JCPER

JOINT COMMITIEE ON PUBLIC EMPLOYEE RETIREMENT
SECOND QUARTER MEETING
April 8, 2010

The Joint Committee on Public Employee Retirement held its 2nd Quarter Meeting at 9:00am in House Hearing Room 1. With a quorum being established, Chairman Franz called the meeting to order. Joint Committee members in attendance were Senators Crowell, Days, Keaveny and Scott and Representatives Atkins, Franz, Norr, Schlottach, Viebrock and Yaeger. Senators Green and Rupp were not in attendance.

The Chairman turned the meeting over to the Executive Director, Ronda Stegmann. The status of proposed pension legislation was reviewed. JCPER is currently monitoring 50 pension related bills. It was noted that SB 896 was heard last week, and a Senate Substitute was introduced last night which would maintain the defined benefit structure while changing the age and service requirements.

A legal opinion from Thompson Coburn, who is outside legal counsel for the Missouri State Employees' Retirement System was presented to the committee. The opinion concludes that any changes to the MOSERS statutes, effecting current employees, would face judicial challenges by current MOSERS members under article I, section 13 of the Missouri Constitution, which prohibits the State from passing laws that impair the obligation of contracts.

Fourth quarter reporting (2009) from 51 of the 85 defined benefit plans was presented to the committee. Double-digit rates of return have been reported by plans reporting for this quarter.

An article from the Springfield News-Leader was handed out to the committee. This article indicates that the City plans to file a request for a declaratory judgment regarding the definition of "actuarial soundness," as pertains to the granting of cost-of-living adjustments to retired police & firefighters.

The committee was given a summary of a Supreme Court ruling (SC89896) pertaining to the Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System. PACARS appealed the trial court's judgment that the portion of the statutory section requiring counties to make pension contributions for prosecutors is an unconstitutional mandate under the Hancock Amendment. The Supreme Court ruled that the trial court erred in concluding that section 56.807 violates the Hancock Amendment and refused to require the County to make the pension contribution.

The Committee discussed the benefits of attending annual Missouri Association of Public Employees Retirement Systems (MAPERS) conference. By a unanimous vote, expenses for JCPER staff to attend the 2010 conference were approved. Expenses for Committee member attendance will not be covered this year, but all were encouraged to attend this educational session from their office budgets.

No further business being presented, the committee adjourned.

Ronda Stegmann
Executive Director

JCPER

JOINT COMMITTEE ON PUBLIC EMPLOYEE RETIREMENT

2nd QUARTER MEETING
April 8, 2010
9:00 am

AGENDA

Roll Call

Legislation

Quarterly Plan Reporting

Springfield Police & Fire Retirement Plan
Statutory Provisions / Watch List Criteria

Prosecuting Attorneys' & Circuit Attorneys' Retirement System

MAPERS Conference

News Articles

Other Business

2010 RETIREMENT LEGISLATION - SENATE

SENATE BILLS			SENATE ACTION						HOUSE ACTION				OTHER ACTION	
Bill Number	System Affected	Description	Sponsor	Committee Assigned	Date/ Time Hearing Rm	Committee Action	Perfected	Passed 3rd Read	Committee Assigned	Date/ Time Hearing Rm	Committee Action	Passed 3rd Read	Notes	Governor Action
SB 580	CERF	Clarifies that counties adopting a charter government after 1/1/08 will continue to collect delinquent & back tax fee at the same level as prior to charter adoption.	Griesheimer	Eco Devo & Local Government	Hearing Complete 01/27/10	DP w/ SCS 01/27/10	02/10/10	02/18/10 with Emergency Clause	Local Government	Hearing Complete 04/07/10				
SB 643	St. Louis Police	Provides for local control of a St. Louis City police force if passed through ordinance. Requires the associated retirement system to continue to be governed under Chaper 86.	Keaveny	General Laws	Hearing complete 03/02/10	DP w/ SCS 03/30/10								
SB 675	St. Louis Police	Provides for local control of a St. Louis City police force if passed through ordinance. Requires the associated retirement system to continue to be governed under Chaper 86.	Wright-Jones	General Laws	Hearing Cancelled 03/02/10									
SB 707	PSRS / PEERS	Allows PSRS members age 75 & over by 01/01/11 to receive additional $5 monthly times years of service & PEERS members to receive additional $3 monthly times years of service.	McKenna	Veteran's Affairs, Pensions & Urban Affairs										
SB 714	PACARS, LAGERS, MOSERS/ MPERS, PSRS	Allows State Auditor to audit public pension plans every 3 years	Crowell	Veteran's Affairs, Pensions & Urban Affairs	Hearing Complete 02/18/10	DP 02/24/10	On Inf. Perfection Calendar							
SB 715	MCHCP	Consolidates all state agencies and colleges or universities into MCHCP	Crowell	Finance, Govt, Elections	Hearing Complete 03/01/10									
SB 736	CERF	Clarifies that counties adopting a charter government after 1/1/08 will continue to collect delinquent & back tax fee at the same level as prior to charter adoption.	McKenna	Eco Devo & Local Government	Hearing Complete 02/3/10	DP Consent 02/11/10	Removed from Consent Calendar							

2010 RETIREMENT LEGISLATION - SENATE

SENATE BILLS			SENATE ACTION						HOUSE ACTION				OTHER ACTION	
Bill Number	System Affected	Description	Sponsor	Committee Assigned	Date/ Time Hearing Rm	Committee Action	Perfected	Passed 3rd Read	Committee Assigned	Date/ Time Hearing Rm	Committee Action	Passed 3rd Read	Notes	Governor Action
SB 797	PACARS	Provides the prosecuting attorney system in Missouri to be converted to a district attorney system.	Green	Judiciary	Hearing Complete 02/15/10	DP 02/22/10	On Inf. Perfection Calendar							
SB 894	MCHCP	Modifies benefit offering for medicare eligible state retirees	Dempsey	Small Business & Insurance	Hearing Complete 02/23/10	DP 03/16/10	3/23/10	4/6/10						
SB 896	MOSERS / MPERS	Requires all state employees hired on or after January 1, 2011 to participate in a defined contribution retirement plan under MOSERS or MPERS	Shields	Veteran's Affairs, Pensions & Urban Affairs	Hearing Complete 02/18/10	DP 02/24/10	On Inf. Perfection Calendar w/ amend pending							
SB 938	KCPSRS	Requires a 50% compensation limit for retirees returning to system covered work and includes IRC conformance provisions	Justus	Veteran's Affairs, Pensions & Urban Affairs										
SB 1048	MOSERS / MPERS/ Judicial Plan	Any state employee hired after 01/01/11 will be required to reach age 67 with at least 10 years of service or utilize Rule of 90 with age 55, to be eligible for normal retirement benefit and will be required to contribute 4% to the system. General Assembly, Elected Official and Judicial provisions are also modified.	Crowell	Veteran's Affairs, Pensions & Urban Affairs										
SB 1049	MOSERS / MPERS/ Judicial Plan	Any state employee, General Assembly member, Elected Official, or Judge who begins employment after 1/1/11, will be required to reach age 62 with service requirements to be eligible for retirement, will be required to contribute 5% to the system, and modifies judicial return to work & survivor provisions	Crowell	Veteran's Affairs, Pensions & Urban Affairs										

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SENATE BILLS			SENATE ACTION						HOUSE ACTION				OTHER ACTION	
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SB 1050	MOSERS / MPERS	Creates the Missouri Public Trust Company to manage investments for MOSERS & MPERS	Crowell	Veteran's Affairs, Pensions & Urban Affairs										

2010 RETIREMENT LEGISLATION - HOUSE

HOUSE BILLS			HOUSE ACTION						SENATE ACTION				OTHER ACTION	
Bill Number	System Affected	Description	Sponsor	Committee Assigned	Date/ Time Hearing Rm	Committee Action	Perfected	Passed 3rd Read	Committee Assigned	Date/ Time Hearing Rm	Committee Action	Passed 3rd Read	Notes	Governor Action
HB 1264	MOSERS & MPERS	Allows members, who retire under a joint/survivor option, to elect & receive a normal annuity upon marriage dissolution under certain circumstances	Komo											
HB 1414	MOSERS	Elected or appointed official of this state or any political subdivision found or pleads guilty of a felony foreits all benefits	McGhee	Ethics	Scheduled Not Heard 01/26/10									
HB 1424	CERF	Clarifies that counties adopting a charter government after 1/1/08 will collect delinquent & back tax fee at same level prior to charter adoption	Franz	Ways & Means	Hearing Complete 02/18/10	DP Consent Rules 03/17/10	03/24/10	03/29/10	Ways & Means	Hearing Complete 04/07/10				
HB 1471	City of Peculiar	Allows the City of Peculiar to submit to voters a retail sales tax of up to .5% for Public Safety Department use.	Scavuzzo											
HB 1533	LAGERS	Reduces the minimum service retirement age for a county road worker from age 60 to age 55	Fischer, L											
HB 1583	MOSERS	Allows active members eligible for normal retirement with an annuity commencing between 1/1/10 and 9/1/10 to retire and receive a health care incentive	Jones, K.											
HB 1597	MOSERS	Establishes a minimum salary for certain employees with the Department of Corrections	Deeken											

2010 RETIREMENT LEGISLATION - HOUSE

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HB 1601	St. Louis Police	Provides for local control of a St. Louis City police force if passed through ordinance. Requires the associated retirement system to continue to be governed under Chapter 86	Nasheed	Urban Issues	Hearing Complete 03/01/10	DP Rules 03/22/10	Perfection Defeated 03/31/10							
HB 1687	MOSERS & MPERS	Authorizes an annual salary adjustment for state employees equal to cost of living adjustment associated with the CPI	LeVota											
HB 1704	MOSERS & MPERS	Requires the transfer of funds to cover a transferred service election between the two systems	Franz & Schlottach											
HB 1715	MCHCP, MoDOT, Conservation	Removes eligibility for state employees hired after 01/01/12 for sponsored health insurance benefits upon retirement	Parson											
HB 1752	St. Louis PSRS	Modifies the make-up of the board of trustees	Chappelle-Nadal											
HB 1798	MOSERS	Provides auto enrollment in the state employees' deferred compensation program for eligible employees hired on or after 9/1/10	Bruns											
HB 1899	Police Chiefs/ Police Officers Retirement Fund	Establishes the Police Chiefs/Police Officers Retirement Fund which would provide a retirement annuity to municipal police chiefs and officers	Dugger	Public Safety										
HB 1992	Law Enforcement	Creates the Law Enforcement Safety Fund and authorizes a $7 surcharge in certain criminal cases to fund a contribution system for certain law enforcement employees	Fischer, L.											

