Dear Representative Richardson:

In your March 13, 2013 email to constituents and interested persons, which I received, you asked "Are Purposed PERS Reforms Legal?" Your email contained a link to an Oregonian editorial that referenced the opinion of former Oregon Supreme Court Justice Gillette and it contained a link to the opinion of attorney William F. Gary, both to the effect that the legislative proposal to reduce the PERS COLA was lawful. You then invited your readers to read these opinions and reach their own conclusions.

I have taken up your invitation and have read the opinions of former Justice Gillette and Mr. Gary. I have also read Assistant Attorney General Keith Kutler's memorandum to the Governor and Legislative Counsel's advice letter to Speaker Kotek on the subject. I join Legislative Counsel in concluding that any legislative attempt to reduce the COLA for current PERS retirees would be overturned by the Oregon Supreme Court. I reached this conclusion based on my thirty years of practicing law, twenty one of which were as a career professional with the Oregon Department of Justice. For that reason, I am writing to urge you to reconsider your position and to oppose any legislative proposal to reduce the annual COLA for PERS retirees.

I urge you to take this position for the simple reason that Legislative Counsel's opinion is right that such legislation is unlawful as a violation of the contract rights of members and would be struck down by the Oregon Supreme Court. The opinions of Assistant Attorney General Kutler, attorney William F. Gary and former Supreme Court Justice Gillette, respectively, are not persuasive to the contrary.

I believe it is bad public policy for the legislature to enact legislation that is certain to precipitate litigation that is predicted to last two years and in which the state's chances of prevailing are exceedingly small. It is also bad public policy for the legislature to enact legislation that, upon being invalidated by the courts, exposes the state to a high risk that the Supreme Court would make an attorney fees award against the state. Such an award was made in *Strunk* and Assistant Attorney General Kutler warned against just such a risk in his February 5, 2013 memorandum to the Governor concerning proposed legislation to reduce the COLA.

I believe it is also bad public policy to single out this group of Oregonians and require them to disproportionately contribute to the resolution of a problem that is not of their making. This is particularly inappropriate, since the group consists of an aging population of persons on fixed incomes. The retirees were induced by a retirement system to include in their financial planning a promised annual COLA (initially 1.5 % and subsequently increased to 2%). This modest COLA simply slows the rate that retirees' pension benefits are reduced by inflation. To diminish the COLA for retirees is a cruel and unnecessary betrayal of trust.

Legal Analysis

Everyone agrees that the Supreme Court held in *Strunk* that the COLA established by subsection 1 of ORS 238.060 is an inviolate contract with retirees which cannot be abrogated or impaired by the legislature.

Subsections 2, 3 and 4 of ORS 238.060 establish the ceiling and floor of the COLA (currently at 2 %) and the procedures for its calculation and implementation. Everyone agrees that whether the legislature can lawfully modify the terms of these subsections to reduce the amount of the COLA is the central issue.

Everyone further agrees that this issue rests on a determination of whether, like subsection 1, subsections 2, 3 and 4 are an unambiguous expression by the legislature of its intention to create contract terms when these three subsections were enacted together with subsection 1.

Based on a reading of subsection 1 of ORS 238.060 the Supreme Court in *Strunk* concluded that the legislature unambiguously expressed its intention to create a COLA as a contractual obligation. The court in that case was not called upon to address the question of whether subsections 2, 3 and 4 were also intended to be contractual terms.

A simple reading of the text of the four subsections of the statute amply demonstrates that these provisions are a coherent whole. Had the legislature sought to create a COLA as a contractual term, but reserved the COLA amount, method of calculation and implementation to be dealt with as a matter of legislative discretion it could have easily done so by including appropriate language to that effect in the original enactment. Of course, no such language is found in the statute.

Kutler's Memorandum

In his February 5, 2013 memorandum to the Governor Assistant Attorney General Kutler advances three arguments in support of the lawfulness of a proposed COLA reduction.

Kutler first argues that since *Strunk* did not address subsections 2-4 of the statute, a "plausible reading" of *Strunk* is that a COLA reduction would be lawful. Plausibility is hardly a ringing endorsement of the argument's persuasive power since it is well recognized that when a court is silent regarding any matter that is not before it for decision, its silence on the matter implies nothing. In some cases courts comment on matters that are not presented for decision. Such comments are known as *dicta* and do not have the force of law. There is no *dicta* in *Strunk* regarding subsections 2-4. Thus, there is neither express language nor implication in the *Strunk* case supporting this argument and no inference may fairly be drawn from the *Strunk* opinion that the court thought that sections 2-4 were anything other than contract terms.

Kutler next argues that the court might reverse its decision in *Stunk* and determine that the COLA enacted in 1971 was a "gratuitous" act by the legislature and not a PERS contract term. Evan assuming that Kutler's analysis is correct, the force of his argument that the 1971 COLA was a gratuity applies only to persons who were already retirees in 1971 when the COLA was enacted. Kutler's argument has no application to persons who were current employees in 1971 or persons who were hired subsequently. Those who, after the 1971 enactment, continued employment and those who were newly hired by the action of continuing or undertaking employment, respectively, accepted the unilateral offer of the contract right to the COLA contained in the statute.

