' Retirement Board, 713 A.2d 132 (Pa. Cmwlth. 1998). The Courts often do not pay attention this difference and indiscriminately talk about "forming pension contracts."

C. IF CONTRACTS RIGHTS EXIST, WHEN DO THEY ATTACH?

PRACTICE TIP: Not all the terms of the pension contract necessarily attach at the same point in time. A functional vesting period for a benefit may attach at the start of employment, but the

benefit itself may accrue and attach as earned. In that case, the rate of future accruals might be changeable, but the time period to qualify for the benefit might not be.

1. Before employment begins?

a. The general rule is that non-employees do not have contract rights to pension benefits and pension plan benefits can be amended or repealed without regard to the rights of individuals who are not yet employees and that when one starts public employment one's action is deemed to be an acceptance of the prevailing salary including the deferred compensation component represented by retirement payments at the time they assumed office. Pennsylvania Federation of Teachers v. School District of Philadelphia, 80 Pa. Commonwealth Ct. 608, 472 A.2d 749 (1984), aff'd, 506 Pa. 196, 484 A.2d 751 (1984), Harper v. State Employees' Retirement System, 154 Pa. Commonwealth Ct. 573, 624 A.2d 279 (1993) aff'd 538 Pa. 520, 649 A.2d 643 (1994).

b. There are, however, three potholes.

i. If pension contract terms are established by the collective bargaining agreement, then it may be necessary to get the consent of existing employees, through amendments of the collective bargaining agreements to change the rights of future employees.

ii. Although the contract clause may allow plan terms to change for future employees, the equal protection clause or other constitutional provisions may limit flexibility.

iii. There are issues involved with "once and future" employees----members who have left or retired and then return to work.

2. When employment starts? In many states, enforceable pension terms attach at the start of employment. Yeazell v. Copins, 402 P.2d 541 (Ariz. 1965); Betts v. Bd. of Admin. of the Public Employees' Ret. Sys., 582 P.2d 614 (Cal. 1978); Oregon State Police Officers' Ass'n v. State of Oregon, 323 Ore. 356, 918 P.2d 765 (1996); City Of Aurora v. Ackman, 738 P.2d 796 (Colo.App. 1987).

3. When membership in the plan begins? Although this event often occurs at the start of employment, it need not. Illinois and New York both have constitutional provisions that lock in a participant's rights to benefits at the time he or she enters the pension system and becomes a participant. Kraus v. Board of Trustees, 390 N.E.2d 1281 (Ill. App. Ct. 1979) and Birnbaum v. New York State Teachers Retirement System, 152 N.E.2d 241 (N.Y. 1958). In many cases, the courts use "employment" and "membership/participation" interchangeably.

4. As benefits accrue? Here as discussed above, the difference between cliff vesting and accrual based benefits can be important.

5. When service requirements are fulfilled? Jones v. Cheney, 489 S.W.2d 785 (Ark. 1973); Petras v. State Bd. of Pension Trustees, 464 A.2d 894 (Del. 1983); Emerling v. Village of Hamburg, 255 App.Div.2d 960 (NY 4th Dept. 1998) (promise of health benefits during retirement

for employees retiring at age 55 with 10 years service became vested when employees completed their 10 years of service).

6. When eligible for retirement? This differs from fulfilling the service requirement in that there are other requirements, such as reaching the retirement age, that needs to be satisfied. Patterson v. City of Baton Rouge, 309 So.2d 306 (La. 1975). Driggs v. Utah State Teachers' Ret. Bd., 142 P.2d 657 (Utah 1943).

PRACTICE TIP: Spiller v. State. 1993 Me. Super. Lexis (Me. Super Ct. April 20, 1993) points out the distinction in benefits functionally vesting (service and age requirements are satisfied) and when they legally vest (contract rights attach). This is a useful distinction that often is blurred by the indiscriminate use of "vesting."

7. At Retirement? Pitts v. City of Richmond, 235 Va. 16, 366 S.E.2d 56 (1988) (rights to disability pension benefits do not vest until the public employee actually fulfills all requirements and retires), Herrick v. Lindley, 391 N.E.2d 729 (Ohio 1979); City of Louisville v. Board of Educ., 163 S.W.2d 23, 25 (Ky. 1942).

8. Other times?

a. In Kansas contract rights arise after "continued employment over a reasonable period of time during which substantial services are furnished to the employer, plan membership is maintained, and regular contributions into the fund are made." Singer v. City of Topeka, 607 P.2d 467, 474 (Kan. 1980).

b. Faulkenbury v. Teachers' & State Employees' Retirement System, 108 N.C. App. 357, 424 S.E.2d 420 (1993) (In pension case, court holds that public employees have a contractual right to receive benefits on the terms that were in effect when they completed the period of service that was required for vesting).

c. Booth v. Sims, 193 W.Va. 323, 337, 456 S.E.2d 167, 181 (1995). Public employees gain a "property right" in promised benefits that cannot be impaired after they have performed "substantial" service.

