

EXHIBIT 1

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Howard Swanson, Lambert Niesen, Steven
Bornus, Richard Maus, James
R. Otto, and William H. Kuretsky,

Court File No. 62-CV-10-5285
The Honorable Gregg E. Johnson
Case Type: 14 Other Civil

Plaintiffs,

vs.

State of Minnesota , Public Employees'
Retirement Association of Minnesota,
Minnesota State Retirement System,
Teachers Retirement Association of
Minnesota, Governor Tim Pawlenty (in his
official capacity), Thomas L. Marshall (in
his official capacity), Mary Most Vanek (in
her official capacity), Mary Brenner (in her
official capacity), David Bergstrom (in his
official capacity), Martha Lee Zins (in her
official capacity), and Laurie Fiori Hacking
(in her official capacity),

Defendants.

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

B. By Cutting Vested Benefits, Defendants Violated the Contract Clauses of United States And Minnesota Constitutions

1. The Contract Clause protects contractual relationships like those at issue here

“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” U.S. Const. art. I, § 10, cl. 1.

The Contract Clause is one of the United States Constitution’s few express bans on the state, and its unique history suggests not only a present importance, but also an importance to the founding and development of America. The United States Supreme Court has observed that the framers placed a high value on the protection of contracts: “Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.” *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

“The modern Contract Clause analysis involves three components: “(1) Does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment substantial?”” *Koster v. City of Davenport, Iowa*, 183 F.3d 762, 766 (8th Cir. 1999) (quoting *Honeywell, Inc. v. Minn. Life and Health Ins. Guar. Assoc.*, 110 F.3d 547, 551 (8th Cir. 1997) (en banc)). If a substantial impairment of a contractual relationship exists, the legislation nonetheless survives a constitutional attack if the “impairment is ... justified as ‘reasonable and necessary to serve an important public purpose.’” *Id.* (quoting *Parella v. Retirement Bd. of the R.I. Employees’ Retirement Sys.*, 173 F.3d 46, 59 (1st Cir. 1999)); see *U.S. Trust Co. v. N.J.*, 431 U.S. 1, 25 (1977).

The Minnesota Constitution provides similar protections. Its Contract Clause provides: “No bill of attainder, ex post facto law, or any law impairing the obligation of contracts shall be

passed . . ." Minn. Const. art I, § 11. To establish a violation of the Minnesota Contract Clause, "a court initially considers whether the state law has, in fact, operated as a substantial impairment of a contractual obligation." *Jacobsen*, 392 N.W.2d at 872. If a substantial impairment is found, "those urging the constitutionality of the legislative act must demonstrate a significant and legitimate public purpose behind the legislation." *Id.* "Finally, the legislature's action is examined in the light of this public purpose to see whether the adjustment of the rights and liabilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the law's adoption." *Id.*

Plaintiffs allege in Counts I and III of their Complaint that Defendants' retroactive application of the 2009 and 2010 Pension Legislation to reduce their postretirement adjustments has violated the Contract Clauses of the United States and Minnesota Constitution.

2. Pension Rights Are Determined by the Law in Force when the Claim to the Pension Arises.

Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to "existing rules or understandings that stem from an independent source such as state law." *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Authoritative and precedential decisions by the Minnesota Supreme Court have declared that "[i]t is well settled that 'the law in force when the claim to a pension arises governs the right to the pension.'" *Axelson v. Minneapolis Teachers' Retirement Fund Ass'n*, 544 N.W.2d 297, 300 (1996) (citing *Butler v. Minneapolis Police Relief Ass'n*, 166 N.W.2d 705, 706 (1969)); see also, *State ex rel. Krake v. Minneapolis Fire Dept. Relief Assn.*, 284 N.W. 884, 885 (Minn. 1939). See also, *Christensen*, 331 N.W.2d at 752 (applying law in force at time pension right arose, even though law subsequently changed); *Sylvestre*, 214 N.W.2d at 666 (same).