2010 RETIREMENT LEGISLATION - HOUSE

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HB 2096	Sheriffs' Retirement System	Modifies when an employee who is a member of the Sheriffs' Retirement System and elected at a special election receives creditable service	Bruns											
HB 2100	CERF	Modifies direct rollover provisions for the County Employees' Retirement System	Franz											
HB 2112	MOSERS	Prohibits members of the General Assembly who have not served at least 3 full biennial assemblies from accruing creditable service under the Year 2000 Plan	Koenig											
HB 2113	Statutory Public Plans	Establishes a defined contribution retirement plan for new hires on or after 1-1-11	Koenig	Retirement										
HB 2122	LAGERS	Allows LAGERS benefit recipients to serve as elected officials for the jurisdiction from which they retired without forfeiting their monthly retirement benefit	Dougherty	Retirement	Hearing Complete 03/16/10									
HB 2134	PSRS/ PEERS	Provides an exclusion in the prohibition of nonprofit organization coverage under systems.	Flook											
HB 2162	KC Police & Civilian Police	Provisions to modify starting date of retirement benefit in event of death of member &/or surviving spouse & modifies criteria associated with prior service purchase	Flook	Retirement										

2010 RETIREMENT LEGISLATION - HOUSE

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HB 2221	KC PSRS	Requires a 50% compensation limit for retirees returning to system covered work and includes IRC conformance provisions	Curls	Retirement	Hearing Complete 03/16/10									
HB 2292	PEERS	Beginning 8/28/10, allows a person employed 17 or less hours per week in a school to be employed in another public school.	Fallert											
HB 2308	MCHCP	Modifies benefit offering for medicare eligible state retirees	Burlison											
HB 2349	University of Missouri	Allows employee of the University of Missouri to be entitled to a leave of absence for military service or election to public office. Such leave shall not result in retirement benefit loss.	Nolte											
HB 2357	Public Retirement Plans	Prohibits Missouri public retirement plans from investing funds with foreign companies located in countries that sponsor terrorism	Smith	Veterans	Hearing Complete 03/30/10	DP Rules w/ HCS 04/06/10	On Perfection Calendar							
HB 2409	PSRS	Increases the retiree return to work limits from 550 hours to 750 hours per school year and compensation limits from 50% to 75% compensation. Requires employee contribution for retiree working over 550 hours but less than 750 hours per year.	Denison											
HB 2417	MOSERS & MPERS	Allows Water Patrol employees transferred to the Highway Patrol to elect retirement benefit coverage under MPERS within 90 days of 1/1/11	Roorda	Public Safety	Hearing Complete 04/07/10									

2010 RETIREMENT LEGISLATION - HOUSE

HOUSE BILLS			HOUSE ACTION						SENATE ACTION				OTHER ACTION	
Bill Number	System Affected	Description	Sponsor	Committee Assigned	Date/ Time Hearing Rm	Committee Action	Perfected	Passed 3rd Read	Committee Assigned	Date/ Time Hearing Rm	Committee Action	Passed 3rd Read	Notes	Governor Action
HCR 4	Social Security	Urges Congress to support repeal of the GPO and WEP	Nolte											

2010 RETIREMENT LEGISLATION - PENSION EXEMPTION

Bill Number	System Affected	Description	Sponsor	Committee Assigned	Date/ Time Hearing Rm	Committee Action	Perfected	Passed 3rd Read	Committee Assigned	Date/ Time Hearing Rm	Committee Action	Passed 3rd Read	Notes	Governor Action
HB 1576	Age 70 & older	Authorizes a refundable income tax credit for taxpayers 70 years of age or older for 50% of the personal property taxes paid on motor vehicles they own	Hoskins											
HB 1577	Age 65 & older	Authorizes an income tax credit for resident taxpayers who are 65 years of age or older with an adjusted gross income of $9,570 or less	Hoskins											
HJR 67	Age 65 & Over	Proposes constitutional amendment exempting age 65 & over from property tax.	Pratt											

THOMPSON COBURN LLP

One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
FAX 314-552-7000
www.thompsoncoburn.com

March 25, 2010

Allen D. Allred
314-552-6001
FAX 314-552-7001
aallred@
thompsoncoburn.com

The Honorable Jason Crowell
Senator
State Capitol Building
Room 323
Jefferson City, Missouri 65101

Re: MOSERS

Dear Senator Crowell:

The Board of Trustees of the Missouri State Employees' Retirement System ("MOSERS") has asked Thompson Coburn LLP, in our role as counsel for MOSERS, to provide you with the following non-privileged analysis of whether the Missouri Constitution would prohibit certain changes to the MOSERS statutes to: (a) require current MOSERS members prospectively to make contributions to MOSERS to fund their retirement benefits; or (b) reduce future retirement benefits of current, non-retired MOSERS members. We expect that any change to the MOSERS statutes would face judicial challenges by current MOSERS members under article I, section 13 of the Missouri Constitution, which prohibits the State from passing laws that impair the obligation of contracts.[1] While it cannot be predicted with certainty how the Supreme Court of Missouri would rule on the legality of such changes to the MOSERS statutes, the following discussion addresses the legal and procedural issues that likely would arise in any case challenging such statutory changes.[2]

[1] Such judicial challenges might also assert claims under the Contract Clause in article I, section 10 of the United States Constitution, which also prohibits the State from passing laws that impair the obligation of contracts.

[2] Because the State clearly may require member contributions from future MOSERS members and may restructure retirement benefits for future MOSERS members, this letter does not further address those issues.

Summary

The Supreme Court of Missouri has not yet addressed whether an amendment to the MOSERS statutes requiring current MOSERS members to make contributions or reducing their future retirement benefits would violate the Missouri Constitution. However, based on decisions in other Missouri cases involving changes in retirement systems, the MOSERS statutes, and cases from other jurisdictions, there is a significant probability that the Supreme Court of Missouri would rule that such a change to the MOSERS statutes violates the prohibition in article I, section 13 of the Missouri Constitution against laws that impair the obligation of contracts.

The Supreme Court of Missouri has previously ruled that the MOSERS statutes create a contractual relationship between members, the State, and MOSERS. The court has further ruled that where a contract exists between an employer/sponsor of a statutory retirement system and an employee/member, article I, section 13 of the Missouri Constitution prohibits the State from amending the retirement system's statutes in a way that deprives the member of the current level of retirement benefits under the retirement system's existing statutes. Courts in other jurisdictions have generally held that changing retirement system benefit plans to require increased member contributions is an unconstitutional impairment of the members' contracts unless: (a) the statutes establishing the retirement system contain some indication that members are subject to increased contributions in the future; or (b) the increased member contributions are offset by increased benefits to the members. Here, no MOSERS statute expressly reserves any right to require member contributions.

Sections 104.540.1 and 104.1054.1 of the MOSERS statutes are part of the contract between the State and current MOSERS members. They provide: "No alteration, amendment, or repeal of [the MOSERS statutes] shall affect the then existing rights of members and beneficiaries, but shall be effective only as to rights which would otherwise accrue hereunder as a result of services rendered by an employee after such alteration, amendment, or repeal." A plausible argument could be made that requiring member contributions for future service credit or reducing future retirement benefits only affects "rights ... as a result of services rendered by an employee after" an amendment of the MOSERS statutes and, therefore, is permissible under the contract between the State and current MOSERS members. However, the Supreme Court of Missouri is more likely to conclude that requiring future member contributions or reducing future retirement benefits would also impermissibly diminish the vested rights of current MOSERS members for prior services rendered. By requiring member contributions, the State would effectively diminish the value of previously promised retirement benefits by increasing the members' cost to obtain those promised retirement benefits. To be constitutional, a change in the MOSERS statutes to begin requiring contributions from current members would need to be accompanied by offsetting benefits to the members (such as salary increases).

Analysis

I. Relevant Missouri cases involving retirement systems.

Missouri appellate courts have addressed the general nature of statutory retirement systems in Missouri and the constitutionality of several types of changes to those retirement systems, including:

- removing non-retired members from a retirement system;
- increasing benefits for retired members of a retirement system;
- reducing the plan sponsor's contributions to a retirement system; and
- eliminating a portion of unpaid overtime and vacation pay from the calculation of pension benefits.

Missouri appellate courts have not specifically addressed whether a governmental entity may change a retirement system to require increased contributions from current members for future work.

A. Phillip

State ex rel. Phillip v. Public School Retirement System of City of St. Louis, 262 S.W.2d 569 (Mo. banc 1953), is the most analogous Missouri case that involved a change in a retirement system. As originally established in 1944, the Public School Retirement System of the City of St. Louis (the "Retirement System") covered full-time employees of the Board of Education of the City of St. Louis (the "Board of Education"), including non-teachers. In 1953, the General Assembly passed a law (the "1953 Act") that effectively terminated the membership of non-teachers in the Retirement System with the hope that these non-teachers would eventually be covered by the federal Social Security program. The Supreme Court of Missouri held that the State's attempted termination of the non-teachers' membership in the Retirement System was unconstitutional under article I, section 13 of the Missouri Constitution because the State had impaired the obligation of the contract among the non-teachers, the Retirement System, and the Board of Education.

The court observed that the issue was whether the State could exclude active non-teachers (who were not yet receiving retirement benefits) "from all future benefits to which they might be entitled under the terms of the existing Retirement System." Id. at 574. The court stated that this issue depended on: (1) whether the non-teachers had a contractual relationship with the Retirement System and the Board of Education providing for contractual rights to the benefits provided by the Retirement System as it existed before the 1953 Act; and (2) if so, whether the 1953 Act impaired obligations under that contractual relationship. Id. The court

noted that "[a] determination of these issues requires a careful review of specific statutory provisions governing the relationship between the Retirement System and its members prior to the effective date of the 1953 Act." Id. The court further added "that the rights of any beneficiary, or member of any retirement system can only be determined by very careful scrutiny of the detailed provisions of the particular statute controlling the creation and operation of the particular retirement system and under the particular facts of the case." Id. at 577.

The court reviewed the various statutory provisions governing the Retirement System and concluded that these provisions "were intended to and did provide for the creation of specific contractual rights in the members of the Retirement System to obtain specific benefits upon compliance with the terms." Id. at 578. The court summarized these rights as being "to the effect that if such [non-teacher] employees remain employees of said Board and remain members of the Retirement System, make the necessary contributions and meet the requirements thereof, as provided, that they will be entitled to the proposed benefits thereunder." Id. at 577-78. These "contractual rights to potential benefits came into existence as a result of the voluntary acceptance of the offer provided by the statute, the beginning of compliance by the employee-members and the payment of consideration in the form of contributions." Id. at 578.

The court pointed to § 169.510(2), RSMo, which provided: "No alteration, amendment or repeal of sections 169.410 to 169.540 shall be deemed to affect the rights of members of any retirement system established thereunder with reference to deposits previously made, or to reduce any accrued or potential benefits to those who are members at the time when such alterations, amendments, or repeal became effective or to reduce the amount of any retirement allowance then payable." The court found that this statute "evidence[d] an intention to create contractual rights" that "cannot be taken away by legislative action." Id. at 578. Because the 1953 Act "tend[ed] to reduce, divest and destroy in a material and substantial manner the potential rights of the [non-teacher] employees ..., who were members and potential beneficiaries of the Retirement System ... on the effective date of the 1953 Act," the court held that the 1953 Act impaired the obligation of contract and was unconstitutional and void. Id.

The court further observed in dictum that the General Assembly might have been able to implement a substitute retirement plan for the non-teachers so long as there was no material and substantial reduction in the non-teachers' potential retirement benefits. Id. at 580. The court, however, found that the 1953 Act did not provide any substantial substitute plan. Id.

B. Breshears

In State ex rel. Breshears v. Missouri State Employees' Retirement System, 362 S.W.2d 571 (Mo. banc 1962), the Supreme Court of Missouri held that a 1961 amendment to the MOSERS statutes (the "1961 Act") that increased retirement benefits for already-retired MOSERS members was an unconstitutional impairment of the contracts of active MOSERS members in violation of article I, section 13 of the Missouri Constitution. Following its decision in Phillip, the court found that the MOSERS statutes create a contractual relationship among MOSERS members, the State, and MOSERS. Id. at 575. The court cited § 104.540.1, RSMo, which the court found to be similar to § 169.510(2) and which provided: "All payroll deductions and deferred compensation provided for under sections 104.310 to 104.550 are hereby made obligations of the state of Missouri. No alteration, amendment, or repeal of sections 104.310 to 140.550 shall affect the then existing rights of members and beneficiaries, but shall be effective only as to rights which would otherwise accrue hereunder as a result of services rendered by an employee after such alteration, amendment, or repeal." The court noted "active members have certain vested interests, extending at least to all payments which have been made into the retirement fund to the present time; that the legislature may alter, amend or repeal the law, but only subject to the rights existing at that time." Id. at 576. The court believed that the 1961 Act impaired the contractual obligations of active members because the 1961 Act would take a portion of the existing fund to pay the benefit increases to retired members, thereby imperiling the ability of MOSERS to pay benefits to all members.

