

NCPERS Files Friend of the Court Brief in Florida Supreme Court Pension Litigation

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In late 2011, a Tallahassee, Florida trial court struck down a 2011 amendment to the law governing the Florida Retirement System which required a 3% employee contribution and adversely affected the COLA benefits. The court found that the law altered the fundamental nature of the employment relationship between the state and its employees and violated the constitutional protection against impairment of contract. The Florida court also found that the bill, which was passed without bargaining, violated the state constitutional provision guaranteeing the right of public employees to collectively bargain. Using a new rule for expedited review of cases of great public importance, the case went directly to the Florida Supreme Court, bypassing the intermediate appellate court.

The NCPERS brief made the following points:

The lower court decision was correctly decided because:

- A. A budgetary shortfall by itself does not justify impairing a constitutionally protected contract.
- B. Federal cases and cases from Florida's sister states support the lower court decision.
- C. Defined benefit plans and their COLAs, such as the Florida Retirement System, are funded on a long-term basis and involve back-loaded benefits.
- D. FRS is one of the best funded state retirement plans despite the long absence of employee contributions.

The State of Florida argued that it had budget shortfalls which warranted the reduction in benefits and levying of an employee contribution in a previously non-contributory plan. NCPERS pointed out substantial U.S. Supreme Court precedent

holding that a government may not violate its contracts with its employees because it wished to spend the money elsewhere. In the end, this issue will focus on what a contract with a state government really means. Depending on the result, the decision may also be of interest to those who engage in long-term commercial contracts with a state government such as bonds, stadiums and landfills.

The State argued that the changes, which related to future years of service, did not affect rights already accrued and that the State had a residual, sovereign power to amend its pension plan as dictated by its economic circumstances. NCPERS countered that the changes did affect accrued benefits, especially the COLA. Defined benefit plans are essentially back-loaded; meaning the most valuable years come at the end of a participant's career. By altering the future benefit structure, the value of the expected benefit has been irrevocably and adversely affected. As to the contribution, NCPERS pointed out that the employee contribution was not needed to strengthen the plan; it was intended as a substitute for the state's contribution. In other words, it was an income tax on a specific part of Florida's population in a state that otherwise has no income tax.

NCPERS also informed the Florida Supreme Court that a binding agreement on the value of retirement benefits was the norm, rather than the exception, in American jurisprudence. Generally, state courts, in interpreting their own laws and constitution, commonly focus only on the law of that state. In a high profile matter such as this, however, state high courts are more willing to review and consider the views of other states on the subject. This is particularly true in cases involving pension plans as the amount of case law on constitutional rights is relatively limited when compared, for example, to case law on criminal law, commercial contract rights, or divorce.

NCPERS' brief also addresses the substantial impact of public employee retirement benefits on the Florida and national economies. Payments to retirees living in Florida is one of the largest economic drivers in the state, adding billions annually to the Florida economy and supporting tens of thousands of jobs. NCPERS' brief also notes that public employees are different. As a group, they are better educated, engage in more complex tasks, and take risks not faced by private sector workers.

The Florida case will also focus on collective bargaining. Florida is one of only three states where public employee collective bargaining is in the state

constitution. This makes collective bargaining a fundamental right which cannot be altered except in the most compelling circumstances. A large number of unions have intervened in support of the trial court decision. While NCPERS supports the right of self determination for working Americans, NCPERS is an advocate for the rights of retirement systems and their members. As a result, the NCPERS brief focuses solely on pension rights.

The Florida case will be the first of three favorable pension decisions by state trial level courts in 2011 to reach a state high court (the other cases being in Arizona and New Hampshire). The case is set for argument before the Florida Supreme Court in Tallahassee in September. A decision is expected by late December. To add further nuance to the case, three of the seven justices must stand for merit retention in November. Organized efforts are underway to unseat those justices believed more favorable to the rights of workers.

NCPERS' brief was prepared by its longtime General Counsel, Robert Klausner and Adam Levinson of the firm Klausner, Kaufman, Jensen & Levinson of Plantation, Florida. A copy of the brief is available on the firm's website, www.robertdklausner.com in the Legal Resources section.