

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC EMPLOYEES RETIREMENT ASSOCIATION

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

MEMORANDUM OF LAW
IN SUPPORT OF PETITIONERS'
MOTION FOR SUMMARY JUDGMENT

Allen Johnson, et al., Petitioners

OAH DOCKET NO. 4-3600-2080902

INTRODUCTION

Petitioners Paul Ostman, Doug Michog, John Edwards, Mark Behning, Terry Purcell, Doug Belanger, Dave Salvesson, Anne Peterson, L. J. Harvey, William L. Johnson, and Dave Wedin (hereinafter "Movants"), submit this Memorandum in support of their Motion for Summary Judgment in the above matter and in response to PERA's Motion for Summary Judgment.

At issue in this proceeding is whether certain forms of compensation, including deferred compensation payments and cash payments which may be applied toward the cost of the City's family medical reimbursement plan, as set forth by the City's collective bargaining agreements, are considered "salary" for PERA purposes. Minn. Stat. §353.01, Subd. 10. It is undisputed that the determination of whether the payments at issue are "salary" under Minnesota law is solely a question of state law.¹ The status of the payments in question may be determined based upon the provisions of the collective bargaining agreements between the City of Duluth and its employees, the correspondence between the City of Duluth and PERA, and the statutory language. PERA's role as

¹ In its Memorandum of Law in Support of PERA's Motion for Summary Disposition, PERA states:

"While applicable IRS law requires certain terms and benefits for government plans, it does not directly define what a government plan must consider to be 'salary' under the terms of its plan. Consequently, the 'salary' status of the payments at issue is a question of state law." PERA Memorandum pg. 5. (Emphasis added)

a fiduciary for the Movants is also clearly set forth in the law. The issues of equitable estoppel, laches and statutory limitations of actions are applicable to this proceeding and limit the authority of the PERA board. The PERA board may not unilaterally reduce the annuities in pay status in an arbitrary and capricious fashion based upon unreliable and recreated data provided by the City of Duluth. PERA's proposed action is also a violation of the constitutional rights of the retirees.

FACTS

Movants are retired employees of the City of Duluth Fire Department, and are members of Local 101 of the International Association of Firefighters (hereinafter "Local 101"). Each Movant had given notice of retirement to PERA, received from PERA numerous pre-retirement estimates, and in reliance on those estimates, retired. After they retired, PERA again "audited" their accounts, and they each received a fixed monthly retirement annuity based upon their "high five" years of salary. After several years of retirement, they each received letters from PERA in March 2009 notifying them that their monthly retirement annuity would be reduced by as much as \$250 per month. They were also notified they would be required to pay back benefits previously received, in amounts up to \$20,000. (Ostman Affid. ¶ 13)

According to PERA the total "erroneous" withheld employee contributions are \$1.137 million, total employer erroneous contributions are \$1.414 million, and net overpayments of excess PERA benefits are \$1.268 million. PERA's action affects 485 retired employees.

Since prior to 1983, Local 101 has had a collective bargaining agreement ("CBA") with the City of Duluth that establishes the terms and conditions of employment of employees within the Fire Department. That CBA has included since 1997 a term relating to deferred compensation payable by the City of Duluth on behalf of each Movant.

It is the interpretation of this provision which is unique and specific to the CBAs of the City

of Duluth, and which has been in effect since 1995 in some contracts, which is at issue in this proceeding.