C. Tomlinson

In Tomlinson v. Kansas City, 391 S.W.2d 850 (Mo. 1965), the Supreme Court of Missouri stressed the significance that provisions such as § 169.510(2) and § 104.540.1 have in determining the contractual rights of members of a retirement plan. In Tomlinson, Kansas City had established the Firemen's Pension Fund of Kansas City (the "Fund") by ordinance. The ordinance required the city to contribute to the Fund the amount deemed necessary by an actuary to keep the Fund actuarially sound. After the actuary found that the city needed to increase its contribution rate from 10 percent to 14½ percent of employment compensation paid to members of the Fund, the city balked and amended its ordinance to grant it discretion as to the amount of contributions that it would make to the Fund. Some members challenged the city's actions in failing to contribute at the 14½-percent rate. The court rejected the challenge, concluding that the city's obligation to contribute to the Fund was not contractual in nature because the city's ordinance contained "no provision prohibiting amendments altering existing rights." Id. at 853. The court contrasted the case with Phillip and Breshears:

> In both Phillip and Breshears, supra, the court en banc recognized that under certain circumstances and for certain purposes the interest of a member of a

> public retirement system may attain a contractual or vested status. However, both of those cases involve the question of the effect of subsequent legislation upon the interest of members in a system established by legislation which specifically provided that subsequent legislation should not impair or diminish the interest originally established. In both cases the court expressly took notice of such provision.
>
> There is no allegation in the plaintiffs' petition that the ordinance establishing the Kansas City Firemen's Pension System contained a similar provision.

Id. It is noteworthy that the court characterized § 104.540.1 as providing "that subsequent legislation should not impair or diminish the interest originally established."

D. Wehmeier

Wehmeier v. Public School Retirement System of Missouri, 631 S.W.2d 893 (Mo. App. E.D. 1982), did not involve any change in a retirement system, but the Missouri Court of Appeals characterized the nature of the Public School Retirement System of Missouri ("PSRS") as follows:

> [T]he Missouri legislature established contractual rights for members of the Public School Retirement System of Missouri when it created that system. The legislation contains a statutory offer of retirement benefits to certain public school employees. The offer is accepted by the employee when he becomes a member of the retirement system and begins compliance with the statutory conditions. This is not to say that the employee's right to retirement payments vests at the time of acceptance. A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due. Thus, at acceptance a valid contract is formed, but the employee-member's right to receive retirement benefits does not finally vest until said member has fully complied with the statutory conditions. In other words, the retirement system is not obligated to pay retirement benefits to a member until the member satisfies the conditions prescribed by statute.

Id. at 896 (quotations and citations omitted). This summary, while dicta, suggests that where a retirement system establishes contractual rights for members, the member's contractual relationship arises when the member first begins employment under the retirement system statutes then in effect.

E. Fraternal Order of Police Lodge #2

In Fraternal Order of Police Lodge #2 v. City of St. Joseph, 8 S.W.3d 257 (Mo. App. E.D. 1999), the Missouri Court of Appeals held that a city's elimination of a portion of accrued but unpaid overtime and vacation pay from the calculation of a member's monthly retirement pension amount did not violate any contractual rights of the member. In that case, the city's ordinance left it to the general discretion of the city's director of finance to determine the method of calculating pension amounts. The court observed:

> The general rule is that a pension granted by public authorities is not a contractual obligation but is a gratuitous allowance, in the continuance of which the pensioner has no vested right, and that a pension is accordingly terminable at the will of the grantor, either in whole or in part. And since there is no contract on the part of the state to continue the payment of a benefit or annuity, a change in the law affecting such benefit or annuity does not impair the obligation of a contract or deprive a pensioner of property within the constitutional meaning.
>
> Governmental employees can have no property rights in a pension fund, nor can those claiming under them have any such rights except their claims be based upon and come within the laws governing the fund. The extent of the rights which vested in employees is governed by the controlling statute in effect at the time their rights to a pension vested, which became a part of the contract of employment as much as if its provisions were written therein.

Id. at 264 (citations omitted). The court reasoned that because "there is nothing in the ordinances or pension plan which creates a right to have a certain method of calculating pension amounts continued, employees have no vested right to the continuation of a certain method of calculating pension amounts." Id. In essence, this case was similar to Tomlinson, where there was no legislative provision establishing contract rights, and unlike Phillips and Breshears, where there were express legislative provisions establishing contract rights.

II. Cases from other jurisdictions on increased member contribution rates.

Although Missouri courts have not specifically addressed whether a governmental entity may change a retirement plan to require increased contributions from current members for future work, several courts in other jurisdictions have addressed this issue.[3] These decisions are illustrative as to how Missouri courts might rule on this issue.

A. An increase in the member contribution rate is permissible when the retirement system statutes so allow or provide that they do not create any contractual rights.

Courts have permitted increased contribution rates for current members when the statutes establishing the retirement system: (a) specifically so allow, or (b) expressly say that the statutes do not create any contract rights. See Transport Workers Union v. Southeastern Pennsylvania Transp. Authority, 145 F.3d 619 (3d Cir. 1998) (switch from noncontributory plan to contributory plan was permissible because statute provided that employee contributions might be required in future); International Ass'n of Firefighters, Local 145 v. City of San Diego, 667 P.2d 675 (Cal. 1983) (increased contribution rates were permissible because city ordinance establishing retirement system provided that contribution rate would be adjusted from time to time based upon actuarial advice to adequately fund system); Coller v. State Univ. of New York, 439 N.Y.S.2d 474 (App.Div. 1981) (state could switch plan from noncontributory to contributory because statute expressly reserved to state the right to end payments made by state in lieu of employee contributions to plan); AFSCME Councils v. Sundquist, 338 N.W.2d 560, 566-57 (Minn. 1983) (state could require increased contributions because retirement system statute provided that it did not create any contract rights).

[3] Courts have uniformly agreed that states may increase the member contribution rate for prospective members. See Booth v. Sims, 456 S.E.2d 167, 184 (W.Va. 1995); Opinion of the Justices, 303 N.E.2d 320, 331 (Mass. 1973).

B. Otherwise, increased member contribution rates are an unconstitutional impairment of the member's contract unless there are offsetting benefit increases.

Absent such provisions in a retirement system's statutes, courts typically have held that an increase in a current member's contribution rate, without offsetting increased benefits to the member, is an unconstitutional impairment of the member's contract with the retirement system and governmental employer. See:

- Oregon State Police Officers' Ass'n v. State, 918 P.2d 765 (Or. 1996) (requiring public employees to begin paying six percent contributions to retirement system impaired public employees' contract with state).

- Booth v. Sims, 456 S.E.2d 167 (W.Va. 1995) (modification of pension statute that increased employee contribution from six percent to nine percent of income was permissible because employees received increased salary and other benefits that offset their increased contribution to retirement plan).

- McDermott v. Regan, 624 N.E.2d 985 (N.Y. 1993) (statute changing funding method for state retirement system violated impairment of contracts clause of state constitution).

- Association of Pennsylvania State College and University Faculties v. State System of Higher Education, 479 A.2d 962 (Pa. 1984) (modification of pension statute that increased employee contribution by 1.25 percent of income, and that did not offer any corresponding new benefits, was impairment of pension contract).

- Singer v. City of Topeka, 607 P.2d 467, 475-77 (Kan. 1980) (increase in contribution rate of firefighters and police officers from three percent to seven percent was unconstitutional) ("Do the challenged statutes impose a substantial detriment on plaintiffs and the classes without correlative benefit? Amendments which more than double employee contributions without increasing benefits do just that, and run afoul of the rule....").

- Opinion of the Justices, 303 N.E.2d 320 (Mass. 1973) (increasing employee pension contributions from five percent to seven percent was unconstitutional).

- Wisley v. City of San Diego, 10 Cal.Rptr. 765 (Cal. App. 1961) (increasing contribution rate of active members of municipal fire departments and police departments from one percent to eight percent was unconstitutional).

- Allen v. City of Long Beach, 287 P.2d 765 (Cal. 1955) (increasing employee contribution from two percent to ten percent of income was unconstitutional).

- Marvel v. Dannemann, 490 F.Supp. 170 (D. Del. 1980) (statutory amendment that had effect of requiring public employee's pension contribution to increase from 1.1 percent to 4.3 percent of salary was impairment of contract).

- 60A Am. Jur. 2d Pensions § 1170 ("Generally, where the jurisdiction recognizes a contractual relationship between the employee and the pension system, a change in the rate of contribution in regard to employees who are active members in the pension system at the time of the change may violate a state constitutional provision that no law is to diminish a public officer's salary or emoluments after his or her election or appointment, or otherwise constitute a breach of contract, unless the employee is provided with a comparable new advantage in regard to his or her pension rights.").

These cases arise under state constitutional provisions prohibiting impairment of contracts (similar to article I, section 13 of the Missouri Constitution) and/or under the Contract Clause in article I, section 10 of the United States Constitution ("No State shall ... pass any ... Law impairing the Obligation of Contracts....").[4]

In Oregon State Police Officers Ass'n, the Oregon Supreme Court summarized the view generally held by the courts:

> The common thread running through the Oregon cases cited above is that the state may undertake binding contractual obligations with its employees, including benefits that may accrue in the future *for work not yet performed.* Moreover, the cases recognize that the PERS pension plan is an offer for a unilateral contract which can be accepted by the tender of part performance by the employee. The Oregon line of cases is consistent with the majority of jurisdictions that have considered the issue and also is consistent with the modern

[4] Analysis under the United States Constitution's Contract Clause has typically been the same as under state constitutional prohibitions on contract impairment, except that under the Contract Clause: (a) there must be a clear showing that a state law has unmistakably created a contractual obligation on the part of the state in the first place (this is known as the "unmistakability doctrine"); and (b) states may substantially impair their contractual obligations when the impairment is reasonable and necessary to serve an important public interest. See Parker v. Wakelin, 123 F.3d 1, 5 (1st Cir. 1997); State of Nevada Employees Assoc., Inc. v. Keating, 903 F.2d 1223, 1227 (9th Cir. 1990).

> view of the nature of pensions. Most jurisdictions adhering to a contract theory of pensions construe pension rights to vest on acceptance of employment or after a probationary period, with vesting encompassing not only work performed but also work that has not yet begun.

918 P.2d at 773. The court observed that increasing the contribution rate effectively diminished the value of the promised pension benefits by increasing the employees' cost to obtain those promised pension benefits:

> Under the *Taylor* analysis, and contrary to the state's argument here, ORS 237.075, and the state's implementation of the authority contained in that statute, promised a pension benefit that plaintiffs could realize only on retirement with sufficient years of service, that is, *after* rendering labor for the state. Plaintiffs accepted that offer by working. The change mandated by Section 10 alters the state's contractual obligation, in violation of *Taylor,* by increasing plaintiffs' cost of retirement benefits for services that, absent a lawful separation of employment, they will provide in the future. That consequence, if approved, would permit the state to retain the benefit of plaintiffs' labor, but relieve the state of the burden of paying plaintiffs what it promised for that labor. That result would frustrate plaintiffs' reasonable contractual expectations that were based on legal commitments expressly made by the state.
>
> Once offered and accepted, a pension promise made by the state is not a mirage (something seen in the distance that disappears before the employee reaches retirement). Nullification of an express term of plaintiffs' PERS contract with the state is an impairment for purposes of Contract Clause analysis. Section 10 expressly and substantially changes the state's contractual promise to plaintiffs with respect to the cost of their participation in the PERS retirement plan and the benefits that they will receive on retirement. Under Section 10, the cost of participation to the employee increases while the benefits that the employee ultimately will receive on retirement decrease. Unquestionably, Section 10 impairs the obligation of plaintiffs' PERS contract.
>
> The statutory pension system and the relationship between the state and its employees clearly established a contractual obligation to provide an undiminished level of benefits at a fixed cost. Under Section 10, because plaintiffs must pay six percent more, the value of their PERS pension contract has been diminished unilaterally. A contrary holding would serve notice on any person who might consider embarking on a career in public service that the state's promises could well prove to be worthless, even after the employees had given consideration for

those promises in the form of partial performance.

Id. at 775-76. See also American Federation of State, County, and Municipal Employees, AFL-CIO v. Commonwealth, 465 A.2d 62, 67 (Pa.Cmwlth. 1983) ("The increased contribution rate, without a commensurate increase in benefits, effectively diminishes the benefits received.").

