IN THE SUPREME COURT OF THE STATE OF OREGON

| | | |
|---|---|---|
| In the Matter of the Consolidated Public Employees Retirement System (PERS) Litigation | ) Case Names and Numbers: | |
| | ) *Strunk* | X (S50593) (Control) |
| | ) *Burt* | _____ (S50647) |
| | ) *Dahlin* | _____ (S50645) |
| | ) *Evans* | _____ (S50532) |
| | ) *Petrillo* | _____ (S50687) |
| | ) *Sartain* | _____ (S50686) |
| | ) *Whitty* | _____ (S50685) |
| | ) | |

STRUNK PETITIONERS' PETITION FOR RECONSIDERATION
March 8, 2005 Opinion by DeMuniz, J.;
Balmer, J., concurring; Durham, J., joined by Riggs
and Kistler, JJ., concurring in part and dissenting in part.


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# STRUNK PETITIONERS' PETITION FOR RECONSIDERATION

## I. INTRODUCTION

The court entered its opinion on March 8, 2005 in the above-captioned matter. Petitioners Strunk et al. petition the court for reconsideration and withdrawal of that portion of the opinion dealing with the subject of "excess earnings" on members' accounts.

## II. POINTS AND AUTHORITIES

In the course of its opinion the court discussed "excess earnings" on members' accounts. The phrase "excess earnings" refers to earnings on the investment of members' accounts over and above the amount guaranteed by ORS 238.255. Petitioners ask the court to reconsider and withdraw the following statements contained in the opinion:

> "We address first petitioners' argument that the statutes before the 2003 PERS legislation guaranteed Tier One members not only annual earnings at a rate not less than the assumed earnings rate but also any earnings in excess of the assumed rate, less any allocations necessary for administrative expenses and to properly constituted reserves. We find no support for that broad proposition in the wording of the statutes on which petitioners rely.
>
> "ORS 238.255 (2001), for example, addressed directly the circumstance in which a Tier One member's 'regular account is credited with earnings for the previous year in an amount less than the earnings that would have been credited pursuant to the assumed interest rate for that year determined by [PERB].' In such instances, PERB credited the difference to the member's regular account and charged that amount to the gain-loss reserve. Although that wording supports a legislative promise that Tier One members' regular accounts will grow annually in an amount not less than the assumed earnings rate, that text evinces no support for the proposition that Tier One members contractually are entitled to any overage that is not applied to administrative expenses or reserves.
>
> "Neither does the legislative direction later in that statute that '[e]arnings in excess of the assumed interest rate

for years following the year for which a charge is made to the [gain-loss reserve] shall first be applied to reduce or eliminate the amount of a deficit,' ORS 238.255 (2001), support petitioners' claim. Although that sentence expressly contemplated the potential for excess earnings, the only command in the statutory wording is that the overage first go toward restoring the gain-loss reserve. Notably absent is any directive that, following such application, PERB must apply any remaining earnings to PERS members' regular accounts.

"Likewise, ORS 238.670 (2001), which addressed years in which the fund's earnings equaled or exceeded the assumed earnings rate and on which petitioners also rely, did not contain any affirmative promise that PERS members were entitled to a crediting of the overage, less expenses, to their regular accounts. Instead, that statute provided only that, for such years, PERB 'shall set aside, out of interest and other income received * * *, such part of the income as [PERB] may deem advisable, not exceeding seven and one-half percent of the combined total of such income' to a reserve account. That statute was not a legislative directive that PERB must credit any remaining excess earnings to members' regular accounts. Finally, we have found nothing in the context or history of those statutory provisions that detracts from the conclusion that we have drawn from the text -- that is, that the legislature made no such promise respecting excess earnings. (45)

"The record in these cases establishes that PERB in fact historically has credited PERS members' regular accounts with excess earnings in good investment years. Even so, it is not for this court to codify PERB's practices. Instead, our task is to ascertain those aspects of the PERS statutes that are promissory and, from those provisions, to determine the precise nature of the obligations that they impose. It is those obligations that set the conditions that the legislature may not in the future alter without consequence. That PERB may have been administering the system in a more generous fashion regarding crediting to members' regular accounts than the statutes required does not alter the nature of the promises that the legislature made.