1. HISTORY OF THE CONTRACT LANGUAGE.

John Hall retired from the Duluth Police Department in April 2006. After retirement he was called back and served as the Chief Administrative Officer of the City for the period July 1, 2006 until April 28, 2008. In 1994, Hall was President of and chief negotiator for the City of Duluth Supervisors Association (hereinafter “CDSA”) and negotiated the CDSA contract effective 1995-1996. In that round of contract negotiations the City was represented by former Chief Administrative Officer Karl Nollenberger. Hall recalls that at a certain point in negotiations, the City would not offer a greater salary increase, but wanted to place some additional compensation on the table for the CDSA unit. The City could provide another one quarter percent or one-half percent but did not want to place it in a percentage of salary because of the effect on other bargaining units and “because of the compounding effect of a percentage increase on subsequent negotiations, which he referred to as “the creep.” Hall recalls that Nollenberger suggested the parties implement a payment toward “deferred compensation.” Nollenberger was a certified public accountant, and very familiar with financial, budget and accounting matters. Hall repeatedly requested verification that any such payments would be includable as salary for PERA purposes, and Nollenberger always assured him they would be. (Hall Affid. ¶ 3, 5)

Accordingly, the CDSA and the City of Duluth entered into a tentative agreement providing for an additional amount of compensation in the amount of \$25 per month in 1995 and \$50 per month in 1996 to be paid by the City on behalf of each member as part of total compensation. The specific language in the 1995 agreement is as follows:

“ARTICLE 12 - DEFERRED COMPENSATION

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 proposed agreement was presented to the CDSA for approval at a group meeting. Jackie Morris, the City Manager of Payroll, was present at that meeting. Jackie Morris specifically recalls that at the unit meeting to approve the proposed contract, Bob Larson specifically asked whether the deferred compensation payments were includable in salary for PERA purposes. The answer given in the group meeting was that they were. (Morris Affid. ¶ 3) The contract was approved by the unit, and went into effect for the 1995-1996 cycle. John Hall recalls presenting the CBA for approval to the CDSA and also recalls Larson asking the question, to which he replied that deferred compensation was PERA eligible. (Hall Affid. ¶ 5)

Jackie Morris was the City Manager of Payroll/Personnel Systems at the time the deferred compensation provision was added to the CDSA contract. She recalls that she and her supervisor, Les Bass, the City Auditor, contacted PERA to determine how to handle this new form of compensation. She recalls that they were advised by PERA to include the deferred compensation as salary, and therefore from the beginning the deferred compensation payments were included in employees' salaries on the paystubs, and also showed as a deduction from total compensation.

(Morris Affid. ¶ 2; Bass Affid. ¶ 4; Stark Affid. ¶ 2, 3) Morris recalls at that time PERA included “most everything in salary,” and there were large fines for omitting items from salary (Morris ¶ 2) It is undisputed that from the beginning of the benefit in 1995, the deferred compensation payments were listed on City of Duluth employee paystubs as salary and part of total compensation until 2007.

In the initial CDSA contract, there was no option available for employees to elect to apply the deferred compensation payment toward the payment for family medical reimbursement under the City of Duluth’s self-insured family medical plan. The original CDSA contract provided only for straight deferred compensation payments as additional salary. As the deferred compensation was added to other CBA’s, employees who were eligible for and elected family medical reimbursement were given the option to apply a portion of the deferred compensation payment toward the cost of family medical reimbursement. This was a minority of employees, and became an increasingly smaller group. (Morris Affid. ¶ 12) Following the initiation of the deferred compensation payment in the CDSA contract, the City of Duluth offered the same payment to the other bargaining units in their contracts. The specific language found in each of those units, for their successive years, is set forth in Storaasli Affid., Ex. A.

2. AVAILABILITY OF THE DEFERRED COMPENSATION FUNDS.

The City’s deferred compensation plan, as set forth in the various contracts over the various bargaining units, always allowed employees to withdraw the deferred compensation funds pursuant to a 457 plan, subject to penalty and taxation. The funds were always available to the employee, in contrast to the funds in a defined benefit plan such as PERA. Additionally, employees may take loans against their deferred compensation funds. (Affidavits of Ostman, Hall, Charbonneau, Wutz, Belanger, Brown) These transactions did occur periodically with the deferred compensation funds of the City of Duluth. The payroll office would receive notices of withdrawals and loans, and

employees would then be ineligible to contribute for a set period. (Morris Affid. ¶ 9)

