Sunday, February 10, 2013

The Divide

The dueling reports on the COLA cap proposal have been issued and reported. On the one hand, the Governor's office requested a legal analysis from the Attorney General on the COLA cap, while House Speaker Tina Kotek asked for legal advice from the Legislative Counsel on the same general proposal. (Do keep in mind that at this time, there is no formal bill that I'm aware that has hit the pipeline for this COLA Cap, so all of this is speculation based on the Governor's proposal that the Legislature pass such a cap in the current session). The documents appear to be contradictory, but, in reality, they are not. On the one hand, the Governor's office got an analysis of how the AG's office would defend the COLA Cap in the Supreme Court, while the Legislative Counsel provided a legal opinion to the Legislature on the proposal in the first place. The AG's analysis was that they "could" defend the COLA Cap in court - as if they had a choice - but it would be easier if they changed a few things around. The Legislative Counsel concluded that he didn't think the COLA Cap would pass contractual muster with the Court.

So, who is right? Well, it is hard to offer an opinion on how a highly charged issue like PERS will be decided in a legal setting. Presumably, the Oregon Supreme Court, like all other Supreme Courts, rules on the basis of something called the "rule of law". They also tend to follow a legal principle called *stare decisis*, which means that subsequent courts try, so far as possible, to respect earlier rulings by the court. If these two principles hold, the COLA Cap does not have a prayer, based on the history of rulings the Oregon Supreme Court has issued in previous PERS cases. I will discuss this history, and provide a brief overview of the Legislative history of the PERS COLA in another post later in the week. Unfortunately, our Supreme Court is elected, not appointed, and the fact that all members of the Court are also PERS members means that their opinions are subjected to more than the usual amount of scrutiny by the media and by the public.

The conflict issue has driven a Bend attorney, Daniel Re, to crusade for empaneling a group of Judges, not in PERS, to hear and rule on all future matters pertaining to PERS. Re has roped Representative Jason Conger (R, Bend) into sponsoring a bill that would require "outside" judges (outside of what?) to rule on any matters of PERS. Re acts like this is a problem unique to the Oregon Supreme Court. In fact, it is not, and another legal principle "the rule of necessity" states that there are some issues that present conflicts of interest to the court. The presumption under the "rule of necessity" is that sometimes these things happen and that the legal principles trump the conflicts and that judges can put their personal situations aside. Re talks about assembling a panel of judges who are not PERS members (not in Oregon) to hear the PERS cases and to rule on them. Where would you find such judges? How would you deal with the constitutional issues that gives the Oregon Supreme Court final jurisdiction over actions taken by the Legislative and Executive Branch? What about State's rights, a favored principle of Conservatives used to try to circumvent many inveighs from Washington, DC? I sincerely doubt that the Conger/Re proposal will get much traction in the Legislature. Some have suggested that perhaps a Federal Court could rule on PERS issues. It will be a cold day in hell when the Federal Court System gets involved in problems unique to a particular state. So, I expect that all PERS issues now and in the future will continue to be resolved in the Oregon Supreme Court.

The Oregon Attorney General offers the Strunk case as an illustration of how the Court chose only to rule on Section 1 of ORS 238.360. Section 1 deals only with the fact of a COLA for PERS retirees, and the Strunk Court basically said that you cannot offer a PERS retirement benefit to which a COLA does not attach. Since the issue there was the temporary suspension of the COLA as a method of repayment for the alleged (then) 1999 over crediting, the Court could limit its attention only to the questions at hand. Therefore, the Court ruled that the Legislature cannot, for

any reason, eliminate the COLA in any year to recoup a debt. To do so would be to define a new benefit form, after the fact, to members who retired before the change. So, it is true that the Strunk court did not rule on the question of the COLA Cap, or offer any opinion as to future changes to the COLA statutes in the ORS. But, to be double-dog sure, the AG said that one strategy might be to get the Strunk ruling on the COLA overturned. If they were to overturn the Strunk ruling on the COLA, then a great deal of mischief might be possible. The AG also suggested that the concept of a COLA Cap might fly better with the Court if it were applied equally to all members. Since the Governor's proposal sets an arbitrary cap on the dollar amount subject to the COLA, it affects members unequally and discriminatorily (the AG didn't use those words, but the implication was there). Courts don't like discriminatory measures. The AG suggested that the Court might be more favorably disposed to view a cap on the percent paid out. The existing cap is 2% (indeed, the existing cap has been 2% since 1973, retroactive to 1972). Limiting the COLA to 1%, for example, would meet the requirement of being non-discriminatory and might pass muster with the Supreme Court. Of course, the Governor's proposal tried to insulate about 50% of current PERS retirees from the impact of the COLA Cap. However, given enough time, all of the people unaffected NOW by the cap, would eventually exceed the cap and would then suffer the way the other half suffered. And, of course, changing the current COLA cap from 2% to 1% might run afoul of another set of rulings, namely the Hughes ruling in 1991.

The Legislative Counsel offered a formal opinion on the legality of the Governor's proposal. In a short, but concise, legal opinion, the LC wrote that the combined weight of Hughes and Strunk, coupled with several other rulings, as well as the history of the COLA implementation through the Legislature, makes it unlikely that the Court would view the Governor's proposal favorably. The LC did not offer any opinion on other variants that might meet with the Court's approval.

So, for now, we leave the question until next week when a concise review of the Legislative history might prove instructive to see how the Legislature viewed the COLA when it first became part of the PERS retiree benefit array.

Posted by mrfearless47 at 11:01 AM
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