Courts generally reason that a legislative retirement scheme constitutes a unilateral contract offer, that a member accepts this unilateral contract offer once the member has provided substantial partial performance, and that a state cannot thereafter revoke its offer and demand substantially more from the member in exchange for the state's promise of a pension than the state did when the member began his partial performance. See Marvel, 490 F.Supp. at 175.

> By meeting certain eligibility requirements, a public employee acquires a *right* to payment under a pension plan. For any employee not yet eligible for payment, this is a mere expectancy; if the public employee does not meet the age and service requirements for benefits, his or her participation in a state pension plan does not allow receipt of a pension. But this same participation *does* create an employee's reliance interest in pension benefits. Consequently, an employee's membership in a pension system and his or her forbearance in seeking other employment prevents the legislature from impairing the obligations of the pension contract once the employee has performed a substantial part of his or her end of the bargain and has substantially relied to his or her detriment.

Booth, 456 S.E.2d at 182.

C. Vested vs. non-vested members.

In the above cases, the courts uniformly held that increased contribution rates are unconstitutional as applied to vested members. As for non-vested members, many of these courts further held that increased contribution rates are unconstitutional once a member begins employment. See Association of Pennsylvania State College and University Faculties v. State System of Higher Education, 479 A.2d 962 (Pa. 1984). Indeed, courts have generally noted that "the modern and better reasoned view recognizes that non-vested employees have contractual rights in pension plans subject to reasonable modification in order to keep the system flexible to meet changing conditions, and to maintain the actuarial soundness of the system." State of Nevada Employees Assoc., Inc. v. Keating, 903 F.2d 1223, 1227 (9th Cir. 1990) (citing Public Employees' Retirement Board v. Washoe County, 615 P.2d 972, 974 (1980)). This is because "employees accept their positions, perform their duties, and contribute to the retirement fund in reliance upon the governmental employer's promise to pay retirement benefits. By rendering services and making contributions, an employee acquires a limited vested right to pension

benefits which may not be eliminated or substantially changed by unilateral action of the governmental employer to the detriment of the member." Washoe County, 615 P.2d at 974.

Other courts have taken a somewhat narrower view of the rights of non-vested members and held that increased contribution rates are unconstitutional only as to non-vested members who have had "[c]ontinued employment over a reasonable period of time during which substantial services are furnished to the employer," Singer, 607 P.2d at 474-75, or who have "sufficient years of service on the system that he or she can be considered to have relied substantially to his or her detriment on the existing pension benefits and contribution schedules," Booth, 456 S.E.2d at 181. These cases, however, do not specify what is a "reasonable period of time" or "sufficient years of service."

Another possible position is that contractual rights in a retirement system are limited to vested members and that detrimental modifications of a retirement system may be applied to all non-vested members. See Blackwell v. Quarterly County Court of Shelby County, 662 S.W.2d 535, 543 (Tenn. 1981) (change in benefit base applied to members who did not yet have sufficient creditable service to receive pension benefits). This appears to be a distinct minority position, however.

D. The possibility of offsetting increased benefits.

As noted above, courts allow for "reasonable modifications" of retirement systems that apply to members prior to retirement for the purposes of keeping the system flexible and accommodating changing conditions while maintaining the integrity of the system. However, "[t]o be sustained as reasonable, the modification must bear some material relationship to the purpose of the pension system and its successful operation; and any disadvantage to employees must be accompanied by comparable new advantages." Washoe County, 615 P.2d at 974-75; see also Singer v. City of Topeka, 607 P.2d 467, 475 (Kan. 1980); Allen v. City of Long Beach, 287 P.2d 765, 767 (Cal. 1955). In other words, there must be increased benefits to offset the increased deductions. Singer, 607 P.2d at 477. Missouri seemed to adopt this approach in Phillip, 262 S.W.2d at 580, discussed above.

Some states hold that the reasonableness of legislative changes is to be measured by the advantage or disadvantage to the affected employees as a group (or groups) and that the validity of the changes is not dependent upon the effect upon each employee. Other courts hold that this measurement must be done on an individual basis. Booth, 456 S.E.2d at 185. These courts reason that "[t]he State cannot justify impairing its contractual obligations to public employees by pointing to advantages accrued by former employees." Keating, 903 F.2d at 1227.

In some cases, courts have found that increased benefits sufficiently offset increased contribution rates such that the increased contribution rates were constitutional. See Booth v. Sims, 456 S.E.2d 167 (W.Va. 1995) (employees received increased salary and other benefits that offset their increased contribution to retirement plan; state may "apportion future wage increases between immediate cash payments to existing workers and improved funding of pension systems" and "may ask workers to help make pension funds solvent by contributing to the funds *new* money given to them by the State for this purpose"); City of Downey v. Board of Administration, 121 Cal.Rptr. 295 (Cal. App. 1975) (court approved amendments increasing employee contributions and also increasing benefits, reducing mandatory retirement age, and granting benefits to surviving spouses).

Some courts have suggested that in evaluating whether an increased contribution rate is constitutional as applied to a particular member, the court may consider any cumulative benefit increases that were enacted after the member began employment and before the contribution rate increase. In Opinion of the Justices, the court observed in dicta:

> What has been said about the presumptive invalidity of the proposed increase in the rate of members' contributions applies most clearly to members who entered the retirement system at approximately its present level of benefits for them (and while § 25(5) in its present form was on the statute book). But there may be other members who entered when the level was lower and who have been the recipients of step-by-step enlargements of retirement rights and benefits through favorable legislation over the years. We revert to the question whether they can claim impairment if the proposed change of the rate of contribution, while worsening their current situation, does not reduce them in net effect below the level at which they entered the system. If they can claim impairment, the question would remain whether, in considering the seriousness of the impairment as related to a claimed justification for it, the government is conceivably entitled to any credit (so to speak) for its past indulgences to those members. One sees in the decisions a tendency to compare the situation just before the proposed reduction of benefits with that which would exist afterwards, without much if any consideration of the significance of a progressive increase of benefits in the past: perhaps the courts implicitly assume that there are corresponding enhancements of the members' just expectations. But the problem has not been analyzed exhaustively, and we can do no more than advert to it in the absence of concrete states of fact.

303 N.E.2d at 330. Research found no case embracing this theory, which would be highly difficult to apply in practice where a retirement system (such as MOSERS) has experienced numerous legislative changes over the years.

E. A state's financial difficulties probably will not justify increased member contributions.

Some cases have suggested in dicta that impairment of contract rights by modifications to a retirement plan might be permissible if the state faces a precarious financial state. Marvel v. Dannemann, 490 F.Supp. 170, 177 (D. Del. 1980). Courts, however, have not upheld modifications on such a basis, noting "[t]hat the maintenance of a retirement plan is heavily burdening a governmental unit has not itself been permitted to serve as justification for a scaling down of benefits figuring in the 'contract.'" Opinion of the Justices, 303 N.E.2d at 329-30.

III. How Missouri courts would likely rule on the constitutionality of prospectively requiring contributions from current MOSERS members or reducing their future retirement benefits.

As noted in the Supreme Court of Missouri's decision in Phillip, analysis of whether the State may prospectively require contributions from current MOSERS members or reduce their future retirement benefits depends on: (1) whether MOSERS members have a contractual relationship with MOSERS and the State; and (2) if so, whether requiring member contributions from existing MOSERS members would impair obligations under that contractual relationship. 262 S.W.2d at 574. On the first issue, the Supreme Court of Missouri previously held in Breshears that the MOSERS statutes create a contractual relationship. It is unlikely that the Supreme Court of Missouri would reconsider that holding. Since Breshears was decided in 1962, the vast majority of courts in the United States have adopted the position that retirement benefits for public employees are contractual in nature.

Assuming that the Supreme Court of Missouri would continue to recognize that the MOSERS statutes create a contractual relationship, it is necessary to determine the extent of that contractual relationship as set forth in the MOSERS statutes and whether the obligations under that contractual relationship would be impaired if the State required contributions from current MOSERS members or reduced future benefits of current MOSERS members. Phillip, 262 S.W.2d at 574, 577.

A. The MOSERS statutory scheme.

1. Participation and retirement benefits.

MOSERS was established in 1957. Participation in MOSERS has always been mandatory for state employees. RSMo § 104.330.1. Chapter 104 has always provided retirement benefits depending on: (1) the member's position (e.g., state employee, General Assembly member, statewide officeholder); (2) the member's number of years of service credit; and (3) the member's compensation during employment. The following chart summarizes service credit requirements for state employees to draw a normal retirement annuity:

Time Period	Years of "Vesting Service" Needed
1957 to September 1, 1972	15 years
September 1, 1972 to July 1, 1981	15 years or 10 years if member terminated employment after he was 35 years old
July 1, 1981 to September 28, 1992	10 years
September 28, 1992 to present	5 years

(The General Assembly provided partial retirement annuities for state employees who retired between October 1, 1984 and September 28, 1992 with at least five years, but less than ten years, of "vesting service.") These retirement annuities have generally increased over the years.

2. Member contributions.

In 1957, § 104.360.1 required members to contribute four percent of the first $7,500 of their annual compensation. Section 104.360.2 authorized MOSERS to increase the members' contribution rate if necessary to pay benefits. Under § 104.370, the State and employers of members who are not paid out of funds in the state treasury were required to remit to MOSERS sufficient funds that, along with the members' contributions, would cover MOSERS' liabilities and cost of administration, but the State's contribution could not exceed four percent of compensation paid to members. Unlike the members' contribution rate, the State's maximum contribution rate was not subject to increase by MOSERS.

In 1967, § 104.360.1 was amended to require members to contribute four percent of the first $15,000 of their annual compensation.

In 1972, the General Assembly repealed § 104.360 and eliminated contributions for most members. (However, members of the General Assembly were required under new § 104.365 to contribute five percent of their compensation.) New § 104.372.1 provided: "Except as provided

in sections 104.365 and 104.515, no payroll deduction shall be made from the compensation of any employee for the [MOSERS'] fund after August 31, 1972." Section 104.372 also entitled members to a refund of their contributions, with interest, upon their retirement or death. Section 104.370 was amended to provide that the State and employers of members who were not paid out of funds in the state treasury were required to provide all of the necessary funding to cover MOSERS' liabilities and costs of administration (taking into consideration the still-required contributions of members of the General Assembly).

In 1976, the General Assembly amended § 104.365 to eliminate contribution requirements for its members and to provide for a refund of contributions made by members of the General Assembly in office on September 1, 1976 upon their retirement or death. (The General Assembly later enacted provisions providing for immediate refunds of contributions for members of the General Assembly and elected state officeholders.)

In 1981, the General Assembly moved § 104.372 to a new § 104.366 and enacted a new § 104.372 that was entirely unrelated to the old § 104.372. The new § 104.366.1 provided: "Except as provided in section 104.515, no payroll deduction shall be made from the compensation of any employee for the [MOSERS'] fund after August 31, 1972." Section 104.366 and a new § 104.367 also allowed for immediate refunds of member contributions that had not been previously refunded under the old § 104.372.

In 1988, § 104.365, § 104.366, and § 104.367 were repealed. While the prohibitions on payroll deductions for members and General Assembly members were repealed, the General Assembly did not enact, and has not since enacted, any provision requiring member contributions, authorizing MOSERS to require member contributions, or expressly providing that the State might require member contributions in the future. MOSERS has continued to be non-contributory for members and has been funded by the State (and employers of members who are not paid out of funds in the state treasury) since 1972 for state employees and since 1976 for General Assembly members.

3. Sections 104.540.1 and 104.1054.1.

Since 1957, the General Assembly has amended the MOSERS statutes on several occasions. While a comprehensive review of all such amendments is beyond the scope of this analysis, these amendments generally have worked to the favor of MOSERS' members, particularly with increased benefits and eliminated contribution requirements.