Kutler's final argument is that the court might uphold COLA reduction legislation as a lawful modification of the statutorily created contract under a theory of contract rescission or reformation. Kutler's limited discussion of this issue defies analysis, but it is noteworthy that Kutler acknowledges in citing *Strunk* that "Oregon courts have not recognized the principle that contracts may be impaired based on economic hardship." He further notes that even if this currently rejected legal theory was to be adopted by the Oregon courts the magnitude of the economic hardship sufficient to justify impairing a contract is exceedingly large. Finally, Kutler notes that the *Strunk* court rejected his third argument when it refused to adopt the economic hardship theory as a basis for modifying the PERS contract which was advanced by employers in that case.

Nowhere in Kutler's memorandum does he offer any assessment of the persuasiveness of his arguments or the likelihood that legislation reducing the COLA would be sustained by the Supreme Court. He opens his memorandum with the truism regarding all litigation that "no guarantees are possible" and he characterizes one of his arguments as merely "plausible." Kutler's memorandum should generate no confidence that the Supreme Court would sustain legislation reducing the PERS COLA.

Attorney William F. Gary's Advice Letter to the Oregon School Boards Association

In an advice letter dated March 11, 2013 concerning the concepts proposed in SB 754 and written to his client, the Oregon School Boards Association, attorney William F. Gary stated that the *Strunk* opinion guarantees a COLA, but that the court did not determine that any particular amount of COLA was guaranteed. Gary is correct, of course, in that regard because the *Strunk* court never addressed the issue. However, Gary goes on to speculate that had the *Strunk* court addressed the issue "it likely would have concluded that [the so called COLA cap] was not an immutable part of the PERS contract." After characterizing the key issue to be whether the COLA cap is "immutable" or not, Gary contends there is nothing in the text of the statute or its context that indicates that the legislature in 1971 intended that the COLA cap be unchangeable. Gary then notes that the cap was changed in 1973 and that there is no evidence in the legislative history that any member of the legislature suggested that the change in the statute breached a promise that the cap would never change. Gary concludes by opining that the legislature "has not promised that the annual cap on the COLA is immutable." (My emphasis.)

Gary, however, misstates the central issue and introduces a straw man into the discussion in the form of the concept of immutability. The central question is not whether the COLA cap in subsection 2 of ORS 238.360 can be changed, it is whether it can be reduced. Of course the cap was changed in 1973. The COLA was increased which meant that the unilateral contract offer of the state to its employees of an increased COLA in 1973 from 1.5% to 2% was accepted by the employees as a function of their continued employment and was accepted by new hires when they joined the work force. Because the legislature in 1973 provided for a .5% benefit increase for employees there would be no reason to expect an objection to the change based on any purported immutability of the statute. An employer is always free under contract law to unilaterally offer its employees increased compensation which the employees effectively accept by continued employment. An employer cannot, however, unilaterally decrease employee compensation under an employment contract.

Gary's analysis is critically flawed and his conclusion that proposed legislation to reduce the amount of the COLA is valid and would withstand judicial challenge without foundation.

Former Oregon Supreme Court Justice Gillette's Opinion

The Oregonian editorial reports that Gillette, now in private practice and representing the Oregon League of Cities, took the position that the proposed COLA reduction was lawful. Gillette was quoted as stating "the best argument is that the Legislature has amended the statutes in substantive ways in the past, proceeding as if the details of the COLAs...are completely within the control of the Legislature and can be changed from time to time... Thus, 'scaling back' COLAs for pensioners with larger pensions may be entirely permissible, because the amount of a COLA is a flexible detail of that part of the PERS system, not an immutable characteristic of it." Gillette, like Gary, introduces the "immutability" straw man into the argument. That COLAs have been changed is beyond doubt. For retirees, a legislative change to increase the COLA is lawful, a change to reduce the COLA is prohibited. This may be Gillette's "best argument," but it is not a winning argument.

Legislative Counsel's Opinion

Legislative Counsel's letter dated February 4, 2013 is clear when it states that "attempts to limit the COLA to the first $24,000 of benefits would be found to be in violation of the contract rights of Tier 1 and Tier 2 members." I believe this opinion applies to all attempts to reduce or limit the COLA of retirees. I also note that Legislative Counsel's opinion, unlike the opinions advanced by Kutler, Gary and Gillette, is given as a matter of disinterested advice, not offered as advocacy for a client.

Conclusion

We all care about teacher layoffs, shortened school years, too large class sizes, increased costs of tuition and the need for reforms to aspects of the PERS system. However, in the vigorous pursuit of solutions to these difficult problems we should not embark on a course of action with such a high risk of negative consequences.

For all these reasons I renew my request that you oppose any legislation that is proposed to reduce the COLA for PERS retirees. I would be happy to discuss this matter with you at your convenience and to answer any questions you may have.

Sincerely,

Frank T. Mussell