

**No. 8263**

This opinion is issued in response to questions presented by Fred McDonal, Executive Director, Public Employees Retirement System, concerning the applicability of Article XI, section 15, of the Oregon Constitution to proposed legislation increasing the retirement benefits of PERS retirees.

**FIRST QUESTION PRESENTED**

Would the proposed legislation require any local government to "establish a new program or provide an increased level of service for an existing program" for purposes of Article XI, section 15(1)?

**ANSWER GIVEN**

Yes. Although the issue is not without doubt, we believe a court would hold that the proposed legislation requires local governments to provide an increased level of service for an existing program.

**SECOND QUESTION PRESENTED**

If the answer to the first question is "yes," would the proposed legislation be covered by the exemption for "[a]n existing program as enacted by legislation prior to January 1, 1997"?

**ANSWER GIVEN**

No.

**DISCUSSION**

We are informed that legislation is likely to be proposed during the upcoming legislative session to prospectively increase the retirement allowances of all current PERS retirees. Such a proposal would require the increased benefits to be funded by employer contributions. Although the legislature has authorized a number of such increases in the past, *see* ORS 238.365, this increase, if enacted, would be the first since Article XI, section 15, of the Oregon Constitution took effect.

Article XI, section 15, originated through a legislative referral to the people for the 1996 general election. House Joint Resolution 2 (1995). The measure was included on the ballot as Ballot Measure 30 and was approved by the people on November 5, 1996. Article XI, section 15(1), provides:

(1) Except as provided in subsection (7) of this section, when the Legislative Assembly or any state agency requires any local government to establish a new program or provide an increased level of service for an existing program, the State of Oregon shall appropriate and allocate to the local government moneys sufficient to pay the ongoing, usual and reasonable costs of performing the mandated service or activity.

A "local government" means "a city, county, municipal corporation or municipal utility operated by a board or commission." Or Const Art XI, § 15(2)(b).

**I. Definition of Affected "Programs"**

The first question requires us to consider whether the proposed PERS benefit increase would require any local government to "establish a new program or provide an increased level of service for an existing program."<sup>(1)</sup> Art XI, § 15(1). For purposes of Article XI, section 15, a "program" means

a program or project imposed by enactment of the Legislative Assembly or by rule or order of a state agency under which a local government must provide administrative, *financial*, social, health or other specified *services to persons*, government agencies or to the public generally.

Or Const Art XI, § 15(2)(c) (emphasis added).

**A. Financial Services to Persons or Government Agencies**

We first consider whether the phrase "financial \* \* \* services to persons" includes the provision of retirement benefits to local government retirees.<sup>(2)</sup> Retirement benefits clearly are a "financial" matter. The remaining question is whether providing those benefits constitutes a "service" for this purpose.

Common usages of the word "service" include the following:

action or use that furthers some end or purpose : conduct or performance that assists or benefits someone or something : deeds useful or instrumental toward some object.

Webster's Third New International Dictionary 2075 (unabridged 1993). A broad reading of the phrase "financial \* \* \* services to persons" therefore could encompass the provision of PERS retirement benefits to local government employees. However, another common usage of the word "service" is "the duties, work, or business performed or discharged by a government official." *Id.* Thus, the voters may have intended the word "service" to include only those functions performed in a local government's capacity as a governmental entity, and not those performed in its capacity as an employer. We turn to an examination of the context.

Article XI, section 15(2)(c), broadly defines the types of services that comprise a "program." In addition to financial services, "program" expressly includes administrative, social and health services as well as "other specified services." Nothing in this definition expressly limits "program" services to activities performed in a governmental capacity.

Moreover, Article XI, section 15, includes "enterprise activities" under its umbrella, which further supports a broad interpretation of the terms "program" and "services." An "enterprise activity" is a "program under which a local government sells products or services in competition with a nongovernment entity." Art XI, § 15(2)(a). If, under the general provisions of Article XI, section 15, a local government is not required to comply with a law, rule or order that relates to an enterprise activity, any competing nongovernmental entities also are exempt from the law, rule or order with respect to that activity. Art XI, § 15(8). These provisions make clear that Article XI, section 15, applies to laws, rules and orders of general application as well as to those directed specifically toward local governments. In addition, these provisions indicate that Article XI, section 15, applies to commercial activities carried out by local governments in competition with private entities. Thus, the context suggests that the voters did not intend to limit the definition of "program" or "services" to activities carried out by local governments in their capacity as governmental entities.

Although the context supports a broad interpretation of "program," it does not unambiguously resolve the question whether a "program" includes the provision of retirement benefits to local government employees. We therefore consider whether the legislative history of Article XI, section 15, resolves this ambiguity.