The only MOSERS statutes that address the impact of statutory changes are § 104.540.1 for the Closed Plan and § 104.1054.1 for the Year 2000 Plan. Section 104.540.1 provides:

> All premium payments and deferred compensation provided for under sections 104.320 to 104.540 are hereby made obligations of the state of Missouri. No alteration, amendment, or repeal of sections 104.320 to 104.540 shall affect the then existing rights of members and beneficiaries, but shall be effective only as to rights which would otherwise accrue hereunder as a result of services rendered by an employee after such alteration, amendment, or repeal.[5]

The Year 2000 plan contains a similar provision:

> The benefits provided to each member and each member's spouse, beneficiary, or former spouse under the year 2000 plan are hereby made obligations of the state of Missouri and are an incident of every member's continued employment with the state. No alteration, amendment, or repeal of the year 2000 plan shall affect the then existing rights of members, or their spouses, beneficiaries or former spouses, but shall be effective only as to rights which would otherwise accrue hereunder as a result of services rendered by a member after such alteration, amendment, or repeal.

§ 104.1054.1.

B. Possible interpretations of §§ 104.540.1 and 104.1054.1 and the contract between the State and current MOSERS members.

Sections 104.540.1 and 104.1054.1 can plausibly be interpreted in two ways. First, the statutes could be interpreted to mean that changes to the MOSERS statutes apply to all future services rendered by current MOSERS members, regardless of whether the changes are detrimental to the current MOSERS members. Second, the statutes could be interpreted to mean that changes to the MOSERS statutes that are significantly detrimental to current MOSERS members do not apply to current MOSERS members, but apply only to future MOSERS members. Missouri courts have not determined which interpretation of §§ 104.540.1 and 104.1054.1 is correct, but we believe that they would likely adopt the latter interpretation and hold that significant detrimental changes in the MOSERS statutes—such as requiring member contributions or reducing future retirement benefits—cannot be applied to current MOSERS members.[6]

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[5] Prior to 1988, the phrase "payroll payments" was used instead of "premium payments" and "104.310" was used instead of "104.320."

[6] Our analysis only addresses changes in the MOSERS statutes that require member contributions or reduce future retirement benefits of current MOSERS members. We have not

1. The literal language of Sections 104.540.1 and 104.1054.1 supports an argument that all changes to the MOSERS statutes apply to future services rendered by current MOSERS members.

The literal language of §§ 104.540.1 and 104.1054.1 supports an argument that the contract between the State and current MOSERS members allows the State to change the MOSERS statutes as to future services rendered by current MOSERS members, regardless of whether the statutory changes are favorable or unfavorable to current MOSERS members. Sections 104.540.1 and 104.1054.1 provide that alterations, amendments, and repeals of MOSERS statutes do not "affect the then existing rights of members and beneficiaries" but do apply "to rights which would otherwise accrue hereunder as a result of services rendered by an employee after such alteration, amendment, or repeal." The phrase "the then existing rights" likely refers to the "deferred compensation" (and the "premium payments") mentioned in the first sentence of §§ 104.540.1 and 104.1054.1 that current MOSERS members have earned through their prior services for the State. Consistent with basic contract law, §§ 104.540.1 and 104.1054.1 make clear that once current MOSERS members have performed services for the State, they are permanently entitled to the benefits and compensation, including the deferred compensation, that they have already accrued for those services.

After §§ 104.540.1 and 104.1054.1 provide that future changes in the MOSERS statutes will not affect the deferred compensation that current MOSERS members have earned for their prior services, those provisions proceed to state that future changes in the MOSERS statutes "shall be effective [ ] as to rights which would otherwise accrue hereunder as a result of services rendered by an employee after such alteration, amendment, or repeal." The word "rights" in this latter clause should have the same meaning as the word "rights" in the earlier phrase "the then existing rights" and likely means the rights of "deferred compensation" (and the "premium payments") mentioned in the first sentence of §§ 104.540.1 and 104.1054.1. In turn, those statutes provide that the MOSERS statutes, as changed, will govern the deferred compensation that current MOSERS members earn for their future services for the State.

State employees, as a class, generally have no right to continued employment at any definite level of compensation, and the State may decrease their compensation for future services

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examined other types of potential changes to the MOSERS statutes, such as changes in retirement annuity options and beneficiary designations. We do not believe that the contractual relationship between the State and current MOSERS members prohibits subjecting current MOSERS members to statutory changes whose potential detrimental effects are de minimis.

at any time.[7] Because deferred compensation is merely one component of the overall compensation of MOSERS members, the State should be able to decrease the deferred compensation of current MOSERS members for future services, including by requiring current MOSERS members to make contributions as to future services. Sections 104.540.1 and 104.1054.1 arguably confirm this right on the part of the State as part of the contractual relationship between the State and current MOSERS members.

Sections 104.540.1 and 104.1054.1 indicate that the State may repeal the Closed Plan and the Year 2000 Plan altogether. With such a repeal, current MOSERS members would receive no further service credit and the amount of their retirement benefits would be frozen under the benefit formula in place before the repeal. For example, a member who had not yet worked five years would receive no retirement benefits because he had not yet worked the requisite five years, and a member who had worked ten years would receive retirement benefits based on ten years of service credit, regardless of how many years he worked for the State. If the State may repeal the plans in this manner, then the State may surely take the less drastic step of amending the plans to require member contributions or reduce retirement benefits attributable to future services rendered.

Moreover, the situation with MOSERS can arguably be distinguished from the situation in Phillip concerning the Public School Retirement System of the City of St. Louis because the statutes governing changes to the MOSERS statutes are different than the statutes governing changes to the Retirement System's statutes. While § 169.510(2) provides that changes would not "reduce any accrued or potential benefits" of current members of the Retirement System, §§ 104.540.1 and 104.1054.1 do not expressly mention "potential benefits" of current MOSERS members, but only expressly mention "the then existing rights," which could be construed to mean only accrued benefits and not future, potential benefits. Further, while §§ 104.540.1 and 104.1054.1 expressly state that changes in the MOSERS statutes apply "to rights which would otherwise accrue hereunder as a result of services rendered by an employee after such" change, § 169.510(2) contains no similar, express provision. Based on these differences in the statutes, one could argue that the contract of current MOSERS members (as contained in the MOSERS statutes) is significantly less protective than the contract of Retirement System members (as contained in the Retirement System statutes) and that, as a result, the court's holding and reasoning in Phillip do not preclude changing the MOSERS statutes to require contributions of current MOSERS members as to their future services or to reduce their future accrual of retirement benefits.

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[7] Many individual state employees enjoy certain protections under the State Personnel Law, RSMo Chapter 36, which governs the appointment, promotion, transfer, layoff, removal, and discipline of employees in many state agencies.

2. The Supreme Court of Missouri would likely conclude that the MOSERS statutes provide a contractual right to retirement benefits at currently-existing levels without member contributions and that changing the MOSERS statutes to require member contributions or reduce future retirement benefits of current MOSERS members would unconstitutionally impair the contract between the State and current MOSERS members.

While the above interpretation of §§ 104.540.1 and 104.1054.1 and the contract between the State and current MOSERS members is plausible, it is more likely that the Supreme Court of Missouri would reject it and, instead, find that the MOSERS statutes provide current MOSERS members with a contractual right to receive retirement benefits at currently-existing levels with no member contributions as to future services. Based on Phillip[8], the court would likely view the MOSERS statutes as providing a unilateral offer that if a person accepts employment with the State and works at least five years for the State, he will receive retirement benefits at the currently-existing levels at no cost to himself or herself (through member contributions) based on his or her compensation and how long he or she works for the State. The court would further likely rule that once a person accepts that offer and commences his employment with the State, there is a valid contract between him, MOSERS, and the State that the State cannot thereafter change to the person's detriment. Such prohibited detrimental changes would likely include reducing retirement benefits below currently-existing levels[9] or requiring the person to pay contributions as a condition of earning the service credit upon which retirement benefits are based, unless the person is afforded increased benefits that fully offset the added cost to him of the contributions.

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[8] As discussed above, Phillip is arguably distinguishable from the situation with MOSERS because of the differences between §§ 104.540.1 and 104.1054.1 (the MOSERS statutes) and § 169.510(2) (the statute governing the Public School Retirement System of the City of St. Louis). However, there is a good chance that the Supreme Court of Missouri would find that these differences in the two sets of statutes are not significant enough to warrant the court departing from its holding and reasoning in Phillip. Indeed, in Tomlinson, the court treated both sets of statutes as effectively providing "that subsequent legislation should not impair or diminish the interest originally established." 391 S.W.2d at 853.

[9] Such prohibited reductions in retirement benefits would probably include: (1) changing the retirement benefit formula; (2) modifying the accrual of salary credit or service credit; (3) raising the retirement age of current MOSERS members; and (4) changing the current MOSERS plans from defined-benefit plans to defined-contribution plans.

In Phillip, the Supreme Court of Missouri embraced the view that a legislative retirement scheme constitutes a unilateral contract offer, that a member accepts this unilateral contract offer once the member begins partial performance through employment, and that a state cannot thereafter change the terms of the contract in a way that is unfavorable to the employee on balance. As discussed above, courts in other jurisdictions have embraced the same view expressed in Phillip, and they have held that increasing an employee's contribution rate after employment begins impermissibly alters the terms of the employee's contract because such increase in the employee contribution rate diminishes the value of the retirement benefits that had been promised to the employee. It is reasonable to assume that the Supreme Court of Missouri would follow these courts and their reasoning, both for vested members and non-vested members, given its holding in Phillip that a member's contractual rights come into existence once the member begins employment.

Sections 104.540.1 and 104.1054.1 clearly state that legislative changes to the MOSERS statutes do not affect the "then existing rights of members," including the deferred compensation that current MOSERS members have earned for prior services. Requiring member contributions or negatively altering the retirement benefit formula as to future services by current MOSERS members would effectively reduce the value of the deferred compensation that current MOSERS members have already earned for prior services.

The Supreme Court of Missouri indicated in Phillip that a member's existing rights include a right to have the retirement system continued throughout his employment in a manner that is at least as favorable as when the member began his employment. Many courts in other jurisdictions have concluded that these existing contractual rights include the right to earn service credit for future work based upon the member contribution rate in effect when one begins public employment.

The Supreme Court of Missouri has used § 104.540.1 and similar statutes to protect retirement system members and prevent legislative changes from adversely affecting their potential retirement benefits. In Phillip, the court refused to allow a legislative change that took away potential retirement benefits from certain non-vested members altogether. Notably, the court could have ruled, but did not rule, that the members had to be allowed to remain in the system, but were not entitled to earn any further service credit. Instead, the court found that it would be unjust to deprive the members of their ability to obtain the retirement benefits that they thought were attainable when they began their employment.

Moreover, in Breshears, the court refused to allow a legislative change that might diminish the future retirement benefits of active MOSERS members by depleting the fund from which those benefits would be paid. Finally, in Tomlinson, the court noted that § 104.540.1 and

similar statutes provide "that subsequent legislation should not impair or diminish the interest originally established." 391 S.W.2d at 853. The theme of these cases is that statutes such as § 104.540.1 are designed to protect current retirement system members from legislative changes that work to their disadvantage.

The Supreme Court of Missouri could adopt the principle that the State has a contractual duty of good faith and fair dealing that precludes the State from making changes to the MOSERS statutes that are detrimental to current MOSERS members. Sections 104.540.1 and 104.1054.1 indicate that as part of its contract with current MOSERS members, the State has discretion to make changes to the MOSERS statutes that impact the contractual relationship. Missouri courts have previously held that contracts to which the State is a party and that grant discretion to the State impose an obligation of good faith and fair dealing on the State. Missouri Consol. Health Care Plan v. Community Health Plan, 81 S.W.3d 34, 45-47 (Mo. App. W.D. 2002). Thus, in dealing with current MOSERS members, the State must exercise its discretionary power in good faith and not in a manner that evades the spirit of its contractual relationship with current MOSERS members or denies current MOSERS members of the expected benefits of the contract. Id. at 46. To act in "good faith," the State must act consistently with the justified expectations of current MOSERS members and cannot act unfairly or unreasonably. Id. at 47.