"For the reasons set out above, we conclude that Tier One members had no contractual right under the PERS statutes as they existed before the 2003 PERS legislation to the crediting of annual earnings in excess of the assumed earnings rate to their regular accounts. Instead, we conclude that, for Tier One members, annual crediting at – but not in excess of – the assumed earnings rate is the promise that the legislature

> extended. Those conclusions, moreover, undermine at least in part petitioners' subsidiary argument, viz., that the legislature contractually is bound to maintain the system's allocation of the burden of funding reserves and paying administrative expenses. So long as Tier One members' regular accounts are credited annually with earnings that do not fall below the assumed earnings rate, the legislature has reserved for itself the ability to redirect any excess earnings.
>
> "Those conclusions, however, do not address fully petitioners' argument that, by changing the future timing of the crediting process, the 2003 PERS legislation removes (i.e., impairs) the obligation that Tier One members' regular accounts annually be credited not less than the assumed earnings rate. In assessing that argument, we begin by comparing the statutory processes for Tier One regular account crediting both before and after the 2003 PERS legislation." (footnotes omitted)

Slip Opinion at pp. 73-76. Petitioners rely upon the following points:

a. The court exceeded its limited jurisdiction when it declared the law relating to excess earnings.

b. The 2003 PERS legislation did not address excess earnings and, consequently, petitioners brought no challenges to the legislation on that point.

c. The effect of the statute on excess earnings was not litigated before the Special Master.

d. The parties only made passing reference to the issue of excess earnings in their briefs before this court.

e. The court erroneously concluded that the prior statutory provisions did not refer to members' rights to receive excess earnings.

f. The court erroneously concluded that there was no supporting legislative history.

**A. The court exceeded its limited jurisdiction when it declared the law relating to "excess earnings."**

House Bill 2003 granted this court original jurisdiction to determine whether any provisions of the PERS reform legislation violated constitutional provisions or constituted a breach of contract. 2003 Oregon Laws Chapter 67, Section 37. The act did not authorize this court to issue advisory opinions unrelated to the constitutionality of the statute or petitioners' claims of breach of contract.

In *Oregonians for Health and Water v. Kitzhaber*, 329 Or 339, 986 P2d 1167 (1999), this court considered a challenge to the emergency clause in SB 686, passed during the 1999 legislative session. The act granted this court exclusive jurisdiction to review the constitutionality of sections 2 to 11 of the act. The emergency clause was contained in Section 15. This court held that the legislature did not include Section 15 within the ambit of this court's statutorily authorized original jurisdiction and that the court may not insert into the statute that which has been omitted. Consequently, the court dismissed the petition for review of the constitutionality of the emergency clause. *Id.* at 344.

The judicial power of the Oregon courts does not extend to advisory opinions absent grant of special jurisdiction. *Oregon Medical Association v. Rawls*, 281 Or 293, 301, 574 P2d 1103 (1978). Even when they are allowed, advisory opinions generally deal with questions of governmental organizations, powers or procedures, not with the constitutional rights of individuals. *Id.*

Because this court was operating under a special grant of original jurisdiction to rule on the constitutionality of the PERS reform legislation its jurisdiction was limited. It exceeded its jurisdiction by expressing opinions about excess earnings.

**B. The 2003 PERS litigation did not address excess earnings.**

With regard to crediting of earnings, petitioners only claimed that the legislation impaired their constitutional rights when it eliminated the guaranty that earnings would be at least equal to the assumed interest rate. Petitioners brought no claims relating to any earnings which may accrue in excess of the assumed interest rate. This is because the PERS reform legislation did not address excess earnings nor did it in any way impliedly eliminate the members' right to receive excess earnings. Consequently, the issue of excess earnings could not have been and was not part of petitioners' challenges.

**C. The effect of the statute on excess earnings was not litigated before the Special Master.**

Although the parties created a voluminous record and although the Special Master made over 120 pages of recommended findings of fact, the Special Master's decision did not directly address the effect of the statute on excess earnings. Again, this is because nothing in the PERS reform legislation addressed or purported to change the PERS board's prior practices of crediting earnings to members' accounts.

During the proceedings before the Special Master respondents argued that PERS was a defined benefit plan so that interest need not "follow principal." The Special Master found that PERS was not a typical defined benefit plan.

> "A typical defined benefit plan is one in which the benefit provided can be determined by the terms of the plan, usually involving salary and years of service, and a percentage multiplier. In a defined benefit plan, the employer bears the risk of ensuring that there is adequate funding to pay member benefits. The employer funds a defined benefit based on recommendations of an actuary and bears the full risk of investment and other actuarial losses. In a defined benefit plan, the 'interest follows principal' principle usually does not apply. Investment income generally is available to offset the cost of providing benefits. However, investment income is allocated according to the provisions of the plan document.