9. Other situations to think about:

a. Gulbrandson v. Montana Public Employees Retirement Bd. 901 P.2d 573, (Mt. 1995). Amended statute increasing retired judges' service retirement benefit from 1% to 1.785% per year does not apply to judges who retired after enactment date, but prior to effective date.

b. National Education Association of Rhode Island. v. Rhode Island, 972 F.Supp100 (D.RI.) Union officers in plan and receiving benefits. Claim dismissed never had property interest. Told almost immediately of legislation to undo. Difference between contributions and expectations striking (and thus expectations unrealistic.)

c. Malcom v. Newton County, 244 G. Appl 464 (Court of Appeals of Georgia, June 13, 2000) Membership in plan opened up to elected officers effective Dec. 1, 1996, but then repealed Dec. 3, 1996. Sheriff joined 12-1-96 and retired 12-31-96. The Dec. 3 repeal impaired

vested contract right to eligibility for benefit including all past service as of 12-1-96. Consideration was his performance of duty 12-1 to 12-31. Fact that he did not make any contributions did not matter.

d. Does a jurisdiction's domestic relations law treatment of pension affect whether or not it is subject to pension contract protections?

e. Can a benefit that is increased after employment starts (and therefore was not part of the original contract) be reduced either before or after the contract rights would normally attach?

f. If a higher multiplier requires an election to receive, and carries with it higher contributions prospectively (but not retroactively) is the retroactive piece of the multiplier a gratuity or are the prospective service and contributions sufficient consideration for all the higher multiplier? *See* Kelley v. State Employees' Retirement Board, 890 A.2d 1173 (Pa. Cmwlth. 2006), aff'd in part, rev. in part 593 Pa. 487, 932 A.2d 61 (2007), cert. den. ___ U.S. ___, 128 S.Ct. 1260, 170 L.Ed.2d 69, 76 U.S.L.W. 3439 (2008).

g. Do contract rights attach only to the pension benefits that relate to the specific job or to the membership in the system? For example, if the retirement age for prison guards is raised, could a member of the retirement system who is not then a prison guard, but who later becomes a prison guard, claim the old retirement age. The better (and in Pennsylvania more recent) answer seems to be that only benefit terms related to the specific job held are constitutionally protected. Zemprelli v. State Employees' Retirement Board, 680 A.2d 919 (Pa. Cmwlth. 1996), alloc. den. 547 Pa. 718, 690 A.2d 239 (1997)

D. WHAT BENEFITS AND ATTRIBUTES OF PLAN MEMBERSHIP ARE PROTECTED:

1. General Propositions and Rules

a. Possibly None.

i. There are still one or two gratuity theory states. In Indiana, if participation in a pension system is mandatory, the pension is a gratuity to which no contract rights apply. Ballard v. Bd. of Trustees of the Police Pension Fund of the City of Evansville, 324 N.E.2d 813 (Ind. 1975), but if it is voluntary then there are contractual rights prior to retirement. Board of Trustees v. Hill, 472 N.E.2d 204 (Ind. 1985).

ii. There are contract rights but the public entity has reserved the ability to unilaterally modify the plan. Reames v. Police Officers' Pension Bd., 928 S.W.2d 628 (Tex. App. 1996).

b. Currently accrued benefits are protected, but prospective changes in accrual rates can be made. Florida Sheriffs' Assoc. v. Dep't of Admin., Div. of Ret., 408 So.2d 1033 (Fla. 1981). This raises the difference between cliff vesting benefits and accrual based benefits. Under an accrual theory, the eligibility periods might be considered a promised not generally subject to change.

c. All aspects of the plan, but permits reasonable modifications when necessary to protect or enhance actuarial soundness of the plan as long as there are no adverse effects to vested or retired members. Blackwell v. Quarterly County Court, 622 S.W.2d 535 (Tenn. 1981). Note although this is sometimes called the "Pennsylvania Rule" Pennsylvania law has changed. American Federation of State, County, and Municipal Employees, AFL-CIO v. Commonwealth, 80 Pa. Commonwealth Ct. 611, 472 A.2d 746 (1984), aff'd 505 Pa. 369, 479 A.2d 962 (1984). The current law is that there is no real distinction between vested and non-vested members and much of the Pennsylvania case law before 1983 gives an overly optimistic view of the ability to change pension benefits for non-vested members.

d. All aspects of the plan, but detrimental changes can be made if there are corresponding benefits, Betts v. Bd. of Admin. of the Public Employees' Ret. Sys., 582 P.2d 614 (Cal. 1978). How are the offsetting benefits determined?

i. Compare each individual's benefits against their individual detriment. Some passed the test and others do not. Abbott v. City of Los Angeles, 326 P.2d 484 (Cal. 1958).

ii. Compare the benefits and detriment to the group as a whole. Any given employee may be better or worse off, but the change rises or falls collectively. Singer v. City of Topeka, 607 P.2d 467 (Kan. 1980).

e. All aspects of the plan, but de minimus or nonsubstantial changes can be made. City Of Aurora v. Ackman, 738 P.2d 796 (Colo.App. 1987).

f. None. No provisions of the retirement benefit contract can be changed without the employees' consent. Yeazell v. Copins, 402 P.2d 541 (Ariz. 1965).