As discussed above, the Supreme Court of Missouri could conclude that current MOSERS members have justified expectations that they will continue to receive retirement benefits at current levels with no member contributions as to future services. The court could stress that:

- The MOSERS statutes (former § 104.360) used to reserve the power to increase member contribution rates, but this power was repealed effective September 1972.
- Between September 1972 and 1988, the MOSERS statutes (former §§ 104.366 and 104.372) expressly provided that there would be no member contributions.
- While these statutes expressly providing for no member contributions were repealed in 1988, since September 1972, MOSERS has always been a noncontributory system for state employees, and there has been no indication in the MOSERS statutes that members might be called upon to make contributions again in the future.

Given this statutory history, the court would likely be reluctant to imply in §§ 104.540.1 and 104.1054.1 a reserved power by the State to require contributions from current MOSERS members for future services.

C. Offsetting benefits.

Courts have allowed increased member contribution rates when accompanied by an offsetting increase in benefits to member. In Phillip, the Supreme Court of Missouri suggested that legislative changes to retirement plans are permissible when the benefits to the members of the changes are equal to or greater than the detriments to the members from the changes.

Here, increasing the retirement benefits of current MOSERS members does not appear to be plausible. Presumably, the State would require increased member contributions to bolster the funding of MOSERS. That goal would not be fulfilled if increased member contributions were matched by increased member benefits.

The General Assembly might be able to match any future salary increases for state employees with future member contribution requirements. This was the approach approved by the West Virginia Supreme Court in Booth v. Sims, 456 S.E.2d 167 (1995). In that case, West Virginia modified a pension statute to increase employee contribution from six percent to nine percent of income while simultaneously increasing salary and other current employment benefits. Because the increase in salary and current benefits was greater than the increase in employee contributions, the legislative change was permissible: "The legislature may increase a public employee's salary contribution to a pension plan if it gives a corresponding raise in salary or other benefits that offsets the employee's increased contribution to the system. To be constitutional ..., the additional salary or other benefits must at least cover the public employee's extra contribution to the system." Id. at 187. The court reasoned: "[T]o the extent that the government wishes to apportion future wage increases between immediate cash payments to existing workers and improved funding of pension systems, it may do so: No state or local employee has a right to a wage increase, and (as in the case before us), the State may ask workers to help make pension funds solvent by contributing to the funds *new* money given to them by the State for this purpose." Id. at 184 (emphasis in original).

* * *

We appreciate the opportunity to provide this analysis to you and would be pleased to answer any questions or provide additional information.

Very truly yours,

Thompson Coburn LLP

By
Allen D. Allred

ADA/jf

cc: Ryan Nonnemaker

Jake McMahon, Esq.

Joint Committee on Public Employee Retirement
Quarterly Reports
2009 Fourth Quarter

Plan Name	Beg. Market Value	End. Market Value	ROR 12 mos.	ROR 36 mos.	ROR 60 mos.
Arnold Police Pension Plan	$6,516,960	$6,815,889	18.1% (Net)	-2.0% (Net)	1.9% (Net)
Black Jack FPD Retirement Plan	$5,862,615	$6,412,521	18% (Net)	2% (Net)	1% (Net)
Bothwell Regional Health Center Retirement Plan	$31,339,152	$32,329,355	20.5% (Net)	0.2% (Net)	3.6% (Net)
Bridgeton Employees Retirement Plan	$18,052,130	$18,735,249	18.15% (Gross)	-4.41% (Gross)	0.48% (Gross)
Carthage Policemen's & Firemen's Pension Plan	$5,262,951	$5,324,160	11.43% (Net)	.39% (Net)	3.08% (Net)
Clayton Non-uniformed Employee Pension Plan	$8,479,000	$8,659,049	16.4% (Gross)	-1.3% (Gross)	3.2% (Gross)
Clayton Uniformed Employees Pension Plan	$24,260,779	$24,970,746	16.4% (Gross)	0.0% (Gross)	3.7% (Gross)
County Employees Retirement Fund	$251,236,000	$260,346,000	23.9% (Gross)	.7% (Gross)	4.1% (Gross)
Creve Coeur Employees Retirement Plan	$13,466,120	$14,053,176	20.5% (Net)	-4.5% (Net)	4.5% (Net)
Creve Coeur FPD Retirement Plan	$6,144,548	$7,171,904	N/A% (Net)	N/A% (Net)	N/A% (Net)
Eureka FPD Retirement Plan	$5,575,678	$5,776,280	21.59% (Net)	-3.87% (Net)	1.19% (Net)
Fenton FPD Retirement Plan	$18,220,071	$18,613,071	15.03% (Gross)	-1.72% (Gross)	1.47% (Gross)
Florissant Employees Pension Plan	$8,641,634	$9,833,388	23.85% (Net)	-5.07% (Net)	0.49% (Net)
Florissant Valley FPD Retirement Plan	$12,909,039	$13,284,284	n/a% (Net)	n/a% (Net)	n/a% (Net)
Glendale Pension Plan	$4,041,937	$4,133,580	21.50% (Net)	na% (Net)	na% (Net)
Jackson County Employees Pension Plan	$144,343,920	$151,269,552	24.73% (Gross)	.99% (Gross)	.87% (Gross)
Joplin Police & Fire Pension Plan	$22,959,092	$23,636,182	26.8% (Net)	1.1% (Net)	5.4% (Net)
Kansas City Civilian Police Employees' Retirement System	$84,344,000	$87,301,000	21.2% (Gross)	-1.3% (Gross)	3.5% (Gross)
Kansas City Employees' Retirement System	$757,638,809	$764,432,000	22.7% (Net)	-2.4% (Net)	3.1% (Net)
Kansas City Firefighter's Pension System	$345,882,755	$355,603,899	25.2% (Net)	-4.1% (Net)	1.6% (Net)
Kansas City Police Retirement System	$615,447,000	$632,532,000	20.9% (Gross)	-0.8% (Gross)	3.9% (Gross)
Kansas City Public School Retirement System	$658,693,043	$677,360,868	15.9% (Gross)	-1.9% (Gross)	3.0% (Gross)
KC Area Transportation Authority Salaried Employees Pension Plan	$8,699,209	$10,709,509	20.73% (Gross)	-1.28% (Gross)	2.90% (Gross)

Please be aware information provided in this report may contain unaudited data.

4/7/2010

Plan Name	Beg. Market Value	End. Market Value	ROR 12 mos.	ROR 36 mos.	ROR 60 mos.
KC Trans. Auth. Union Employees Pension Plan	$26,279,458	$33,078,497	28.66% (Net)	-1.46% (Net)	3.12% (Net)
Ladue Non-uniformed Employees Retirement Plan	$2,454,031	$2,745,132	23.45% (Net)	-1.05% (Net)	2.66% (Net)
Ladue Police & Fire Pension Plan	$18,011,192	$19,514,791	23.89% (Net)	-1.10% (Net)	2.63% (Net)
Little River Drainage Dist Retirement Plan	$372,264	$390,193	2.41% (Net)	2.63% (Net)	2.63% (Net)
Mehlville FPD Retirement Plan	$26,706,108	$26,139,821	1% (Gross)	1% (Gross)	1% (Gross)
Metro St. Louis Sewer Dist Employees Pension Plan	$172,850,778	$179,384,938	20.8% (Net)	2.5% (Net)	5.1% (Net)
Mid-County FPD Retirement Plan	$1,298,856	$1,323,603	16% (Gross)	3.3% (Gross)	4% (Gross)
Missouri Higher Education Loan Authority Pension Plan	$22,411,181	$22,803,106	22.05% (Gross)	-.03% (Gross)	2.3% (Gross)
Missouri State Employees Retirement System	$6,787,105,416	$6,898,255,041	18.4687% (Net)	0.6540% (Net)	4.9217% (Net)
North Kansas City Hospital Retirement Plan	$160,774,699	$167,001,179	22.3% (Net)	-.3% (Net)	3.2% (Net)
North Kansas City Policemen's & Firemen's Retirement Fund	$33,382,163	$34,151,353	25.82% (Gross)	- 0.11% (Gross)	2.87% (Gross)
Pattonville-Bridgeton FPD Retirement Plan	$17,739,182	$18,315,170	42.992% (Gross)	-0.732% (Gross)	2.69% (Gross)
Prosecuting Attorneys' Retirement System	$22,747,710	$23,510,861	19.0% (Net)	0.8% (Net)	3.9% (Net)
Public Education Employees' Retirement System	$2,317,297,000	$2,412,005,000	15.81% (Gross)	-2.04% (Gross)	2.70% (Gross)
Public School Retirement System	$23,450,308,000	$24,187,796,000	15.51% (Gross)	-2.16% (Gross)	2.59% (Gross)
Raytown Policemen's Retirement Fund	$7,961,849	$8,198,016	21.95 % (Gross)	2.71% (Gross)	-0-% (Gross)
Richmond Heights Police & Fire Retirement Plan	$27,637,247	$28,577,294	22.10% (Net)	1.08% (Net)	4.62% (Net)
Rock Community FPD Retirement Plan	$6,854,639	$7,072,059	20.06% (Net)	-0.59% (Net)	2.5% (Net)
Sheriff's Retirement System	$27,165,318	$27,165,318	19.190% (Gross)	3.732% (Gross)	5.770% (Gross)
Springfield Police & Fire Retirement Fund	$118,505,150	$129,432,208	17.90% (Net)	-2.72% (Net)	0% (Net)
St. Joseph Policemen's Pension Fund	$22,606,903	$23,696,654	16.9% (Gross)	2.6% (Gross)	24.3% (Gross)
St. Louis County Employees Retirement Plan	$388,896,783	$401,222,409	23.27% (Gross)	-2.86% (Gross)	2.17% (Gross)
St. Louis County Library Dist Empl Pension Plan	$31,099,829	$31,544,196	22.7% (Net)	2.6% (Net)	5.8% (Net)
St. Louis Employees Retirement System	$556,872,793	$565,925,577	13.96% (Gross)	-1.41% (Gross)	4.02% (Gross)
St. Louis Firemen's Retirement System	$367,349,786	$378,722,857	19.09% (Net)	-3.14% (Net)	1.90% (Net)
St. Louis Public School Retirement System	$844,865,000	$870,099,000	20.9% (Gross)	0% (Gross)	3.8% (Gross)

Please be aware information provided in this report may contain unaudited data.