The deferred compensation funds were also available for employees to “buy back” years of military service toward their pension. Active employees who were contemplating retirement could obtain access to their deferred compensation funds for the purchase of years of military service toward retirement. Doug Michog used \$38,500 of his deferred compensation funds to purchase two years toward his PERA annuity (Michog Affid. ¶3), and Doug Belanger used \$42,338.73 to obtain a credit of one year and eleven months of military service (Belanger Affid. ¶4). David Salveson and Paul Ostman also used their deferred compensation for military buy-backs. (Salveson Affid. ¶ 3; Ostman Affid. ¶)

The City of Duluth deferred compensation program never required or mandated any “match” either by employer or employee. It was always includable in salary, and never required a match. The deduction for deferred compensation on employee paystubs was one number, including all amounts contributed from any source. (Bass Affid. ¶ 6; Morris Affid. ¶ 11; Stark Affid. ¶ 13)

Stark recalls that in 2001, she and City Auditor Bass argued the City’s payments were not covered under the statute governing the \$2,000 match, since that statute required an employee match and the City’s union contracts did not. Since all amounts were treated as salary, and no match was required, the State Auditors were satisfied. (Stark Affid. ¶ 13)

3. THE CITY OF DULUTH MEDICAL REIMBURSEMENT PLAN.

The City of Duluth does not provide “health insurance” for single employees, or family “insurance” for the families of employees. Since the early 1980's, the City of Duluth has never purchased medical, hospitalization or health insurance for its employees. The City of Duluth determined in the 1980's that it would be required under new Governmental Accounting Standards Board rules to book as a liability its accrued sick leave plan. Rather than accrue that liability, the

City was able to negotiate with its collective bargaining units an agreement to institute a self-insured “pay-as-you-go” medical reimbursement plan. (Stark Affid. ¶ 6, 7; Brown Affid. ¶ 3)

The City of Duluth’s medical reimbursement plan is not insurance, but is a “pay-as-you-go” medical reimbursement plan. (Brown Affid. ¶ 3) The City promises to reimburse claims presented to it, and hires a claims administrator to collect, approve and pay claims of employees and families. There is no reserve fund dedicated only for the insurance of claims made, and the administrator is not an insurer. There have been times when the City fund for payment of claims was below zero. (Morris Affid. ¶ 13; Stark Affid. ¶ 7; Bass Affid. ¶ 7; Brown Affid. ¶ 3.)

The City has, since the early 1990's, paid for reimbursement of medical claims for its single employees. The City has never offered to pay for any family “coverage” to employees, but rather has offered in its CBAs a certain dollar amount of payment which employees could apply against the cost of family coverage if they had eligible dependents and elected the plan. Any remaining cost must be paid by the employee, typically through payroll deduction. (Brown Affid. ¶ 4; Hall Affid. ¶ 9, 10)

The cost of the medical reimbursement plan for families was quite high compared to other coverages available through spouses employment and on the private market, and therefore many employees never chose to participate in the family medical reimbursement plan. (Morris Affid. ¶ 12). As the plan became smaller and experienced anti-selection, the cost continued to increase, and therefore over time fewer employees participated. (Morris Affid. ¶ 12) Most of the employees who received deferred compensation payment through their CBAs did not participate in family medical reimbursement plan. (Morris Affid. ¶ 12) For those employees, either because they were single and not eligible for family coverage, or because they chose not to participate in the family coverage, the option to direct their funds away from deferred compensation never existed. Those employees

were the increasing majority. In the CBAs the City had made an unqualified promise to pay the deferred compensation, and the employees received it as compensation. (Brown Affid. ¶ 2, 3; Bass Affid. ¶ 4; Stark Affid. ¶ 2, 4; Morris Affid. ¶ 12)

The majority of employees never had the option to receive the deferred compensation in any form other than the deferred compensation payments, since they were not eligible for, or did not elect, the family medical coverage.