2. Specific benefits and issues

a. Benefits reductions can occur by reducing the rates at which benefits accrue, the size of cliff vested benefits, lengthening the time period for benefit eligibility, or increasing the member contributions required for the same benefits. American Federation of State, County, and Municipal Employees, AFL-CIO v. Commonwealth, 80 Pa. Commonwealth Ct. 611, 472 A.2d 746 (1984), aff'd 505 Pa. 369, 479 A.2d 962 (1984).

b. Tax status.

i. Tax exemption: The states are split on whether state tax treatment of pension benefits is contractually protected. In some states, the tax treatment of pension payments is outside of the pension contract and not vested in the employee and if the pension formula and gross dollars paid have not been changed or impaired, so there is no impairment. Herrick v. Lindley, 391 N.E.2d 729 (Ohio 1979). In other states, the courts have concluded that the legislature intended the tax exemption of public pension benefits to be a term of the contract between the governmental employer and the employee. Hughes v. Oregon, 838 P.2d 1018 (Ore. 1992). In Hughes, it was significant that the tax exemption was in the retirement statutes.

ii. IRC §414(h) pickup contributions: Legislation to eliminate 6% pickup contributions was unconstitutional because it substantially impaired these contractual rights without justification by any significant and legitimate public purpose. Oregon State Police Officers' Association v. Oregon, 918 P.2d 765 (Ore. 1996). Would this same result occur in Ohio or other states that allow changes on exemptions?

iii. Changes necessary to remain (or become) a qualified plan. Although at least one state has essentially concluded that tax qualified status is not relevant, the author thinks this is a winnable case. Certainly there could be offsetting advantages and the reason could be necessary and compelling. Additionally, there valid arguments that a qualified plan is what was bargained for and expected by the members and that they implicitly consent to any changes necessary for the plan to remain qualified.

iv. IRC §415(m) Qualified Governmental Excess Benefit Arrangements. Benefits paid under IRC §415(m) arrangements could have less favorable federal tax treatment (and be more conditional if the arrangements did not have sufficient money to pay the benefits) than payments under a "regular" plan. It seems as if the establishment of an arrangement would not be a impermissible impairment because the benefit itself is not being reduced (at least as long as funding exists) and otherwise the benefit would not be payable at all from a qualified plan (so it is actually an increase in the "real" benefits available. But what about repealing a §415(b) arrangement. Once granted, are governments locked into them?

c. Actuarial factors for benefit calculations. In Baumgardner v. Public Employees Ret. Bd. of the State of Montana, 2007 Mont. Dist. LEXIS 133 (May 21, 2007) found changes in actuarial factors not be an unconstitutional impairment of contract. In O'Dea v. Public School Employes' Retirement Board, 66 Dauphin 58, 88 D&C 593 (1954) is was not an unconstitutional impairment of contract to use the actuarial factors in effect when she retired instead of when she began working because the Retirement Code provides for actuarial calculations to be made at time of retirement and authorizes the Board to adopt tables as necessary from time to time. Hence, O'Dea's contract included floating actuarial rates and benefit calculations to be made using rates in effect at time of retirement. She implicitly approved of the change in the tables and there was no unilateral impairment and her contract rights were inchoate at the time of employment and did not become definite until she terminated at superannuation age. The law in the 1950's allowed changes in the system to preserve the actuarial soundness of the system if member not yet vested.

d. Funding status/methodologies. There is a significant split on whether or not there is a contractually protected right to actuarial methodologies and employer contributions. Most cases seem to fall into one of there categories:

i. **No impairment because there is no right to a specific actuarial methodology or funding status. Only the benefits are protected.** Minneapolis Teachers Retirement Fund Association v. Minnesota, 490 N.W. 2d 124 (Minn. App. 1992) (no contract right to sound actuarial funding); Kosa v. State, 292 N.W. 2d 452 (1980) (new funding method as good as old method); People Ex rel Sklodowski v. State, 182 Ill.2d 220, 695 N.E.2d 374 (1998). The pension protection clause of the state constitution was intended to create a contractual right to benefits, without freezing the politically sensitive area of pension financing and thus the

beneficiaries had no cause of action for the state's allege failure to meet its funding obligations.