Nothing in the 1996 Voters' Pamphlet indicates whether the measure was intended to apply to local governments' personnel obligations, such as public employee retirement benefits. However, the legislative history of the referring bill, House Joint Resolution 2, supports a finding that the bill was intended to apply to state-imposed personnel requirements. In oral testimony before the House General Government and Regulatory Reform Committee, Bob Cantine of the Association of Oregon Counties specifically cited a recent PERS benefit increase as one example of a state mandate for which local governments should be reimbursed:

One is the PERS taxation case which has put us in a position of having to pay higher benefit levels when the state taxed PERS. They [the state] took the revenue, increased the benefits and told all the local governments you have to pay the higher benefit level, but they kept the revenue. We would probably say we would like to be relieved of the responsibility or share the revenue with us.

Minutes, House General Government and Regulatory Reform Committee (HJR 2), March 2, 1995, at 8.

Many of the local governments that submitted written testimony also cited personnel mandates, such as state occupational safety and health requirements (OSHA), mandatory overtime pay and retirement benefits, as examples of unfunded state mandates. *See* Minutes, House General Government and Regulatory Reform Committee (HJR 2), March 2, 1995, Exhibit L at 3 (defining mandates as including "personnel mandates" relating to "shifts, fringe benefits, compulsory binding arbitration of labor-management impasses, and retirement benefits"), Exhibit H at 4, 8, 10, 11, 12, 14 and 15 (citing OSHA requirements, mandatory retiree health benefits and state overtime pay requirements as among various cities' "top five" unfunded mandates). *See also* Minutes, House General Government and Regulatory Reform Committee (HJR 2), March 17, 1995, Exhibit C at 2 (listing employee benefits as a local government program that provides "administrative, financial, social, health or *other* specified services to persons, government agencies and the public").

This legislative history supports the conclusion that Article XI, section 15, was intended to apply to state-mandated personnel services, including mandatory public employee retirement benefits. Moreover, that interpretation is consistent with the provision's text and context, which indicate that the term "program" was intended to have broad application. Therefore, we conclude that the provision of PERS benefits to retirees constitutes "financial \* \* \* services to persons" for purposes of Article XI, section 15.

## **B. Programs "Imposed" on Local Governments**

The definition of a "program" also requires that the "program or project" in question be "*imposed*" by enactment of the Legislative Assembly or by rule or order of a state agency under which a local government *must* provide \* \* \* financial \* \* \* services to persons." Art XI, § 15(1)(c) (emphasis added). We therefore consider whether the provision of PERS retirement benefits is "imposed" on local governments for purposes of this provision.

A common usage of the word "impose" is

to make, frame, or apply (as a charge, tax, obligation, rule, penalty) as compulsory, obligatory, or enforceable [impose] a duty on a city official> <the obligations *imposed* by international law -- *Encyc. Americana*>

Webster's Third New International Dictionary 1136 (unabridged 1993). Because this definition applies to duties "imposed" on city officials and obligations "imposed" by law, it is consistent with the context in which the word "imposed" is used in Article XI, section 15. Under this definition, a program is "imposed" by the state if a state law, rule or order makes participation in the program "compulsory, obligatory, or enforceable."

Oregon's first statewide retirement system was established by the Public Employes Retirement Act in 1945. Or Laws 1945, ch 401. That Act required all public employers to participate in the system, except those specifically excluded by the Act. Or Laws 1945, ch 401, § 8. *See also* Or Laws 1945, ch 401, § 2(1) (defining "public employer" as "the state, one of its agencies, or one of its political subdivisions"). The 1945 Act excluded from participation (1) employees covered under a pre-existing retirement system established by a public employer or a teacher's retirement association; (2) a political subdivision, other than a school district, that employed fewer than five employees whose positions normally required more than 600 hours of service per year; and (3) a political subdivision, other than a school district, that elected not to participate in the system by written notice provided before May 1, 1946. Or Laws 1945, ch 401, § 8(1), (2), (3). Political subdivisions that came into existence after May 1, 1946, or that were excluded from participation under one of the above provisions could elect to participate in the 1945 system. Or Laws 1945, ch 401, § 8(7).

In 1953, the 1945 system was abolished and the current system was established in its place. Or Laws 1953, chs 180 and 200. All local government employers that participated in the 1945 retirement system were required to participate in the new system. Or Laws 1953, ch 200, § 8. As under the 1945 system, other local government employers could elect to participate prospectively in the current system. In addition, the 1953 Act included an express provision allowing political subdivisions other than school districts to withdraw from participation under certain conditions (e.g., advance written notice of withdrawal, employee petition signed by at least 75 percent of covered employees, audit, and payment of unfunded withdrawal liability). Or Laws 1953, ch 200, § 8(4); *former* ORS 237.061. This withdrawal provision was repealed effective January 1, 1956. Or Laws 1955, ch 131, §§ 21 and 22. No other statute has ever authorized withdrawal by PERS employers.