From 1995 until 2006, the City of Duluth uniformly treated all deferred compensation payments to Movants as salary, and reported those amounts to PERA as salary, as advised by PERA in 1994. (Morris Affid. ¶ 6)

4. DEFERRED COMPENSATION INCLUDED ON PAYSTUBS AS SALARY.

In 1997, the City of Duluth adopted a new software program for payroll. From 1997 on, paystubs of employees show “DEF COMP” on the income side of the paystub along with salary and other items of compensation, and also show a deduction for deferred compensation on the deduction side. (Hall Affid. ¶ 4, 13; Isabell Affid. ¶ 2-4; Isabell Affid. ¶ 4; Johnson Affid. ¶ 2-4; Keenan Affid. ¶ 4-6.

For those few employees who did direct the deferred compensation amount toward the cost of the family medical reimbursement plan, the amount also showed as income on their paystubs as “INS SUPPL.” (Keenan Affid. ¶ 4-6) The amount paid by the employer pursuant to the CBA was included as total compensation, even though it was directed toward family medical reimbursement. It may well have been subject to withholding. (Keenan Affid. ¶ 6)

5. AUDITS BY THE OFFICE OF STATE AUDITOR.

The Office of State Auditor performed a yearly audit of the City of Duluth. State Auditor employees were housed within City Hall, and worked year-round to complete the audit. Audits of

payroll were performed every year. The audits had to be completed at the calendar year-end to be included in the financial reports in January. It was always an extremely stressful time for City staff working with the State Auditors to provide the underlying information. (Morris Affid. ¶ 7) The Office of State Auditor always did a specific and separate payroll audit. They would identify approximately 25 payroll stubs and ask the payroll department to provide all the supporting data for each payroll check chosen. That would include W-4's, contracts, time cards, and any deductions to support each check number. The Office of State Auditor always included in the payroll audits some paystubs from firefighters, since the firefighter pay was always so complicated. They frequently requested paystubs from Les Bass and Jackie Morris as well, since they worked directly with payroll and were in a position to have access to the system. (Hall Affid. ¶ 11; Stark Affid. ¶ 11;) Since the deferred compensation payment was listed specifically on paystubs from 1997 onward, it is undisputable that the Office of State Auditor had knowledge of and audited the City's deferred compensation plan from 1997 through 2007. The City switched to a new payroll software system in 1997. (Storaasli Affid. Ex. B) There was a special audit of that new payroll system after the first year. (Hall Affid. ¶ 11, Morris Affid. 5, Stark Affid. ¶ 10) The audit included the deferred compensation at that time and was satisfactory. (Hall Affid. ¶ 11, Stark Affid. ¶ 10; Morris Affid. 11)

The notes of the audit by the Office of State Auditor for year-end 1998 identified as a significant change the GASB No. 32 relating to deferred compensation. (Storaasli Affid. Ex. B) Persons involved in that audit included City Auditor Les Bass, Assistant City Auditor Genie Stark, and from the Office of State Auditor Greg Mutchler and Wayne Parson. Clearly the State Auditor was aware of the deferred compensation plan and the accounting methods or accounting principles applied, since it was listed as a significant change in paragraph 2 effective year-end 1997.

The Office of State Auditor, in completing the year-end 2000 audit, followed written procedures and accounting and auditing considerations which are included in their notes. They included as an objective “payroll and related liabilities are recorded correctly as to amount and period, and distributed properly by account, fund and budget category, and disclosures are adequate (assertions 4 and 5).” (Storaasli Affid. Ex. B) This basic procedure included a summary schedule of “salaries payable” as well as summarizing information for “PERA” disclosures. For year-end 2000, those procedures were signed off by the Office of State Auditor. The Auditor signed off on the conclusion on February 21, 2001. (Storaasli Affid. Ex. B)