Plan Name	Beg. Market Value	End. Market Value	ROR 12 mos.	ROR 36 mos.	ROR 60 mos.
University of Mo Retirement, Disability & Death Benefit Plan	$2,369,662,000	$2,431,571,000	21.0% (Net)	-1.5% (Net)	3.9% (Net)
Valley Park FPD Retirement Plan	$2,709,908	$2,798,566	15.57% (Net)	n/a% (Net)	n/a% (Net)
	$40,889,941,685	$42,071,743,501			

	ASSET ALLOCATION AS OF December 31, 2009									
	MOSERS		MPERS		PSRS		LAGERS		CERF	
TOTAL Assets in Millions	$ 6,898.25		$ 1,338.50		$ 26,600.60		$ 3,722.40		$260	
	Target	Actual	Target	Actual	Target	Actual	Target	Actual	Target	Actual
Domestic Equity			22.5%	20.9%	27.0%	32.1%	27.3%	32.1%	35.0%	38.7%
International Equity			22.5%	23.5%			10.0%	12.5%	15.0%	16.4%
Global Equity	45.0%	44.5%			15.0%	20.5%	14.3%	9.3%	0.0%	0.0%
Emerging Market Equity							2.0%	3.0%	0.0%	0.0%
Private/Venture Equity	7.5%	5.2%	10.0%	10.3%	10.5%	4.8%	5.0%	2.1%	5.0%	0.7%
TOTAL EQUITY	**52.5%**	**49.7%**	**55.0%**	**54.7%**	**52.5%**	**57.4%**	**58.5%**	**59.0%**	**55.0%**	**55.8%**
Domestic Fixed Income (Investment Grade)	10.0%	8.1%			28.0%	23.5%	17.0%	20.2%	30.0%	30.7%
International Fixed Income (Investment Grade)							0.0%	0.0%	0.0%	0.0%
Global Fixed Income (Investment Grade)			16.0%	14.3%			5.0%	3.9%	0.0%	0.0%
Real Return Bonds (TIPS)	10.0%	10.2%			4.0%	6.2%	2.0%	2.6%	0.0%	0.0%
High Yield/Bank Loans/Opportunistic RMBS-CMBS	5.0%	9.4%		3.2%			0.0%	3.0%	0.0%	0.0%
Private Debt (Distressed, Opportunistic)	2.5%	4.0%			2.0%	1.0%	0.0%	0.0%	0.0%	0.0%
TOTAL DEBT	**27.5%**	**31.7%**	**16.0%**	**17.5%**	**34.0%**	**30.7%**	**24.0%**	**29.7%**	**30.0%**	**30.7%**
Commodities	3.0%	1.8%					2.5%	1.7%	0.0%	0.0%
Real Estate	6.0%	2.5%	13.0%	11.2%	7.5%	3.7%	5.0%	1.0%	5.0%	3.4%
Infrastructure						0.3%	0.0%	1.0%	0.0%	0.0%
Oil & Gas Partnerships /MLPs		3.3%				0.8%	0.0%	0.6%	0.0%	0.0%
Timberland & Ag Land	6.0%	4.8%					5.0%	5.2%	0.0%	0.0%
TOTAL REAL ASSETS	**15.0%**	**12.4%**	**13.0%**	**11.2%**	**7.5%**	**4.8%**	**12.5%**	**9.5%**	**5.0%**	**3.4%**
Hedge Funds (as an asset class)	5.0%	6.0%	16.0%	12.3%	6.0%	7.1%	5.0%	1.9%	10.0%	9.1%
Hedge Funds (portable alpha)		16.8%		4.2%		2.9%	7.5%	7.8%	0.0%	0.0%
Short Term (Cash)		0.2%		4.3%			0.0%	0.0%	0.0%	1.0%
TOTAL	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**	**100.0%**

	ACTIVE VS. PASSIVE PERCENTAGES OF TOTAL PORTFOLIO AS OF December 31, 2009									
	MOSERS		MPERS		PSRS		LAGERS		CERF	
	Active	Passive	Active	Passive	Active	Passive	Active	Passive	Active	Passive
Domestic Equity			20.9%		20.3%	11.8%	32.1%	0.0%	38.7%	0.0%
International Equity			23.5%				12.5%	0.0%	16.4%	0.0%
Global Equity	44.5%				18.7%	1.8%	9.3%	0.0%	0.0%	0.0%
Emerging Market Equity							3.0%	0.0%	0.0%	0.0%
Private/Venture Equity	5.2%		10.3%		4.8%		2.1%	0.0%	0.7%	0.0%
TOTAL EQUITY	**49.7%**	**0.0%**	**54.7%**	**0.0%**	**43.8%**	**13.6%**	**59.0%**	**0.0%**	**55.8%**	**0.0%**
Domestic Fixed Income (Investment Grade)	6.9%	1.2%			13.5%	10.0%	20.2%	0.0%	30.7%	0.0%
International Fixed Income (Investment Grade)			12.5%	1.8%			0.0%	0.0%	0.0%	0.0%
Global Fixed Income (Investment Grade)							3.9%	0.0%	0.0%	0.0%
Real Return Bonds (TIPS)		10.2%	3.2%			6.2%	2.6%	0.0%	0.0%	0.0%
High Yield/Bank Loans/Opportunistic RMBS-CMBS	9.4%						3.0%	0.0%	0.0%	0.0%
Private Debt (Distressed, Opportunistic)	4.0%				1.0%		0.0%	0.0%	0.0%	0.0%
TOTAL DEBT	**20.3%**	**11.4%**	**15.7%**	**1.8%**	**14.5%**	**16.2%**	**29.7%**	**0.0%**	**30.7%**	**0.0%**
Commodities	1.8%						1.7%	0.0%	0.0%	0.0%
Real Estate	2.5%		11.2%		3.7%		1.0%	0.0%	3.4%	0.0%
Infrastructure					**0.3%**	**0.0%**	**1.0%**	**0.0%**	**0.0%**	**0.0%**
Oil & Gas Partnerships /MLPs	1.0%	2.3%			0.8%		0.6%	0.0%	0.0%	0.0%
Timberland & Ag Land	4.8%						5.2%	0.0%	0.0%	0.0%
TOTAL REAL ASSETS	**10.1%**	**2.3%**	**11.2%**	**0.0%**	**4.8%**	**0.0%**	**9.5%**	**0.0%**	**3.4%**	**0.0%**
Hedge Funds (as an asset class)	6.0%		12.3%		7.1%		1.9%	0.0%	9.1%	0.0%
Hedge Funds (portable alpha)							7.8%	0.0%	0.0%	0.0%
Short Term (Cash)	0.2%		4.3%				0.0%	0.0%	1.0%	0.0%
TOTAL	**86.3%**	**13.7%**	**98.2%**	**1.8%**	**70.2%**	**29.8%**	**100.0%**	**0.0%**	**100.0%**	**0.0%**

	ANNUALIZED TOTAL RETURN NET OF FEES FOR PERIODS ENDED December 31, 2009					ANNUALIZED DOMESTIC EQUITY NET OF FEES FOR PERIODS ENDED December 31, 2009				
	MOSERS	MPERS	PSRS	LAGERS	CERF	MOSERS	MPERS	PSRS	LAGERS	CERF
1 Year	18.47%	14.20%	15.51%	19.74%	23.53%	30.10%	32.60%	28.35%	26.06%	39.79%
3 Years	0.65%	(3.60%)	(2.16%)	(0.42%)	**0.35%**	(3.75%)	(6.60%)	(5.37%)	(4.45%)	(3.07%)
5 Years	4.92%	2.80%	2.59%	3.92%	3.79%	1.40%	(0.40%)	0.75%	1.37%	1.91%
10 Years	4.99%	3.10%	3.45%	3.80%	4.88%	1.61%	(0.70%)	0.59%	1.38%	3.13%

	ANNUALIZED INTERNATIONAL EQUITY NET OF FEES FOR PERIODS ENDED December 31, 2009					ANNUALIZED FIXED INCOME NET OF FEES FOR PERIODS ENDED December 31, 2009				
	MOSERS	MPERS	PSRS	LAGERS	CERF	MOSERS	MPERS	PSRS	LAGERS	CERF
1 Year	31.72%	29.80%	37.39%	48.22%	28.34%	16.67%	25.00%	3.03%	5.40%	14.93%
3 Years	2.13%	(5.60%)	(4.84%)	(1.72%)	(4.87%)	4.28%	2.70%	5.60%	7.15%	7.03%
5 Years	9.83%	5.60%	5.26%	7.05%	4.46%	4.45%	3.50%	4.80%	5.95%	5.63%
10 Years	6.82%	4.50%	2.12%	4.91%	5.90%	7.54%	4.50%	6.37%	7.34%	6.13%

News-Leader.com

On cost-of-living adjustments, all routes carry legal risk for city of Springfield

Break constitution or face lawsuits? Not much certainty in tricky call.

Amos Bridges • News-Leader • March 22, 2010

Finding itself "between a rock and a hard place," the city of Springfield plans to ask a judge whether it legally can grant cost-of-living adjustments to retired police and firefighters in July.

The dilemma, involving a tangle of apparently conflicting state and local laws, appears to hinge on whether the city's pension fund is "actuarially sound" --a term never explicitly defined in state law.

The stakes are high:

Granting the cost-of-living adjustments (COLAs) risks violating the state Constitution.

Withholding them would save the pension plan $400,000 to $500,000 in the next fiscal year but almost certainly would trigger a lawsuit by retirees, who, by the terms of the plan, are promised an annual 3 percent increase.

Requests for clarification from the Missouri Attorney General's Office and a state committee that oversees pension programs have only muddied the waters, so the city plans to file a request for declaratory judgment, which would allow a judge to sort out the legal mess.

"When you get conflicting opinions from the state, you have to get it resolved to make sure you're doing the right thing," City Manager Greg Burris said. "That's why we're seeking an outside decision."

"Actuarial soundness"

City Attorney Dan Wichmer said the COLA question has been percolating since May, when Dan Tobben, an attorney retained by the police and fire associations, told members of the pension fund citizen task force the city was obligated to fund the pension system to "actuarial soundness."

Tobben said he didn't think the 28 percent funding level at the time was sufficient.

"If he's making the allegation that we're actuarially unsound ... we said one of those issues ... that we d on't know how to deal with is the COLA," Wichmer said.

Provisions of the Tier I police and fire pension plan guarantee automatic 3 percent COLAs each year to all age and service retirees who are at least 56 years old, as well as all disability retirees.

But Wichmer said the city was unsure whether the COLA provision -- on the books since 1983 -- ran afoul of a 2007 state law that prohibits benefit increases "beyond current plan provisions" when the law was adopted, if the plan is at less than 80 percent funding.

Article 6, Section 25 of the Missouri Constitution adds another wrinkle. It grants cities the ability to grant periodic COLAs "provided such pension and retirement systems will remain actuarially sound."

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"Actuarial soundness" is never legally defined, however, Wichmer said. "We didn't know how to answer it."

As of June, Springfield's pension fund was 46.5 percent funded using the actuarial value method.

Voters approved a 3/4-cent sales tax that will begin pumping millions of dollars into the fund in June, but it's not clear whether that revenue would count toward the question of actuarial soundness.

Opinions sought

The city in July sought opinions from the state Joint Committee on Public Employee Retirement and the Missouri attorney general, Wichmer said.

JCPER has declined to offer direct advice, suggesting the city seek a legal opinion on the matter. The committee did, however, note in a Feb. 9 letter that most state and local government retirees won't receive a COLA in 2010.

But COLAs for those retirees are tied to changes in the Consumer Price Index (which declined), rather than the automatic increase granted to Tier I Springfield police and firefighters.

The attorney general provided a more detailed response to the city's request, which was funneled through Sen. Norma Champion's office.

Although not legally binding, the Jan. 25 opinion concluded that -- despite an apparent conflict within the Missouri Constitution -- the city legally may pay the COLA only if the fund remains actuarially sound.

"It seems like the attorney general's saying it is a benefit increase ... but none of them have responded whether or not we're actuarially sound," Wichmer said. "If we are, it seems to say we can grant the benefit. But if we're not, it seems like we can't."

"Catch-22"

Wichmer said he plans to file the request for declaratory judgment in Greene County court by midweek.

The COLA question then will be considered by a judge, who will make a decision based on any expert witness testimony and applicable laws.

"You're going to have to have an expert witness in the form of an actuary" to attempt to define actuarial soundness, Wichmer said.

Other interested parties -- retirees, the police and fire employee associations, even taxpayers -- potentially could join the lawsuit and present their own witnesses or arguments.

"We have in fact spoken to a few retirees because we think they need to be in it," Wichmer said. "I think the associations have spoken about it with their attorneys ... and taxpayers always have standing to challenge expenditure of city funds."

He doesn't think the case is adversarial, however, adding that the city won't dispute that retirees would be harmed if the COLAs were suspended.

"We're getting direction from state entities that says we can't pay it, and the ordinance says we have to pay it," Wichmer said. "We're trying to get some guidance."

Shawn Martin, president of the International Association of Fire Fighters Local 152, said he has discussed the issue with Tobben, the association's attorney. If the city attempts to suspend the COLAs,

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"it will definitely trigger a lawsuit from our retirees."

"Our opinion on this is if a pension system offers a COLA, then the pension system must remain actuarially sound," Martin said. "If our pension system is declaring itself not actuarially sound, then I believe the pension board has a fiduciary responsibility to have the city make the fund sound."

Echoing Wichmer, he said the problem is "there is no definition of actuarial soundness in the state of Missouri. It's completely subjective."

But Martin thinks the 2007 state law "implicitly defined" the term by allowing the state to withhold tax revenues from cities whose plans fall below 60 percent funding if the city also fails to make the actuary's required annual contributions.