ii. **No impairment absent a showing of significant impairment or likelihood that the change in funding methodologies will affect benefits or make the system "unsound" and governments need to be able to make adjustments and have flexibility regarding public fisc.** Louisiana Municipal Association v. State of Louisiana, 893 So2d 809 (La. 2005) Change in funding structure does not mean a change in accrued benefits. Method by which actuarial soundness is to be achieved is left to the legislature. Jones v. Board of Trustees, 910 S.W.2d 710 (Ky. 1995), (Plaintiffs failed to prove under funding would affect amount of benefits members would receive.) West Virginia Education Association v. Consolidated Public Retirement Board, 194 W. Va. 501 (1995) (failure to fund in an actuarially sound manner impaired participants' contract rights, but restoring actuarial soundness over a 40 year period mooted the violation; court imposed permanent injunction on diversion of funds); Board of Education v. New York State Teachers' Retirement System, 605 N.Y.S. 2d 432 (N.Y. App. Dept. 1993). (Deferral of annual contribution was permissible because legislature left independent authority with the fund management to accept or reject interest assumption in valuation.). Gudzek v. McCall, 193 Msc2d 759 (Supreme Ct of NY. Sept 17, 2002) (Starting to pay administrative expense from the plan assets instead of a separate employer contribution did not destabilizes the retirement system or creates an inappropriate level of risk. Plaintiffs failed to demonstrate how their benefits might be depleted by the legislation.). Retired Public Employees Council of Washington v. Charles, 148 Wn2d 602 (Wash. 2003). Legislative change to funding formulas and actuarial methodologies not impairment of contract because there was no showing the reduced contribution rates would harm the systems If the plan is actuarially and fiscally sound, then the contract was not impaired because there is no indication the lowered contribution rates render the system actuarially unsound.

PRACTICE NOTE: The actuaries that the author has worked with take the position that so long as there is an actuarially reasonable funding methodology and schedule in place, merely having an accrued actuarial liability, even a large one, does not make the plan actuarially unsound.

iii. **Impairments found because members have rights to actuarially sound plan.** Bd. of Administration of the Public Employees' Retirement System. V. Wilson, 52 Ca. App. 4th 1109, 61 Cal Rptr.2d 207 (1997). The legislature, in responding to budget pressures, could not change the payment schedule for employer contributions from monthly to annually, 12 months in arrears, because this constituted a substantial impairment of that right, which was not accompanied by any offsetting advantage and which was not shown to be necessary. McCall v. New York, 640 N.Y.S. 2d 79 (N.Y. App. Dept. 1996). Crediting assets in the supplemental retirement fund to employers to offset a funding shortfall was found to be a violation of beneficiary contractual rights because of interference with fund management prerogatives. McDermott v. Regan, 587 N.Y.S.2d 533 (N.Y. Sup. Ct. 1992). Legislative change in actuarial funding method impairs contract. Municipality of Anchorage v. Jack Gallion and Anchorage Police and Fire Retirees Association v. Board of Trustees of the Anchorage Police and Fire Retirement System, 944 P.2d 436 (Alaska, 1997). Ordinance impaired vested rights of members of fully funded plans to have actuarial soundness of their

plans evaluated separately from that of under funded plan and thus violated constitutional provision prohibiting impairment of accrued benefits.

Questions: If the State guarantees benefit payments, would that matter? Does it matter if members are entitled to credit and benefits only if the employer actually makes contributions (implying that it could not.) Also, presumably if the Board's have the authority to make actuarial funding decisions, either to select methodologies, investment earning assumptions, life expectancy table, etc., those decisions do not impair contracts.

e. Privacy issues under Right to Know laws. Pennsylvania State University v. State Employees' Retirement Board, 880 A.2d 757 (Pa. Cmwlth. 2005), aff. 594 Pa. 244, 935 A.2d 530 (2007) concluded that there was not a contractual right to privacy that was impermissibly impaired by a Right to Know Law enacted after the start of work.

f. Binding arbitration or right to negotiate over pension benefits. If the constitution permits but does not mandate that the legislature allow collective bargaining over pension benefits, then it is permissible to remove the right to collectively bargain or go to binding arbitration over pension benefits and fix those benefits by statute. Pennsylvania State Troopers Association v. Commonwealth, 145 Pa. Commonwealth Ct. 291, 603 A.2d 253 (1992), aff'd per curiam 533 Pa. 111, 619 A.2d 1355 (1993).

g. Offsets. Retirement Code provision allowing set-off of amount owed to the Commonwealth against retirement benefits of member who was vested on date of enactment of set-off does not unconstitutionally impair contract. Cianfrani v. State Employees Retirement Board, 57 Pa. Commonwealth Ct. 143, 426 A.2d 1260 (1981) aff'd per curiam 501 Pa. 189, 460 A.2d 753 (1983).

h. Return to work provisions. Generally not protected, but discussed in the next section on when and how benefits can be changed.

i. Post termination or post retirement retroactive benefit enhancements after retirement. This involves retroactive benefit enhancements and ad hoc COLAs. (Automatic COLAs are presumably would have the same status as other benefits earned during service.) One would think that post retirement ad hoc COLAs or retroactive post termination benefit increases would be gratuities and thus able to be amended or withdrawn. But see Nicholas v. The State of Nevada 992 P2d 262 (Nev. 2000) to the contrary. (Retroactive post termination benefit increases vested.) Does it make a difference that COLAs are authorized under a constitutional provision that makes them an exception to the constitutional prohibition against additional salary after performance of duties? Pa. Const. . Does it make a difference if the constitution prohibits gratuities?

j. Is the elimination of choices (say one of 4 actuarially equivalent benefit payment options) an unconstitutional impairment of contract. Probably not, because the value of the benefit is unchanged and the loss of a payment option could be viewed as a di minimus change.

k. Health benefits. The rules are different than for pensions and this a subject for a full outline, so not covered here.