The Office of State Auditor working papers also include a written note initialed on July 24, 2002, identifying the Duluth deferred compensation plan citing Minn. Stat. §356.24 relating to deferred compensation, and state, “It appears that the contributions made by the City are not in compliance with this statute.” The Office of State Auditor description of the plan in the working papers is in error, since it implies that only employees “who choose not to have family coverage” receive deferred compensation. In fact, all employees under bargaining agreements received the deferred compensation unless the employee was eligible for, elected family coverage, and chose to direct the payment away from deferred compensation toward the cost of family coverage. A copy of Minn. Stat. §356.24 was enclosed with the working paper note. (Storaasli Affid. Ex. B)

The identical typed note was included in the follow-up of non-reportable conditions for the year ended December 31, 2001, and hand written notes include that the “wording not quite right.” The Office of State Auditor recommended that “City Attorney review the statute to determine the legality of the City contributions.” Another copy of the follow-up page includes the circled written term “resolved.” (Storaasli Affid. Ex. B)

Both Les Bass and Jackie Morris recall the deferred compensation plan being questioned by

the Office of State Auditor in about 2001. At that time Les Bass was City Auditor and Jackie Morris was Manager of Payroll/Personnel Systems. Bass and Morris recall that when the issue was raised, the Office of State Auditor representatives were particularly interested in knowing whether the deferred compensation payments were included as income on employees' paystubs and whether any matching payments were ever required. Morris advised Bass that the deferred compensation income was always listed on the paystubs as income, and that there was never any matching required. Bass reported this information to the Duluth representatives of the State Auditor, and the audit issue was resolved. (Bass Affid. ¶ 6; Morris Affid. ¶ 11) The documents from the State Auditors working papers and notes confirm this conclusion. (Storaasli Affid. Ex. B) Stark, Morris and Bass all recall the issue of deferred compensation being raised b the State audit in 2001, and being satisfactorily resolved and removed from that audit. (Hall Affid. ¶ 11; Morris Affid ¶ 11; Stark Affid. ¶ 10) Wayne Parson, the auditor from the City of Duluth who later raised the deferred compensation issue in 2007, was included and a member of the team of the Office of State Auditor in Duluth during this 2001 audit when the issue was resolved. He later moved from the State Auditor to the City staff.

6. PAYROLL RECORDS OF THE CITY ARE DESTROYED.

The City of Duluth had data processing limitations, and the payroll department was advised in 2005 that not all records could be retained due to insufficient memory capacity. Accordingly, the Payroll Department determined to keep only the past payroll total amounts, and not the payroll detail in computer memory. Jackie Morris, Manager of Payroll/Personnel Systems, indicates that any payroll records of the City of Duluth prior to 2005 do not have stored detail. (Morris Affid. ¶ 16) Only the totals were kept, and the breakdown of payroll detail was not maintained in the system.

7. PARSON'S JULY 31, 2007 E-MAIL TO PERA.

John Hall was Chief Administrative Officer of the City of Duluth during 2006 and 2007. At

that time, the City was in severe financial stress due to substantial local government aid cutbacks. Hall recalls that during staff meetings, department heads were repeatedly asked to brainstorm where they could find expenditure reductions or revenue for the City. At this time, Wayne Parsons, who had moved from being one of the State Auditors of the City to becoming the City Auditor, volunteered that he believed that the deferred compensation plan might not be “in compliance.” He never advised Hall that any particular steps needed to be taken, or the legal or financial basis for this noncompliance. (Hall Affid. ¶ 12) On July 31, 2007, Parson directed an e-mail to PERA inquiring whether certain provisions of CBAs are “salary not subject to PERA withholding.” Wayne Parson described the deferred compensation payments as “employer paid benefits” and did not further provide the history and context of the payments, which had been in effect since 1995 and which at that time were approved by PERA. Parson sent the e-mail on Tuesday, July 31, 2007, at 3:50 p.m. The e-mail included five pages of contract excerpts addressing the issue. Chris Arcand from PERA replied the same day, within 45 minutes, with a two sentence answer indicating that he “agreed” that the deferred compensation payments were not eligible as salary.