> "By contrast, in a defined contribution plan, the only defined aspect is the contribution made into the plan. It operates like a savings account, in that contributions are invested, and the benefit at retirement depends on investment performance. In a defined contribution plan, interest generally follows principal, the member bears the risk of investment loss, and the employer bears no risk once it has made its promised contributions.
>
> "PERS is not a typical defined benefit plan in that (1) it is partially funded by employee contributions that are credited to employee accounts, to which fund earnings also are credited; and (2) under the currently predominant Tier One payment option, the Money Match, employers match member account balances at retirement, and the resulting amount is then annuitized. Those distinct features of PERS are at the center of many of the parties' disagreements.

Other than in this fashion, to set the context of other disputes, the issue of earnings on member accounts did not arise before the Special Master. The Special Master concluded that the question whether the PERS statutes mandated or authorized any or all of certain administrative practices, including earning allocations, was beyond the scope of his report. JER-23, n. 17.

**D. The parties only made passing reference to issue of excess earnings in their briefs before this court.**

Although petitioners made reference to their right to receive excess earnings in their opening brief (at p. 6, n. 6; p. 28; and p. 31), petitioners were stating the historical fact that members have always received excess earnings on their account. Petitioners did not argue or suggest that the PERS reform legislation in any way affected this right.

Similarly respondents discussed the issue of excess earnings to explain from their perspective the historical reason why there was a deficit in the gain-loss reserve. See Non-State Defendants' Answering Brief at pp. 43-45; State of Oregon's Answering Brief at pp. 12-14; PERB's Responding Brief at pp. 15-19.

It is true that petitioners stated their view that members are guaranteed all earnings on their accounts after allocations for administrative expenses and reserves (Petitioners' Brief at p. 32) and that the equal crediting policy adopted by PERB was the only crediting policy which is consistent with the PERS statutes (Petitioners' Reply Brief at p. 22). However, these statements and the contrary ones propounded by respondents must be read for what they are: efforts of the parties to place the constitutional issues in an overall context. This court should not have treated those discussions as an invitation to interpret provisions of the PERS statutes not affected by the 2003 legislation.

**E. The court erroneously concluded that the statutory provisions did not refer to members' rights to receive excess earnings.**

In concluding that the PERS statutes did not address excess earnings, the court discussed only ORS 238.255 and ORS 238.670. However, these statutes must be read in the context of the entire PERS statutory scheme. This statutory scheme does indeed make clear that members are entitled to the earnings on their accounts.

ORS 238.250 provides:

> "The board shall provide for a regular account for each active and inactive member of the system. The regular account shall show the amount of the member's contributions to the fund *and the interest which they have earned*...." (Emphasis added.)

ORS 238.255 then states:

> "The regular account for an active or inactive member of the system shall be examined each year. If the regular account is credited with earnings for the previous year in an amount less than the earnings that would have been credited pursuant to the assumed interest rate for that year determined by the board, the amount of the difference shall be credited to the regular account and charged to a reserve account in the fund established for the purpose...."

Thus, ORS 238.255 first tests the amount of earnings credited to the member's account under ORS 238.250. It is only when the amount credited is less than the assumed interest rate that ORS 238.255 activates the guaranty.

ORS 238.665 provides:

> "Contributions required by this chapter to be placed in the retirement fund, *and interest required to be allocated to the member accounts* of members of the retirement system and to participating employers, shall not be included in the biennial departmental budget of the board." (Emphasis added.)

As emphasized, the statute refers to the interest "required" to be allocated to the member accounts. ORS 238.665, formerly ORS 237.279, is virtually unchanged from its original version in the 1953 codification of PERS. The provision pre-dates by many years the guaranty contained in ORS 238.255. Therefore, ORS 238.665 can only be referring to the earnings on the member's account which is "required to be allocated," not on the guaranty.[1]

Even ORS 238.300, the central provision describing the retirement benefit, states that:

> "Upon retiring from service at normal retirement age or thereafter, a member of the system shall receive a service retirement allowance which shall consist of the following annuity and pensions:
>
> > "(1) A refund annuity which shall be the actuarial equivalent of accumulated contributions by the member *and interest thereon* credited at the time of retirement...." (Emphasis added).