D. HOW CAN BENEFIT TERMS BE CHANGED AND FOR WHAT REASONS AND IN WHAT CIRCUMSTANTCES?

PRACTICE TIP: If a challenged benefit carries with it a lower employee contribution rate be sure to counterclaim for the higher contributions in the event the plaintiffs win. Otherwise, you risk having waived the higher contributions even though you must now pay the higher benefit. See, Catania v. Commonwealth, 71 Pa. Commonwealth Ct. 393, 455 A.2d 1250 (1983).

1. Reservation of Rights

As contract rights have become stronger with a greater likelihood hood of implied contractual rights being drawn from the statutes by the courts, reservation of rights provisions probably need to be more explicit and stronger. Even a reservation of rights clause, however, may not allow the reduction of already accrued benefits if the jurisdiction adopts the position that pension are deferred compensation currently earned. To do so would be tantamount to retroactively decreasing salaries and trying to recoup money already paid in paychecks (or to decide not the pay the current paycheck that is two-weeks deferred under the payroll system.)

2. Consent (Expressed or implied). Consent to contract changes so that the change is either mutual, or at least not unilateral can be obtained in a number of ways, either expressly or implicitly. Because these grade into each other, a number of different examples of how consent might be obtained will be listed. Note that some of these may require advance statutory language and plan design planning.

3. A voluntary transfer from one pension plan to another offered by the same employer without a break in employment is a consent to the terms of the new plan, even if a reduction in benefits occurs or the amendments were enacted while a member of the old plan. See, Osser v. City of Philadelphia, 75 Pa. Commonwealth Ct. 145, 461 A.2d 639 (1983), rev. 506 Pa. 339, 485 A.2d 392 (1985), on remand 94 Pa. Commonwealth Ct. 116, 503 466 (1986).

4. Consent can be given through participant "opt in" or "opt-out" elections for new benefit tiers. Generally, "opt-in" elections are stronger legally, as they require affirmative consent. "Opt-out" member elections mean the default result is the lower benefit and knowing and informed consent is harder for the plan to establish when the inevitable "I forgot" challenge occurs. Members might need to be given incentives to opt-into lower benefit structures, which makes this a plan design issue so not as to spend all the savings of the new tier in the cost of the incentives.

5. Union negotiations and binding arbitration equals consent. Unions stand in the place of their membership and collectively agree for the members in areas within the scope of their authority. By going to binding arbitration the union agrees in advance to the total result of the negotiated contract or binding arbitration award. Union members cannot selectively choose or reject aspects of a negotiated agreement or arbitration award as they would wish. Pennsylvania State Troopers Association v. State Employes' Retirement Board, 677 A.2d 1329 (Pa. Cmwlth. 1996), alloc. den. 547 Pa. 734, 689 A.2d 237 (1997).

6. Does plan membership voting on changes equal consent or is it a tyranny of the majority that is not able to strip away the economic and contract rights of the individual plan members?

7. Speech and Debate Clause. Plan changes were not unconstitutional as applied to legislators because the legislature establishes and adopts its own pension benefits and the plaintiffs were in the legislature at the time. State Employes' Retirement Board v. Bower, 1 Pa. Commonwealth Ct. 537, 275 A.2d 429 (1971), Harper v. State Employees' Retirement System, 154 Pa. Commonwealth Ct. 573, 624 A.2d 279 (1993) aff'd 538 Pa. 520, 649 A.2d 643 (1994). But this rationale may be flawed because it ignores the tyranny of the majority concept. Just because a majority of legislators may be willing to accept a two-tiered plan does not mean is it not unconstitutional as to the minority who want to change it, but cannot because they lack the votes. However, in Cianfrani v. State Employees' Retirement Board, 57 Pa. Commonwealth Ct. 135, 417 A.2d 279 (1980), aff'd on reconsideration 57 Pa. Commonwealth Ct. 143, 426 A.2d 1260 (1981) aff'd per curiam 501 Pa. 189, 460 A.2d 753 (1983) where a forfeiture statute was being applied to a legislator who claimed it was an unconstitutional impairment of contract, the legislator successfully used the Speech and Debate clause to keep his vote in favor of the forfeiture statute from being considered his consent to it.

8. Do new terms of elected office create new employment and pension contracts subjecting the occupant to new contract terms and changes since the last election? Or is employment considered continuous? What about shifting from one employer to another in the same retirement system (say from school district to school district)? Does it matter what rights the member has to access is benefit and make "positive" decisions during the transitions. It might be difficult to argue that the break in service is not enough to give the member all the elections available o a new member, or the annuity rights available to a terminated member, but is a sufficient break in service to impose new contract terms.