Although Springfield's plan is below the 60 percent threshold, the city has been making the required payments "and is actually exceeding that with the sales tax," he said. "We're on an accelerated payment plan, so-to-speak."

Martin said he doesn't agree with all of the conclusions in the attorney general's opinion but acknowledged "the city is in a Catch-22 right now."

The decision to seek a judge's opinion is understandable, he said, but he's "comfortable" that decision will clear the way for the COLAs. "I'm not overly concerned about it at this point."

Waiting on ruling

Ken Homan, chairman of the pension board, said trustees hope a judge's ruling will help clarify the situation.

"The board does think that (according to plan provisions) we have no other option but to make the COLA adjustment," he said. "But we don't want to be thrown in court with that one, so we are in support of the city going for a declaratory judgment before July 1."

Wichmer said the city "hopefully" can get a decision before July, "but I would be more apt to say early autumn."

The case might not end in Greene County. If any of the interested parties dispute the judge's decision, it could be appealed -- potentially as high as the state Supreme Court.

Burris said the City Council has been kept abreast of the issue in closed session meetings because it involves the potential for litigation.

He said he's not sure what the city will do if a decision is delayed beyond July. "It's too early to decide that."

Statutory Provisions Associated with Public Pension Plan Funded Ratio

Section 105.683

Requires withholding of political subdivision funds associated with:

- ✓ *Plans having a funded ratio below 60%,*
- ✓ *The political subdivision has failed to make 100% of the ARC for 5 successive plan years, and*
- ✓ *The plan has experienced a descending funded ratio for 5 successive years.*

Plan deemed delinquent, when, effect of.

105.683. Any plan, other than a plan created under sections 169.010 to 169.141, RSMo, or sections 169.600 to 169.715, RSMo, whose actuary determines that the plan has a funded ratio below sixty percent and the political subdivision has failed to make one hundred percent of the actuarially required contribution payment for five successive plan years with a descending funded ratio for five successive plan years after August 28, 2007, shall be deemed delinquent in the contribution payment and such delinquency in the contribution payment shall constitute a first lien on the funds of the political subdivision, and the board as defined under section 105.660 is authorized to compel payment by application for a writ of mandamus; and in addition, such delinquency in the contribution payment shall be certified by the board to the state treasurer and director of the department of revenue. Until such delinquency in the contribution payment, together with regular interest, is satisfied, the state treasurer and director of the department of revenue shall withhold twenty-five percent of the certified contribution deficiency from the total moneys due the political subdivision from the state. (L. 2007 S.B. 406)

Section 105.684

- ✓ *Prohibits benefit enhancements beyond plan provisions in effect prior to 08/28/07 for plan with a funded ratio lower than 80%. Such enhancement cannot result in a funded ratio less than 75% after adoption.*
- ✓ *Any plan with a funded ratio less than 60% shall have the actuary prepare an accelerated contribution schedule.*

Benefit increases prohibited, when–amortization of unfunded actuarial accrued liabilities–accelerated contribution schedule required, when.

105.684. 1. Notwithstanding any law to the contrary, no plan shall adopt or implement any additional benefit increase, supplement, enhancement, lump sum benefit payments to participants, or cost-of-living adjustment beyond current plan provisions in effect prior to August 28, 2007, unless the plan's actuary determines that the funded ratio prior to such adoption or implementation is at least eighty percent and will not be less than seventy-five percent after such adoption or implementation.

2. The unfunded actuarial accrued liabilities associated with benefit changes described in this section shall be amortized over a period not to exceed twenty years for purposes of determining the contributions associated with the adoption or implementation of any such benefit increase, supplement, or enhancement.

3. Any plan with a funded ratio below sixty percent shall have the actuary prepare an accelerated contribution schedule based on a descending amortization period for inclusion in the actuarial valuation.

4. Nothing in this section shall apply to any plan established under chapter 70, RSMo, or chapter 476, RSMo. (L. 2007 S.B. 406)

Joint Committee on Public Employee Retirement (JCPER) Annual Watch List

The JCPER has historically presented to its members a Watch List which contained information on Missouri's public pension plans whose funded ratio fell below 70% on an actuarial basis. This report is presented on an annual basis. In 2003, after the first market downturn of this decade, it was determined by JCPER staff that a more appropriate measure be used for the Watch List utilizing a funded ratio on a market value basis. This change in criteria was precipitated by the following:

- ✓ Plan's Market Value of Assets represents the actual assets in the fund.
- ✓ Market Value Funded Ratio provides a more level basis when determining plans for the Watch List. The Market Value of Assets is not subject to actuarial methods, assumptions and limitations utilized when determining the Actuarial Value of Assets. These actuarial components may vary among each individual pension plan.
- ✓ It is important to note that this Watch List criteria is for internal procedure purposes only. The JCPER continues to recognize utilization of actuarial components to assist in reducing volatility associated with funding levels and contribution levels.

Summary of SC89896, *Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System an agency of the State of Missouri v. Barton County, Gerry Miller, John Stockdale, and Dennis Wilson*

Appeal from the Barton County circuit court, Judge Kevin L. Selby

Argued and submitted Sept. 2, 2009; after further briefing, resubmitted on briefs Dec. 7, 2009; opinion issued March 23, 2010

Attorneys: PACARS was represented by J. Kent Lowry, Jeffery T. McPherson and Kim S. Burton of Armstrong Teasdale LLP in Jefferson City, (573) 636-8394, and the county was represented by Marc Ellinger and Thomas Rynard of Blitz, Bardgett & Deutsch LC in Jefferson City, (573) 634-2500.

Overview: The Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System (PACARS) appeals the trial court's judgment holding that the portion of the statutory section requiring Missouri counties to make pension contributions for prosecuting and circuit attorneys is an unconstitutional mandate under the Hancock Amendment to the Missouri Constitution. In an 4-3 decision written by Judge Laura Denvir Stith, the Supreme Court of Missouri reverses the trial court's decision and remands (sends back) the case for further action. While the Hancock Amendment generally bars the state from mandating that counties pay for a new activity or service or for an increased level of activity or service without a state appropriation to pay for that new or increased mandate, the Missouri Constitution also provides that increases in the "compensation of county officers" does not constitute a new or increased level of a service or activity. The Court finds that the pension contributions in question are a form of "compensation of county officers" and so fall within the exception to the Hancock Amendment.

In a concurring opinion, Judge Michael A. Wolff argues the state should not continue to rely on counties to pay prosecutors, who represent the state of Missouri and are part of the state's criminal justice system, which is a state necessity. In a dissenting opinion, Judge Richard B. Teitelman would hold that the context and language of the Missouri Constitution show that the phrase "compensation of county officers" as used in article VI, section 11 of the constitution does not include the PACARS pension contributions required by section 56.807, RSMo, which, therefore, violates the Hancock Amendment.

Facts: In 1989, the legislature enacted the PACARS statutes authorizing the creation of a retirement fund for prosecutors and circuit attorneys. The 1989 statute provided that the state would reimburse counties for the cost of contributions to the fund. In 1995, the legislature amended the statute to remove the necessity for the state to reimburse counties. Barton County nonetheless continued to receive incentive payments until January 2002, when the state discontinued making incentive payments. As a result, the Barton County commission voted to discontinue participation in the retirement fund. In November 2006, PACARS filed a petition for writ of mandamus against Barton County and its commissioners, requesting that the court compel Barton County to make the pension contributions. The trial court found that section

56.807, RSMo, violates the Hancock Amendment. It rejected PACARS' argument that the pension contributions fell within an exception to the Hancock Amendment set out in article VI, section 11 of the Missouri Constitution for "increases in the compensation of county officers." PACARS appeals.

REVERSED AND REMANDED.

Court en banc holds: The trial court erred in concluding that section 56.807 violates the Hancock Amendment and in refusing to require Barton County to make the pension contributions mandated by that section. While in 1982 this Court held that the Hancock Amendment generally prohibits the state from increasing a county's financial obligations to county employees without state reimbursement, *Boone County v. State*, 631 S.W.2d 321, 326 (Mo. banc 1982), article VI, section 11 was amended in 1986 to provide that "compensation of county officers" does not constitute a new or increased level of a service or activity under the Hancock Amendment. The question is whether pension contributions, and not just salary and incidentals, are included within the meaning of the term "compensation of county officers." The meaning of the word "compensation" varies depending on its context. This Court previously has recognized that, when used in its broad or generic sense, "compensation" can include all remuneration for services rendered. Further, Missouri's dissolution cases recognize pension benefits as a form of deferred compensation that are earned as a person works rather than a bonus earned only at the time of payment. Looking at the intent of the legislature as reflected in these statutes, the Court concludes that the word "compensation of county officers" as used in article VI, section 11 of Missouri's constitution includes pension contributions.

Concurring opinion by Judge Wolff: The author concurs that the Court's decision is what the law allows but notes that it allows the state to continue to rely on a patchwork of locally funded county-by-county prosecution offices for the administration of justice. He further notes the burden of paying the prosecutors who represent the "state of Missouri" on the counties, many of which struggle financially to meet their other obligations. He argues that spending money for criminal justice is a necessity, not an optional luxury or obligation that can be funded by some other government.

Dissenting opinion by Judge Teitelman: The author would hold that the phrase "compensation of county officers" as used in article VI, section 11 of the Missouri Constitution does not include the PACARS contributions required by section 56.807, RSMo, and, therefore, that constitutional provision does not exempt PACARS contributions from the Hancock Amendment. It is the constitution itself – not the statutes governing classification and distribution of marital property in a dissolution action or generic definitions and synonyms – that provides the context for understanding the meaning of this phrase. This context demonstrates that the phrase "compensation of county officers" does not refer to pension contributions or benefits. To the extent that article VI, section 11 was intended to overrule *Boone County v. State*, 631 S.W.2d 321, 326 (Mo. banc 1982) (holding that a salary increase violated the Hancock Amendment), the contextual interpretation of "compensation of county officers" supports nothing more than the conclusion that it refers to salary. The history and current structure of the Missouri Constitution establish that, at no point past or present, has the constitution equated pensions and compensation. If public employee pensions were just another form of compensation, there would

have been no need for the specific authorization of pensions in article VI, section 25 of the Missouri Constitution. This section is not a redundancy; rather, it was required because the term "compensation" as used in the constitution does not include public employee pensions. Further, the plain, unequivocal language of article VI, section 13 of the Missouri Constitution establishes that the compensation of prosecutors does not include pension contributions made on their behalf. The author also notes he concurs in the spirit of Judge Wolff's concurring opinion.

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NIRS: Public Plans Outperformed Private Plans In 2009

By NU ONLINE NEWS SERVICE
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In 2009, state and local pension plans performed better than their private sector plans, according a study of data from the Federal Reserve.

The National Institute on Retirement Security, Washington, D.C., is making that point in an analysis of trends revealed in the Fed's Flow of Funds data.

For the year, public pension plans posted gains of 16%, as compared with 13% gains for defined benefit plans in the private sector, according to the NIRS analysts.

Such a large performance gap between public and private DB plans is new, they say.

They attribute the shift to fairly dramatic changes that corporate plans have made to their portfolios in recent years.

In much of the earlier part of the decade, the analysts point out, plans in both sectors each held about 60% of their assets in stocks. But by year-end 2009, corporate pension plans, as a group, had cut back investing in stocks to just 38% of their portfolio, while public plans trimmed only slightly, to about 57% equity exposure, they say.

The NIRS analysts term that change "striking."

Their explanation is that public plans "took a long-term, balanced approach to investing even in the face of drastic changes in the market" but that private plan sponsors were facing significant pressure that led to the equities pullback.

This pressure stemmed from changes in federal pension law and threatened changes to private sector accounting standards, the analysts say. Another factor: accounting regulations that would require valuation of pension assets and liabilities as though the plan were terminating immediately.

Both factors made sponsoring a pension a far less attractive proposition for employers. and so the private plans tried to limit the damage in ways that resulted in a "policy shift away from equities," the analysts conclude.