Interestingly enough, no follow-up or further action was taken by PERA to this notice by Duluth. Despite the fact that Chris Arcand had received copies of actual CBA documents in effect, not merely drafts, there is no record of Arcand or any other person at PERA pursuing the issue, despite PERA’s fiduciary duty to members. The Legislative Auditor made a finding that PERA never followed up the 2007 contact, and PERA concedes it did not. (Storaasli Affid. Ex. E-18)

Apparently, the City of Duluth in 2007 ceased reporting the deferred compensation payments as salary to PERA. There is no written documentation provided of when and how this decision was made. Jackie Morris indicates she was told by Wayne Parson to change the payroll reports in 2007 to PERA so the deferred compensation payments were not included in salary. (Morris Affid. ¶ 14)

However, neither the City of Duluth nor PERA notified employees or retirees of this decision or the basis for it. During the balance of 2007 and into 2008, neither the City nor PERA notified employees considering retirement of any potential reductions in benefits. PERA continued to send out retirement annuity estimates based upon the higher salary estimates including deferred compensation. Pam Wutz prepared for and retired December 31, 2007, with no notice from either PERA or the City that her estimates may be greatly inflated. When she later requested to rescind her retirement and return to work due to the reduction in her pension, the City refused. (Wutz Affid. ¶¶ 3, 8)

8. POTSWALD’S LETTER REPORTING “ERROR” TO PERA ON SEPTEMBER 15, 2008.

More than 13 months later, on September 15, 2008, Lisa Potswald, Chief Administrative Officer of the City of Duluth, directed a letter to Mary Most Vanek, the Executive Director of PERA. At that time Potswald notified Vanek of “an error” made by the City of Duluth. In that letter Potswald characterized the erroneous payments as “an insurance supplement payment.” Potswald made no reference to deferred compensation, and her letter does not even include the words “deferred compensation.” Potswald cites the extensive number of years that the City had been making these “insurance supplement payments.” She clearly had not reviewed the CBA’s herself since she was not using the correct contract language. She notes the amount of contributions by the employer is a “substantial amount of money.” Potswald in the letter states that “our annual financial statement audit conducted by the Office of the State Auditor did not detect this error.” This was incorrect. A copy of Potswald’s letter was also sent to Wayne Parson. He apparently did not notify her or PERA that in fact he was a member of the very same audit team that had questioned the deferred compensation plan in 2001, but resolved the issue and determined it to be legal and in

compliance with PERA and the law. (Storaasli Affid. Ex. E-19)

9. PERA REQUESTS THREE YEARS OF PAYROLL RECORDS.

In response to Potswald's letter, Chris Arcand from PERA, directed an e-mail on September 18, 2008, to Jackie Morris, the Manager of Payroll/Personnel Systems, requesting only those records the City has in possession which are reliable, and suggests that three years would be a reasonable time limitation. He stated:

“We ask only that you provide information that would be reasonable for the City to compile. For instance, if your records are archived or inaccessible beyond three years, we ask that you only go back three years through the date that you stopped taking the inadvertent contributions.” (Morris Affid. Ex. 1)

Jackie Morris proceeded to gather three years of records. According to Jackie Morris, the City records back to 2005 are reliable and trustworthy, and are correct, but the City had destroyed all payroll detail for payroll records prior to 2005, and therefore the detail records for any prior years were not only not archived or inaccessible, but they were not in existence at the time of the request by Chris Arcand. (Morris Affid. ¶ 16) The next morning, on September 19, 2008, Arcand received an e-mail directly from Wayne Parson attaching CBA provisions, and including the following language:

“Also, please direct any inquiries regarding this issue directly to me and not to our payroll office.”

Parson apparently stepped into the place of Jackie Morris, the payroll specialist for 15 years, in order to handle the matter personally.