A review of these statutory provisions in the context of the entire PERS statutory scheme shows that central to the statutory promise was the members' entitlement to the earnings on their accounts, even when those amounts exceed the guaranteed amount provided

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[1]As petitioners pointed out in their opening brief at p. 28, the relevant terms of ORS 238.250 remained virtually unchanged since the adoption of the original PERS Act in 1945, so the reference to the interest earned here also does not refer to the guaranty.

under ORS 238.255. This promise was made well before the guaranty of ORS 238.255 was added to the statutory contract. In short, the court simply is mistaken when it states that there is:

> "...nothing in the context or history of those statutory provisions that detracts from the conclusion that we have drawn from the text – that is, that the legislature made no such promise respecting excess earnings." Slip Opinion at 74-75.

**F. The court erroneously concluded that there was no supporting legislative history.**

As shown from the just-quoted segment of the court's opinion, the court also concluded that there was no legislative history respecting the promise of excess earnings. Here the court overlooked legislative history contained in petitioners' brief and in the record.

Petitioners cited legislative history of HB 2507 (1975) at page 32 of their brief. JER-150. In addition, other materials in the legislative history included in the record of this case reflect the clear legislative intent that the guaranty be treated as a minimum, but not as a maximum, benefit, and that the members would receive excess earnings. The May 29, 1975 minutes of the House Ways and Means Committee (contained in the legislative history material submitted by the non-State defendants) (a copy of which is included in the Appendix) includes the following:

> "House Bill 2507 – Relating to Investments; creating new provisions; and amending ORS 293.726."
>
> "Representative Gwinn moved that House Bill 2507 be amended as set out on the printed agenda, and that it be reported out 'Do pass as amended.'
>
> "Representative Gwinn pointed out that as a result of the stock market decline in the past several years, members of the Public Employes' Retirement System have not received any earnings on their account balances for these years. Interest

> has been earned on bond and other investments in employes annuity accounts, but those earnings have been more than offset by the decline in stock values. This bill, as amended by the Salary Subcommittee insures that PERS members will receive earnings at least equal tot he assumed interest rate earned by the System. The assumed interest rate is based upon recommendations of the Retirement Fund actuary, and represents the conservative estimate of average earnings over an extended period of time. If the income credited to the members' account balances in any one year exceeds earnings, the difference must be made up in the first subsequent year that earnings exceed the assumed interest rate. This difference must be recovered within a five-year period or the employer's account–the state, local government or school district–will be charged for the balance. It appears unlikely, however, that this will happen. *If the income in any year exceeds the assumed interest rate after recovering over-distributions in prior years, the members' accounts are credited with their share of the excess earnings.* The members by this bill are assured reasonable interest earnings, and are permitted to participate in actual earnings in excess of the rate estimated by the actuary." (Emphasis added.)

This legislative history makes clear that by implementing the guaranty the legislature was not intending in any way to deprive members of the right to participate in actual earnings in excess of the assumed rate.

### G. An important issue such as the right to excess earnings should be decided only after full and fair litigation

As this court states in its opinion (Slip Opinion at 8):

> "This court best fulfills its obligation to interpret the laws of this state after a trial court and the Court of Appeals have had an opportunity to consider and refine the factual and legal issues."

In *City of Eugene v. PERB*, Case No. S50617, presently under advisement before this court, the intervening public employees challenged one aspect of the PERS board's allocation of 1999 earnings: the board's action in moving some of the excess earnings from the employee accounts to the benefit of the employers' accounts. To petitioners' knowledge this was the first and only time that the board ever diverted excess earnings in member

accounts to some other use within the system. After a trial, the court ruled in favor of the public employees that the PERS board's diversion of employee earnings to employer accounts violated the statutory contract.[2] Although PERB filed a notice of appeal from that ruling it dismissed its appeal.

Issues of great public importance such as this one should be presented to this court only after a trial in which the parties have had the opportunity to develop an evidentiary record and to submit thorough legal argument.

## III. CONCLUSION

The court's statements about excess earnings are *dicta* because they were completely unnecessary to the resolution of the issue before the court, namely whether the elimination of the guaranty constitutionally impaired petitioners' contracts. Petitioners are not asking the court to modify its opinion to agree with petitioners' view. Rather petitioners ask this court to recognize that any issues regarding members' entitlement to excess earnings should be presented to this court only after they are properly raised and litigated in the lower courts.

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[2]The court also ruled on summary judgment that the board's actions violated its fiduciary obligation to the members.

Petitioners ask the court to reconsider its opinion and withdraw the *dicta* for the various reasons stated above. The withdrawal of the challenged *dicta* will in no way affect or impact the rulings of the court relating to the 2003 PERS reform legislation.

DATED this ___ day of March, 2004.

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CERTIFICATE OF FILING AND SERVICE

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