9. Forfeiture statute that provide that "each time a public officer or public employee is elected, appointed, promoted, or otherwise changes a job classification, there is a termination and renewal of the contract for purposes of [a pension forfeiture when convicted statute]" is not an unconstitutional impairment of contract when applied to the entire benefit of a fully vested member who is reelected or appointed to office. Shiomos v. State Employes' Retirement Board, 132 Pa. Commonwealth Ct. 379, 572 A.2d 1311 (1990), aff'd 533 Pa. 588, 626 A.2d 158 (1993).

a. If such a forfeiture would be unconstitutional but for this expressed language, then is the insertion of this language into the pension contract itself an impairment of contract? And if it is not, is this language needed at all?

b. What is the effect of a nominal change in classification, without a change in duties or compensation. What if the job change is involuntary job change due to a demotion, or the employer reorganizing its agencies or civil service bumping?

c. In this validity of this pension forfeiture statutory provision where the consent for contract changes is deemed given by new hire, election, appointment, promotion, or reclassification the result of the facts and underlying issues involved? Would a similar "deemed consent" provision will be upheld if inserted as a rule of general applicability in the Retirement Codes.

10. Police powers and public good. Statutes that are passed by the legislature that are necessary for the general good of the public are constitutional even if the statute incidentally alters existing contract rights. Cianfrani v. State Employees' Retirement Board, 57 Pa. Commonwealth Ct. 143, 426 A.2d 1260 (1981) aff'd per curiam 501 Pa. 189, 460 A.2d 753 (1983). Is legislation making pension

benefits marital property and subject to equitable distribution (where previously they were the sole property of the member and under the member's exclusive control) an unconstitutional impairment of contract? Or would it also fall into the "police power" or "good of the public" exception?. BUT in Mager v. State Employees' Retirement Board, 849 A.2d 287 (Pa. Cmwlth. 2004) alloc. den. 580 Pa. 691, 859 A.2d 770 (2004) the retroactive application of a newly enacted probate code provision that automatically removed ex spouses from retirement beneficiary nominations to invalidate a beneficiary nomination when the retirement and divorce occurred before the enactment of the provision was held to impair constitutionally protected contract rights.

11. Legislatively or administratively imposed involuntary terminations that incidentally eliminate pension rights (agencies go out of business, programs are transferred to different employers, higher job standards are required, bona fide mandatory retirements ages are imposed, furloughs occur etc.) are job and employment actions, not pension impairments. The pension contract does not create an independent or constitutional right to continued employment. DiNubile v. Kent, 19 Pa. Commonwealth Ct. 438, 338 A.2d 722 (1975) aff'd 466 Pa. 572, 353 A.2d 839 (1976), Chuk v. State Employees' Retirement System, 885 A.2d 605 (Pa. Cmwlth. 2005)

12. A new contract is formed by a break in service, either with or without withdrawing contributions or severing membership in the plan, and then returning to service. (This is where the issue of whether the pension terms are part of the employment contract or if there is a separate pension contract based upon membership in the system, including being inactive or a vestee or annuitant becomes important.) Carabello v. Bd of Pensions and Retirement, 893 A.2d 211 (Pa. Cmwlth,. 2006) Withdrawing contributions means that when you return and reinstate service you are placed in the new lower tier without an impairment of contracts. It is not an unconstitutional impairment of contract to have a new and lower class of service multiplier for any employee who discontinues and then resumes service. Rybak v. State Employees' Retirement Board, 154 Pa. Commonwealth Ct. 586, 624 A.2d 286 (1993), aff'd 538 Pa. 476, 649 A.2d 431 (1994); Klein v. SERB, 108 Pa. Commonwealth Ct. 39, 528 A.2d 1071 (1987), rev'd., 521 Pa. 330, 555 A.2d 1216 (1989), on reconsideration, 523 Pa. 188, 565 A.2d 757 (1989). Wingert v. State Employes' Retirement Board, 138 Pa. Commonwealth Ct. 43, 589 A.2d 269 (1991) Changing the benefits for annuitants who return to service during period annuitant was retired was not an unconstitutional impairment. Annuitant took new job as he found it. Was not an employee when the law was changed. Retired Adjunct Professors v. Almond, 690 A.2d 1342 (R.I. 1997). Professors had no reasonable expectation that they would be re-employed following retirement. Therefore, the legislature could amend the law to require suspension of benefits upon any re-employment by the state. But see (which seems to be an aberration) American Federation of State, County and Municipal Employees v. Commonwealth, 111 Pa. Commonwealth Ct. 81, 533 A.2d 785 (1987), aff'd 520 Pa. 363, 554 A.2d 39 (1989) where continuous membership in the retirement system as an annuitant, inactive member or vestee was the determining factor, and not continuous employment. (Note. The court's opinion is internally inconsistent.)

13. "Windows" or temporary benefits are allowed. The expiration of a window or temporary benefit is not an impairment of contract because by its term when establish it was limited and was going to expire.

14. Can an employee be required to waive or relinquish an already vested benefit as a condition of future employment?

15. Limits on benefits can be imposed simultaneously with the grant of those benefits, even for existing employees. The imposition of the $12,000 limit by the "D-3 legislation" was not an unconstitutional impairment of contract. Rather, it was an increased and more generous limit created simultaneously with the creation of Class D-3 benefits (when compared to the previous D, D-1, and D-2 limits.) State Employes' Retirement Board v. Bower, 1 Pa. Commonwealth Ct. 537, 275 A.2d 429 (1971). The limit may need to have an escape provision so as to not lower the benefit below what it would have been before the simultaneous increase and limitation.