Commissioner of Human Services for denial of welfare benefits); *Lynch v. Public School Retirement System of Missouri*, 27 F.3d 336, 338 (8th Cir. 1994) (Attorney General was a proper defendant to enforce order concerning operation of pension system). Liability may be imposed even where the individual defendant was not involved in enacting the unconstitutional law. See *Yenuti v. Riordan*, 702 F.2d 6 (1st Cir. 1983).

Individual Defendants are the officials charged with enforcing state laws governing the Retirement Systems. As such, they have been acting under color of law in applying the 2009 and 2010 Pension Legislation to the Plaintiffs, in violation of the Contract Clause and Takings Clause of the United States Constitution, as explained above. Because Plaintiffs have been deprived under color of state law of a federally-protected right, this Court should enter judgment in favor of the Plaintiffs on Count V and VI.

Plaintiffs have brought a claim seeking prospective, injunctive relief against the Individual Defendant state officials in their official capacities.

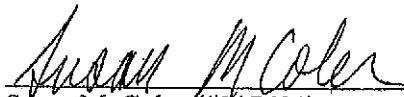
Official-capacity actions or prospective relief are not treated as actions against the state. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989); *Alsbrook v. City of Maumelle*, 194 F.3d 999, 1010 n.19 (8th Cir. 1999) (citing *Will*). State governors are frequently proper defendants in cases brought under Section 1983 that seek injunctive relief. See, e.g., *Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979) (prison overcrowding case brought against Missouri Governor and state officials); *Arkansas Day Care Ass'n, Inc. v. Clinton*, 577 F.Supp. 388 (D. Ark. 1983) (claim predicated on Establishment Clause).

V. CONCLUSION

For all of the above reasons, Plaintiffs respectfully request the Court to grant their Motion for Summary Judgment in its entirety.

Dated January 28, 2011

HALUNEN & ASSOCIATES



Susan M. Coler (#217621)
Clayton D. Halunen (#219721)
Halunen & Associates
1650 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Telephone: (612) 605-4098
Facsimile: (612) 605-4099

William T. Payne (admitted pro hac vice)
Stephen M. Pincus (admitted pro hac vice)
Stember Feinstein Doyle Payne
& Cordes, LLC
Allegheny Building, 17th Floor
429 Forbes Avenue
Pittsburgh, PA 15219
Telephone: (412) 281-8400
Facsimile: (412) 281-1007

Attorneys for the Plaintiffs

EXHIBIT 2

STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No. 09-E-0290

American Federation of Teachers – New Hampshire

v.

The State of New Hampshire

PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Petitioners move for summary judgment pursuant to RSA 491-8:a.

I. INTRODUCTION

It is well settled in New Hampshire that Class Members acquire a vested right in pension benefits from the New Hampshire Retirement System (“NHRS” or “the System”) when they begin public employment. As our Supreme Court held in State Employees’ Ass’n of New Hampshire, Inc. v. Belknap County, “these benefits constitute a substantial part of an employee’s compensation and *become vested upon the commencement of permanent employee status.*” 122 N.H. 614, 621 (1982) (emphasis added); see also In Re Concord Teachers (New Hampshire Retirement System), 158 N.H. 529 (N.H. 2009).

Class Members held up their end of the “deal” by contributing the required portion of their wages to the NHRS and providing the requisite years of service. Defendants, by contrast, have not upheld their end. To the contrary, instead of disbursing the benefits promised, Defendants changed the formula for calculating pensions that was in effect when Petitioners’ rights vested. The new formula will deprive the Class of their full entitlement by no longer treating certain payments—such as automobile and clothing allowances—as “earnable compensation” when determining the amount of pension due. Defendants have also altered the method of funding the account used to pay promised annual pension cost-of-living adjustments

Article I, section 10, of the Federal Constitution provides that “[n]o state shall ... pass any ... law impairing the obligation of contracts....” This Court has “relied on federal contract clause cases to resolve issues raised under Part 1, article 23 where contract impairment, not simply retroactive application of a law was alleged.” Opinion of Justices (Furlough), 135 N.H. at 630 (citations omitted). In fact, the federal Contracts Clause, Article I, section 10 of the U.S. Constitution, and the New Hampshire Contracts Clause have been held to “offer equivalent protections where a law impairs a contract, or *where a law abrogates an earlier statute that is itself a contract.*” Id. (citation omitted and emphasis added); State v. Fournier, 158 N.H. 214, 221 (2009) (citing Opinion of Justices (Furlough)).