In 1971, the legislature enacted the "equal to or better than" provisions, which establish a minimum level of retirement benefits for police officers and firefighters. ORS 237.620(1) required that by July 1, 1973, all public employers must participate in PERS with respect to police officers and firefighters employed by them. The only exception to this mandated coverage is for public employers who provide retirement benefits that are "equal to or greater than" PERS benefits. ORS 237.620(4).

Except as required by the "equal to or better than" provisions, local government employers have had no legal obligation to begin participation in PERS or its predecessor, the 1945 system. Once an employer has actually commenced PERS participation, however, it cannot discontinue participation without legislative authorization. Moreover, participating employers have a legal obligation to fund all benefits established by the legislature, including benefit increases adopted after an employer joins PERS.<sup>(3)</sup> *Stovall v. State of Oregon*, 324 Or 92, 122-24, 922 P2d 646 (1996).

Because most local government employers initially elected to participate in PERS, the question for purposes of Article XI, section 15, is this: are we to determine whether a program is "imposed" as of its inception -- in this case, when an employer first has the opportunity or obligation to participate in PERS -- or as of the time the program's service levels are

increased by legislative action? Although the issue is not entirely without doubt, we believe the second approach is more consistent with the intent of Article XI, section 15.

The apparent purpose of Article XI, section 15, is to limit the state's ability to unilaterally increase a local government's financial obligations. If we look to the time of PERS' inception, that program has never been "imposed" on local governments except to the extent of the "equal to or better than" requirements. Hence, Article I, section 15, would not apply and participating local government employers would be subject to any increases in their retirement obligations that the legislature chose to enact, including increases that may not have been reasonably foreseeable by the local governments when they elected to participate in PERS. Over time, legislative changes could result in a mandatory PERS "program" that differs substantially from the "program" the local government initially elected to join, but that program would not be considered to be "imposed" for purposes of Article XI, section 15, even though the local government could not withdraw, because the local government initially entered PERS voluntarily. We believe this interpretation would be fundamentally at odds with the basic purpose of Article XI, section 15.

The alternative approach would be to determine whether a program is "imposed" as of the time the state increases the level of services under the program. Under this approach, PERS would be an "imposed" program because, at the time of the proposed benefit increase, state law prohibits participating public employers from withdrawing from the program. We believe this interpretation, i.e., determining whether participation in the program is currently compulsory on local governments that previously opted to participate, is more consistent with the purpose of Article XI, section 15, and therefore is the more reasonable interpretation.

Although the issue is not entirely without doubt, we believe that a court considering the question would conclude that the proposed retiree benefit increase would require participating local government employers to "provide an increased level of services" under an existing program for purposes of Article XI, section 15(1).

## II. Exemption For Existing Programs

Article XI, section 15, does not apply to "[a]n existing program as enacted by legislation prior to January 1, 1997." Art XI, § 15(7)(c). Although PERS was enacted by legislation before January 1, 1997, the proposed benefit increase was not part of the PERS program before that date.<sup>(4)</sup> Thus, we are also asked whether Article XI, section 15(7)(c), exempts all terms of the PERS program, including those adopted after 1996, or only those terms that were in effect before January 1, 1997. We conclude that Article XI, section 15(7)(c) applies only to the terms of the PERS program in effect before January 1, 1997.

Although it is possible to read Article XI, section 15, as broadly exempting all programs enacted before 1997, including aspects of those programs enacted after December 31, 1996, we believe such an interpretation would require a strained reading of the text. The text exempts existing programs *as* enacted by legislation before January 1, 1997. The phrase "as enacted by" strongly suggests that the exemption was intended to apply only to the terms of a program as they existed before 1997.

The more restrictive interpretation also would be more consistent with the apparent objective of Article XI, section 15. The primary effect of Article XI, section 15, is to give local governments more control over their financial obligations. The reasons for exempting pre-existing mandates are apparent -- retroactive application of the funding requirements could have a devastating effect on the state budget, and the termination of pre-existing programs for lack of funding could interfere with contract rights. In contrast, there is no apparent rationale for allowing the state to prospectively increase local governments' obligations under pre-existing programs.

Because the text and context are relatively clear, a reviewing court might decline to consider legislative history to clarify the meaning of Article XI, section 15(7)(c). If a court did consider the legislative history, however, that history also supports the more restrictive interpretation. The explanatory statement in the Voters' Pamphlet reads in part:

The state is required to pay the usual and reasonable costs of [programs imposed on local governments after January 1, 1997] *and costs of the state's increasing the level of services under existing programs after January 1, 1997.*

1996 Voters' Pamphlet at 23 (emphasis added).

Because the Voters' Pamphlet was issued in 1996 for use in the November 5, 1996, election, the most reasonable interpretation of the phrase "existing programs" would include programs in existence at the time of the 1996 election. This explanatory statement therefore supports our conclusion that the limitations of Article XI, section 15, were intended to apply to increases in service levels under programs that existed before January 1, 1997.