16. Can future legislatures be bound, either constitutionally, or as matter of public policy?

17. Governmental Bankruptcy. Not available to states, but available to political subdivisions and other governmental entities. Steven Felderstein is presenting a separate outline on bankruptcy.

18. Constitutional amendment. DiNubile v. Kent, 19 Pa. Commonwealth Ct. 438, 338 A.2d 722 (1975), aff'd 466 Pa. 572, 353 A.2d 839 (1976) (the constitution itself cannot be unconstitutional); Gondelman v. Commonwealth, 120 Pa. Commonwealth Ct. 624, 550 A.2d 814 (1988), 520 Pa. 451, 554 A.2d 896 (1989) (All parts of the State constitution are equal.) (Both cases dealing with retirement rights of judges.)

OTHER POSSIBLE CONSTITUTIONAL PROTECTIONS

IV. JUDGES ARE SPECIAL. Pennsylvania Courts have found sources of authority to prevent the reduction of pension benefits for "new" judges grounded in Pennsylvania constitutional provisions that may have corresponding provisions in other state constitutions. A series of benefit changes that could be applied to "new" judges under the contract clause were later declared unconstitutional for "new" judges because the constitution required that judges receive adequate compensation, because the constitutional establishment of a Unified Judicial System prohibited judges on the same bench from receiving different pensions, and because the independence of the judiciary and its status as a coequal branch of government would be at risk if the legislature could establish two-tier benefit structures for new judges. Goodheart v. Casey, 118 Pa. Commonwealth Ct. 75, 545 A.2d 399 (1988), aff'd, 555 A.2d 1210, 521 Pa. 316 (1989) on reconsideration, 565 A.2d 757, 523 Pa. 188 (1989). Short of a constitutional amendment, the solutions seem to be limited to rechallenging the plurality decision in a more favorable fact pattern, trying to draft changes to be effective when the last sitting judge retires or is reelected, spinning out the judges into a separate pension plan so any tax qualification problems that cannot be fixed under state law will not taint the rest of the retirement system, or not enact any more pension benefit enhancements for judges.

V. EXPOST FACTO LAWS: Pension benefit changes, particularly those imposing or enlarging pension forfeiture provisions based upon the conviction of crimes, if applied retroactively or in situations where the crimes or the forfeiture-triggering event (Conviction, Guilty plea, etc.) occurred before the effective date of the forfeiture provision may be unconstitutional ex post facto laws even if not violative of contract impairment rules. Burello v. State Employes' Retirement System, 49 Pa. Commonwealth Ct. 364, 411 A.2d 852 (1980). The solution would be to avoid retroactive criminal forfeiture provisions.

VI. DUE PROCESS CLAUSE

During the first part of the 20th century, the courts relied on substantive due process to invalidate state laws. Although most jurisdictions today use contract impairment theories when pension laws are changed, in Connecticut public pension rights are property rights protected by the due process clause. Pineman v. Oechslin, 488 A.2d 803 (Conn. 1985). Additionally, it is not unusual to see a due process claim or an unlawful taking claim made in conjunction with a contract impairment claim in other jurisdictions. The due process clause generally protects against individuals with property rights in their pension from arbitrary state legislation.

A full-blown analysis of substantive due process in the public pension arena is beyond the scope of this Outline, but a few notes are in order. The focus of the rational basis test for substantive due process is whether it was irrational for the law to have been passed at all. To prove that a statute is irrational and therefore unconstitutional under substantive due process, the challenger must show that there is no relationship between the statute and a legitimate state interest. Morris v. Public School Employes' Retirement System, 114 Pa. Commonwealth Ct. 369, 538 A.2d 1385 (1988) alloc. den. 521 Pa. 615, 557 A.2d 345 (1989). For substantive due process purposes, a member's property interest in retirement benefits extends only to those benefits to which he is legally entitled. Hughes v. Public School Employes' Retirement Board, 662 A.2d 701 (Pa. Cmwlth. 1995), alloc. den. 542 Pa. 678, 668 A.2d 1139 (1995)

The Fourteenth Amendment requires due process only when the state seeks to deprive a person of life, liberty or property interests. Therefore, if the plaintiff does not have a property interest in the benefit at issue, a due process claim will not lie. Peterson v. Sweetwater County School Dist. No. one, 929 P.2d 525 (Wyo. Dec. 17, 1996). Linda Hoffman v. Pennsylvania State Employes' Retirement Board, 743 A.2d 1014 (Pa. Cmwlth. 2000), alloc. den. 563 Pa. 705, 761 A.2d 552 (2000).

VII. Equal Protection Clause

Equal protection challenges in the area of pension benefit changes usually arise in the context of two tier pension benefit structures where either the "new" employees are receiving a usually lower benefit than "old" employees, or when changes in the benefit structure result in two classes of employees receiving different benefits.