“Contract Clause analysis in New Hampshire requires a threshold inquiry as to whether the legislation operates as ‘a substantial impairment of a contractual relationship.’” Tuttle v. New Hampshire Medical Malpractice Joint Underwriting Ass’n, 159 N.H. 627 (2010) (quoting Lower Village Hydroelectric v. City of Claremont, 147 N.H. 73, 77 (2001)). “‘This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.’” Id. (quoting Lower Village Hydroelectric, 147 N.H. at 77). “If the legislation substantially impairs the contract, ‘a balancing of the police power and the rights protected by the contract clauses must be performed, and ... [the] law ... may pass constitutional muster only if it is reasonable and necessary to serve an important public purpose.’” Id. (quoting Opinion of the Justices (Furlough)), 135 N.H. at 634).

“A plaintiff is entitled to restitution for unjust enrichment if the defendant received a benefit and it would be unconscionable for the defendant to retain that benefit.” Nat’l Employer Serv. Corp. v. Olsten Staffing Serv., 145 N.H. 158, 163 (2000). “The party seeking restitution must establish not only unjust enrichment, but that the person sought to be charged had wrongfully secured a benefit or passively received one which it would be unconscionable to retain, and unjust enrichment generally does not form an independent basis for a cause of action.” General Insulation Co. v. Eckman Const., 159 N.H. 601, 621 (N.H. 2010).

Again, NHRS requires all of its active members to contribute to the system based on a percentage of their earnable compensation. Prior to July 1, 2008, “payments in lieu of medical/dental insurance” and/or “clothing allowances” were considered “earnable compensation” by many employers and as such, many Class Members who received these and similar payments made contributions to NHRS based on the amount of these payments.

As a result of HB 1645, NHRS will no longer factor in these payments to calculate a retiring member’s “earnable compensation” upon which his pension is calculated. If the Constitutionality of HB 1645 is upheld, these Class Members have made contributions to NHRS and will receive no benefit. As such, NHRS should be ordered to return the contributions paid on “other compensation” like clothing allowances, as it would be unconscionable for them to retain them.

IV. CONCLUSION

For the reasons cited above, Petitioners request that partial summary judgment be entered in their favor on all Counts, except for Counts IV, VIII, XII, XVI and XVII, which have been withdrawn.

Respectfully submitted,

The Petitioners

By their attorneys,

By: _____

Glenn R. Milner, Esq.

NH Bar No. 5568

Molan Milner and Krupski, PLLC

100 Hall Street, Suite 101

Concord, NH 03301

(603) 410-6011

William T. Payne, Esq.

John Stember, Esq.

Stephen M. Pincus, Esq.

Stember Feinstein Doyle & Payne, LLC

Allegheny Building, 17th Floor

Pittsburgh, PA 15219

(412) 281-8400

EXHIBIT 3

37. Even if SDRS reaches 100% funding in several years and maintains that level, Class Members will still lose thousands of dollars over the course of their remaining lives due to the compounding nature of the reduced increases.

COUNT I

(Declaratory Relief: Seeking a Judicial Determination that SB 20 violates the Contract Clause of the South Dakota Constitution)

38. Plaintiffs repeat and reallege the allegations contained in the preceding paragraphs and incorporate them by reference.

39. The Contract Clause of the South Dakota Constitution instructs: "No ex post facto law, or law impairing the obligation of contracts or making any irrevocable grant of privilege, franchise or immunity, shall be passed." South Dakota. Const. art. 6, § 12.

