

STATE OF MINNESOTA
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ADMINISTRATIVE
HEARINGS

FOR THE PUBLIC EMPLOYEES RETIREMENT ASSOCIATION

In the Matter of the PERA Salary
Determination Affecting Retired and
Active Employees of the City of Duluth

OAH Docket No. 4-3600-208090

John Hall, Petitioner

Honorable Judge Johnson

I am unrepresented by attorney and I argue from a lay person's perspective on behalf of myself and other City of Duluth Retirees who share my somewhat unique circumstance. I will spare you my argument over the legal issues in consideration of my inabilities and that I know learned attorneys will do so. I address what sets me and similar situated retirees apart from other petitioners.

I, and other similar retirees were members of the City of Duluth Supervisory Association (CDSA) in 1995 when article 12 of the collective bargaining agreement (CBA) between the CDSA and the City was first negotiated, and first included deferred compensation in the CBA for its members. The eligibility of the dollars paid under Article 12 to be included in pension calculations is now being retroactively contested by PERA in collaboration with the City. If successful, PERA will benefit by reducing their obligations and even though they would refund contributions made by retirees, would have had free use of those funds for many years. If successful, the City has hopes of recovering PERA assessments paid on those earnings.

The CDSA members who were paid these contested dollars agreed to accept them in lieu of regular pay for the convenience of the City. When this agreement was negotiated, there was no discussion or any consideration of diverting these dollars to satisfy health care expense. Article 12 of the 1995-1996 CBA is reprinted in its entirety here:

12.1 The employer shall allow an employee to participate in any deferred compensation plan of the employee's choice which meets the following criteria:

- a. It has been approved by the deferred compensation commission.
- b. It qualifies under the laws and regulations of the United States, State of Minnesota, Internal Revenue Service.
- c. The employer can accomplish any record keeping, data processing, accounting, or administration of the plan by making a reasonable effort.

The employer shall not do any act to change, alter, amend, or terminate any employee's deferred compensation plan without first giving at least sixty (60) days' written notice of its intention, and completing the processing of any grievance brought concerning the proposed action, unless law, ruling or order of the Internal Revenue Service requires it.

Beginning January 1, 1995, the employer shall contribute \$25 each month to any employee's deferred compensation plan which exists pursuant to this article. Beginning January 1, 1996, the amount of the employer's contribution shall be increased to a sum of \$50 each month.

The Court should notice there is no mention in the above Article 12 of hospital-medical benefits. Those were and are covered in Article 13 and there has never been, nor is there now any mention in Article 13 of deferred compensation. When the City subsequently decided dollars paid under Article 12 could be diverted to pay for healthcare expenses, such diversion was authorized in Article 12, deferred compensation, and remains there through this date, not in Article 13 Hospital-Medical Benefit Plan. The authorization in Article 12 simply clarifies that, as can dollars paid under any other Article, these dollars too can be used for the purpose of hospital-medical benefits.

Myself and other similarly situated employees without dependents, being ineligible for family coverage, had no ability to divert any dollars from Article 12 to health care reimbursement. This is significant in that Ms. Mary Most Vanek, in her initial defenses for PERA's position, claimed that the ability to divert the dollars to health care recharacterized them as a benefit instead of wages. I have never had the ability to divert these dollars to health care. They are pure deferred wages and by statutory definition, wages.

There are a number of facts that have been established in these proceedings. These contested earnings were paid by the city pursuant to a CBA between the CDSA and the City of Duluth in which the City agreed to certain costs in exchange for necessary services. Part of those costs the City agreed to pay were assessments on earnings intended to fund subsequent pension benefits payable to the employees upon retirement.

The employees performed numerous tasks and labor as they agreed to do in exchange for those earnings and the associated PERA assessments, and subsequently retired in anticipation of receipt of pension benefits based on those earnings. The City received the benefit of the work performed in exchange for those costs.

PERA received those City paid assessments on wages, and similar assessments from the employees, and pursuant to its investment strategies, invested the funds to provide revenue to fund its obligations. PERA received the benefit of having had investment use of those funds for the appropriate time period. Now, as many as 15 years after the fact, the City and PERA would like a "do over." To unwind this agreement fairly at this late date is impossible.