Based on the text, context and legislative history, we conclude that the exemption in Article XI, section 15(7)(c), applies only to those PERS provisions enacted before January 1, 1997. Benefit increases imposed by statutory amendments adopted on or after January 1, 1997, would not be exempt under that provision.<sup>(5)</sup>

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1. In interpreting a constitutional provision adopted through the referendum process, the courts apply the analysis adopted by the Supreme Court in *PGE v. Bureau of Labor and Industries (PGE)*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993). Under that analysis, the first step is to examine the provision's text and context to determine the voters' intent, giving words of common usage their plain, natural and ordinary meaning. *Id.* at 611. If the voters' intent is clear from the text and context, the search ends there. If, however, the voters' intent is not clear from the text and context of the constitutional provision, the courts look to the provision's history to help them ascertain the voters' intent. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994). The history of a referred constitutional provision includes information available to the voters when the measure was adopted, such as voters' pamphlet materials and contemporaneous news reports and editorials on the measure. *Id.* at 560 n 8. It also includes the legislative history of the bill referring the measure to the voters. *City of Portland v. Smith*, 314 Or 178, 190-91 n 4, 838 P2d 568 (1992).

Return to [previous location](#).

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2. Although PERS administers and pays the retirement benefits, "participating PERS employers *provide and fund* the benefits; PERC and PERB act as a *conduit* through which those benefits pass." *Stovall v. State of Oregon*, 324 Or 92, 124, 922 P2d 646 (1996) (emphasis in original).

Return to [previous location](#).

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3. We have considered whether the obligation of participating local governments to continue participating and to fund future benefit increases arises from a contract between the state and the local government. If that is the case, the obligation would be "imposed" by contract and not by state law, rule or order. The Oregon Supreme Court has found, however, that there is no enforceable statutory contract between the state and local government employers with respect to the provision of PERS benefits. *Stovall*, 324 Or at 120. Consequently, we conclude that a participating local government's obligation to continue participating and to fund future benefit increases arises not from a statutory contract but from state law.

Some local government employers participate in PERS pursuant to express contracts with the Public Employees Retirement Board. We have not been asked to review any specific contracts and therefore express no opinion as to the possible effect of such a contract on a particular employer's ability to invoke Article XI, section 15.

Return to [previous location](#).

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4. The legislature has increased the benefits payable to PERS retirees several times in the past. *See* ORS 238.365, 238.370. We have considered whether these past increases create an implied contractual obligation on the part of the state to provide similar increases in the future. If so, periodic retirement benefit increases would be part of the PERS program as enacted by legislation before January 1, 1997, and thus would be exempt from the limitations of Article XI, section 15.

In private pension plans, an employer may inadvertently create a permanent plan benefit by establishing a pattern of repeated plan amendments providing for similar benefits in similar situations for substantially consecutive, limited periods of time. 26 CFR § 1.411(d)-4, Q&A-1(c). As a governmental plan, PERS is not subject to this rule. *See* 26 USC §§ 401(a) (flush language following paragraph (34)), 411(e)(1)(A). Even if the private plan rule did apply, we believe the prior PERS benefit increases were not sufficiently similar or consecutive to establish any clear pattern.

More fundamentally, the mere enactment of prior benefit increases is not enough under Oregon law to impose a permanent contractual obligation on the state. Oregon courts will not infer a binding contractual obligation from legislation that does

not unambiguously express the intention to create that obligation. *Eckles v. State of Oregon*, 306 Or 380, 390-91, 760 P2d 846 (1988), *appeal dismissed* 490 US 1032 (1989); *Hughes v. State of Oregon*, 314 Or 1, 14, 838 P2d 1018 (1992). None of the previously enacted benefit increases express any intention to contractually obligate the state to provide future increases. Compare ORS 238.365 (providing for ad hoc increases in retirement benefits) with ORS 238.360 (requiring permanent annual cost-of-living adjustments to PERS retirement benefits). Therefore, we conclude that, except for the cost-of-living adjustment provided for in ORS 238.360, the state has no contractual obligation to provide retiree benefit increases.

Return to [previous location](#).

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5. This opinion is limited to the questions presented and does not address whether the proposed legislation would be covered by any exemption other than Article XI, section 15(7)(c).

Return to [previous location](#).

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**Go to:**

[Top of page.](#)

[AG Opinions home page.](#)