Pension benefits need not be equal for employees performing similar work. Using date of hire or taking office or type or size of employer or underlying salary payments to distinguish different pension benefit levels is acceptable. "Two-tier" pension plans based on date of hire are not prohibited by equal protection concerns. Harper v. State Employees' Retirement System, 154 Pa. Commonwealth Ct. 573, 624 A.2d 279 (1993) aff'd 538 Pa. 520, 649 A.2d 643 (1994); Bean v. State of Montana, 342 Mont. 85, 179 P. 3d 524 (2008). Two tier plans are valid if the later tier provides the higher benefits. Brown v. State of New Jersey, 356 NJ Super 71 (Superior Court of New Jersey Appellate Division, December 17, 2002); Donahue v. Public School Employees' Retirement System, 834 A.2d 655 (Pa. Cmwlth. 2003), aff'd per curiam, 580 Pa. 14, 858 A.2d 1162 (2004), cert. denied, 543 U.S. 1122, 125 S.Ct. 1099, 160 L.Ed. 2d 1070, 73 U.S.L.W. 3448 (2005); Kelley v. State Employees' Retirement Board, 890 A.2d 1173 (Pa. Cmwlth. 2006), aff'd in part, rev. in part 593 Pa.

487, 932 A.2d 61 (2007), cert. den. ___ U.S. ___, 128 S.Ct. 1260, 170 L.Ed.2d 69, 76 U.S.L.W. 3439 (2008). For a different result see Employees' Retirement System of Georgia v. Martin, 272 Ga. 535 (Ga. 2000.) (Date of membership in system did not provide a rational basis for different treatment.)

Pension benefits are treated as economic issues and are subject to a rational basis analysis when challenged as a denial of equal protection. To prove that a statute is irrational and therefore unconstitutional under equal protection, the challenger must show that the different treatment is unrelated to a legitimate state interest. Morris v. Public School Employes' Retirement System, 114 Pa. Commonwealth Ct. 369, 538 A.2d 1385 (1988) alloc. den. 521 Pa. 615, 557 A.2d 345 (1989). Mere dissatisfaction with one's compensation cannot be transformed into a constitutional challenge even though another employee may be receiving greater compensation for similar service. Harper v. State Employees' Retirement System, 154 Pa. Commonwealth Ct. 573, 624 A.2d 279 (1993) aff'd 538 Pa. 520, 649 A.2d 643 (1994). Notwithstanding the rational basis test, because suspect classes for equal protection analysis are race, national original and for state law purposes, alienage and quasi-suspect classes are gender and legitimacy, pension benefit changes that attempt to use these sorts of classifications could be subject to strict or heightened strict scrutiny.

The actuarial soundness of the system is a sufficient legitimate state goal. Rybak v. State Employees' Retirement Board, 154 Pa. Commonwealth Ct. 586, 624 A.2d 286 (1993), aff'd 538 Pa. 476, 649 A.2d 431 (1994). Even mere administrative efficiency is acceptable as a rational basis for differentiating between benefit levels and administrative schemes. Linda Hoffman v. Pennsylvania State Employes' Retirement Board, 743 A.2d 1014 (Pa. Cmwlth. 2000), alloc. den. 563 Pa. 705, 761 A.2d 552 (2000).

The U.S. Supreme Court has adopted the following rules.

1. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality."

2. "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific."

3. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Morris v. Public School Employes' Retirement System, 114 Pa. Commonwealth Ct. 369, 538 A.2d 1385 (1988), alloc. den. 521 Pa. 615, 557 A.2d 345 (1989)

When justifying the classifications used by the legislator, it is not necessary to show that the legislature actually considered purported reasons for the classification. Linda Hoffman v. Pennsylvania State Employes' Retirement Board, 743 A.2d 1014 (Pa. Cmwlth. 2000), alloc. den. 563 Pa. 705, 761 A.2d 552 (2000). This means that you can get as creative as you can to invent reasons for the legislation!

Pam Anderson

From: "Marcucci, Nicholas" <nmarcucci@state.pa.us>
To: "'Mumford, Terry'" <Terry.Mumford@icemiller.com>; <pama@nappa.org>; <ptaylor@independentfiduciary.com>; <peter_mixon@calpers.ca.gov>; <james.salvie@trb.state.ma.us>; <gsmith@copera.org>; <Eric.Wampler@ky.gov>; "'Toumanoff, Michael'" <MToumanoff@manatt.com>
Cc: <rich@nappa.org>
Sent: Wednesday, June 02, 2010 7:51 AM
Subject: RE: Conference Attendance and Board membership

Dear Fellow Board members, Rich and Pam:

I recently received final denial from the Governor's Office on attending the NAPPA conference and meetings in Asheville this month. As part of that process, my Executive Director also made it clear that he does not want me to re-up on Board membership when my term expires at this meeting. I suppose that if the Governor's office will not permit me to attend meetings (and given the continuing budget crisis in Pennsylvania, I do not see that freeze lifting anytime soon) it is probably better for NAPPA as an organization to have a Board member who is able to give NAPPA the attention it deserves. I am writing so that you can be thinking in advance about the Board membership issues for this month's meeting.

I have enjoyed my participation on the Board and will be available if you want me to be conferenced-in on the Board meeting held in conjunction with the Educational sessions.

Sincerely yours

Joe Marcucci

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