The City was a knowledgeable party to this agreement, represented by Karl Nollenberger, then Chief Administrative Officer, who, for his own purposes, initially suggested the now-contested dollars be characterized as "deferred compensation" instead of being included in the wage tables. He assured the CDSA, in the person of its then president, John Hall, that the dollars would be PERA-eligible. John Hall has testified in affidavit that he was repeatedly assured by Mr. Nollenberger that the deferred compensation dollars to be paid under Article 12 were PERA-eligible. This testimony has been corroborated by affidavit testimony of Jackie Morris. Neither PERA nor the City has made any discernable effort to produce Mr. Nollenberger to dispute that testimony. It is uncontested.

While the City was able to avoid participation in this proceeding, City Auditor Wayne Parson did testify that he had discussions with PERA in 2007 and intended to secure the disqualification of these contested earnings, which he knew would reduce pension benefits. Still he testified, he took no steps to make the City's plan known to its employees until October of 2008, and the City allowed numerous employees to commit to retirement in expectation of benefits that the City knew it intended to later cause to be significantly reduced.

Throughout this period, in an effort to reduce economic stress, the City continued to encourage eligible employees to retire so it could replace those employees with entry level people at lower pay and thus reduce payroll, or leave their positions vacant and reduce payroll even further. To divulge its plan to reduce pensions would have discouraged retirement on the part of affected employees who would have delayed action until the final benefits were known. The City did not advise retirees of this intent until late in 2008, and only when the retirement stimulus of the 2007-08 labor agreements had largely been realized and it was too late for employees to reconsider retirement. This has resulted in considerable hardship for retirees who are now without ability to recover their loss.

PERA produced witnesses whose testimony revealed that while PERA employees were conspiring with the City to disqualify these contested earnings, and knew that doing so would result in significantly reduced pension benefits, other PERA employees continued to encourage employees to retire based on the very benefits that PERA and the City planned to reduce.

PERA argues that these deferred dollars are not wages but a fringe benefit because they are not voluntarily deducted. Testimony of Larry Kroll and Wayne Parson is clear that there is no way to distinguish the actual source of the dollars used to offset medical program costs. There is no evidence offered by PERA or the City that if an employee chooses to increase or decrease the dollars that go to deferred compensation accounts, resulting in an increase or decrease of take home dollars, that the dollars paid under Article 12 must be affected first or last. In other words, there is no requirement that Article 12 dollars be treated any differently than other dollars the employee voluntarily deducts from wages.

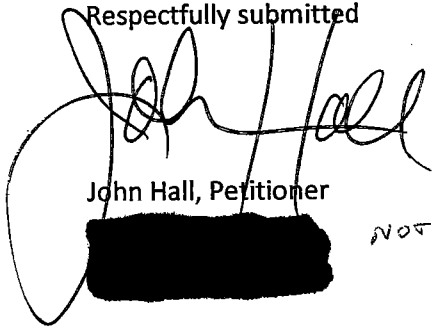
Employees could choose for example, to decrease take home dollars and thereby increase contributions to deferred compensation or to medical program costs without affecting Article 12 dollars. Similarly, employees could choose to decrease Article 12 dollars and deduct them instead to hospital-medical program costs, or could leave Article 12 dollars alone and reduce the number of deferred compensation

dollars normally deducting from other wages and divert them instead to hospital-medical costs. The dollars are interchangeable. All though there is a requirement that some dollars be deducted from some source for contribution to deferred compensation, and in some cases to hospital-medical program costs, there is no requirement they be Article 12 dollars, the particular dollars contested by PERA. The source of that deduction is at the employee's discretion. The deduction of Article 12 dollars is voluntary. They are wages by statutory definition.

If in fact a mistake has been made in characterization of these dollars, it was made by a number of other governmental agencies around the same time, which supports the affidavit testimony of Jackie Morris who believes she consulted with PERA in the mid 90's and followed PERA's instructions. If a mistake was made, it was made by the City Administrator and quite likely, by PERA.

Both PERA witnesses, Patricia Kapplehoff and Cheryl Keating were asked the question, "are the retirees responsible in any way" and answered "absolutely not." For this court of justice to somehow conclude a result that robs innocent retirees of their well earned pensions, and splits the "loot" between the culpable parties, is incomprehensible.

Respectfully submitted



John Hall, Petitioner



NOT PUBLIC DATA
REDACTED
JH

November 24, 2010