40. Under South Dakota law, government pensions are considered a form of contract between public sector workers and the government. *Tait v. Freeman*, 74 S.D. 620, 57 N.W.2d 520 (1953).

41. The Contract Clause of the South Dakota Constitution restricts the Defendants from enacting and enforcing laws that adversely affect pension benefits of public employees have already earned and are receiving.

42. The named Plaintiffs having made the requisite contributions to the Plans throughout their public sector employment, having met the age and service eligibility requirements to receive a pension, having terminated their employment and having begun receiving pension benefits from the Plans, their right to annual postretirement improvements were terms of a contract binding on the State of South Dakota and SDRS.

43. The named Plaintiffs are contractually entitled to benefits at the levels that were specified under South Dakota law when they began receiving their pensions, including the level of annual postretirement improvements.

44. SB 20 violates the contractual rights of Plaintiffs and Class Members to annual postretirement improvements to their pensions at the levels and in the manner specified by South Dakota law when they began receiving their pensions.

45. Because SB 20 diminishes vested pension benefits and because Defendants' actions were neither reasonable nor necessary and because alternatives were available to Defendants to increase funding of SDRS without breaching the contractual rights of Plaintiffs and Class Members, Defendants violated the Contract Clause of the South Dakota Constitution.

46. This is an action for declaratory relief pursuant to SDCL § 15-6-57 and the Uniform Declaratory Judgments Act, SDCL Ch. 21-24. SDCL § 21-24-1 provides: "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree."

COUNT II

(Declaratory Relief: Seeking a Judicial Determination that SB 20 violates the Contract Clause of the United States Constitution)

47. Plaintiffs repeat and reallege the allegations contained in the preceding paragraphs and incorporate them by reference.

48. The Contract Clause of the United States Constitution declares that "[n]o state shall...pass any...law impairing the obligations of contracts..." U.S. Const. art. I, § 10.

70. Individual Defendants have deprived Plaintiffs and Class Members of their rights secured by the Substantive Due Process protections of the United States Constitution.

RELIEF REQUESTED

WHEREFORE, the Plaintiffs request that this Court order the following relief:

- A. Assume jurisdiction of this case;
- B. Enter a declaratory judgment pursuant to SDCL § Ch. 21-24, finding that SB 20 violated the Contract Clause of the South Dakota Constitution, and the Contract Clause, the Taking Clause and the Substantive Due Process protections of the United States Constitution;
- C. Issue a permanent injunction barring implementation of SB 20;
- D. Certify the proposed Class pursuant to SDCL § 15-6-23, *et seq.*;
- E. Issue an order appointing Goodsell Quinn LLP and Stember Feinstein Doyle Payne & Cordes, LLC as counsel for the class;
- F. Award Plaintiffs and the Class monetary damages (plus prejudgment interest), pursuant to SDCL § Ch. 21-24 to make them whole for any loss and to restore them to the positions they would have been in but for SB 20;
- G. Award attorney fees and costs incurred in this action pursuant to 42 U.S.C. § 1988, SDCL § 21-24-11, and/or as available under state law or otherwise; and
- H. Issue such other relief as the Court deems just and proper.

Dated this ____ day of June, 2010.

Respectfully submitted,

By: _____
G. Verne Goodsell
Goodsell Quinn, LLP
246 Founders Park Drive, Suite 201
PO Box 9249
Rapid City, SD 57709
Telephone: (605) 343-3000
Facsimile: (605) 343-3251

and

Stephen M. Pincus, Esq.
William T. Payne, Esq.
John Stember, Esq.
Stember Feinstein Doyle Payne & Cordes, LLC
Allegheny Building, 17th Floor
429 Forbes Avenue
Pittsburgh, PA 15219
Telephone: (412) 281-8400
Facsimile: (412) 281-1007
(motions for *pro hac vice* to be filed)

On behalf of Plaintiffs and others similarly situated