On October 8, 2008, Wayne Parson reported to PERA that for the years 2005, 2006 and 2007 he believed \$5,857,244.87 was erroneously reported as salary, and the PERA taxes overpaid during that time were \$761,907.46. He indicated that the City continues to “investigate payroll records prior to 2005. (Storaasli Affid. Ex. E-9)

10. CITY “RECREATES” PAYROLL RECORDS FROM PRIOR TO 2005.

Jackie Morris had prepared the three years of records as requested by Arcand, but at the time she completed them and was ready to send them, she was escorted out of her office.² The City then assigned an individual to create new software for the purpose of recreating the prior payroll detail. The individual doing this job, Skip LeClair, was unable to complete it without contacting Morris repeatedly for assistance. Neither LeClair nor any other persons in the Payroll Department had ever worked with the prior payroll software systems. Once the new software was completed, it required interpretation to place the various payments into categories. None of the individuals remaining at the City payroll department had any knowledge of the categories used under the prior software. Jackie Morris believes that the recreated records for the time periods prior to 2005 are not trustworthy or reliable both because LeClair contacted her so much and due to the lack of knowledge of any person in the department of the previous software and payroll systems. (Morris Affid. ¶ 16, 18) The City, rather than providing the trustworthy three years of records which were actually requested by PERA, spent numerous hours and days creating new software in order to recreate records from 1997 through 2004 to send to PERA. The greater number of years the City included resulted in both a greater hardship to retirees and a greater refund to the City.

The records provided by the City are not trustworthy. PERA prepared for each retiree under the firefighters’ CBA a chart listing the value of benefits received from 1997 through 2007 and sent them to retirees in March 2009. (See, Paul Ostman Affid. Ex. 14) Since the numbers for deferred compensation and medical reimbursement are lumped together on this chart, every chart should

² Morris was retained as a City employee on full pay and benefits, but was not allowed to come to work, until her retirement on December 31, 2008. She was never subject to any complaints or discipline.

include the same numbers which were listed in the fire CBA. The numbers in many retirees charts are different. Affidavits from Paul Ostman, Dave Salveson, Doug Michog, John Edwards, Terrance Purcell and Pam Wutz state that the numbers listed in their charts differ from other retirees under the same contract. Jim Charbonneau had all his old paystubs. He made a spreadsheet and compared the City and PERA numbers to his own. There are numerous mistakes, and the numbers are inconsistent with the CBA. (Charbonneau Affid. ¶ 8 Ex. 6) Yet even when these charts on their face show errors, PERA proceeded to use City of Duluth numbers as a basis to reduce the pensions of retirees.

Doug Michog used his deferred compensation to buy back military credits. The City calculated the cost, and he was very surprised to later receive an overpayment notice from PERA along with a check for \$529.17. The City's calculation was in error and PERA apparently found that mistake. (Michog Affid. ¶ 3)

After receiving notice in March of 2009 of the amount of reduction in his annuity, Paul Ostman requested a copy of his PERA file. Within days of making the request, Ostman received an unsolicited letter from PERA identifying errors made by PERA in the calculation of his reduced monthly annuity. (Ostman Affid. ¶ 16) His monthly annuity was increased from the reduced amount by approximately \$30. He was also advised that the lump sum which PERA had advised him he would owe was reduced from \$7,418.69 to \$1,294.80. (Ostman Affid. ¶ 16, Ex. 17) PERA could not give an explanation of the errors, and it seems unlikely that the request for the file and the re-audit of his account were coincidence.

11. PERA UNILATERALLY REDUCES RETIREES' MONTHLY PAYMENTS.

PERA implemented the reduced annuities for retirees effective July 1, 2009. Many retirees experienced monthly reductions in excess of \$200 per month. Paul Ostman's annuity was reduced

by \$250. (Ostman Affid. ¶13) For many, including Paul Ostman, \$200 had been the difference between electing a 100% survivor annuity, or 75%, or 50%. It is a significant difference for many people. (Ostman Affid. ¶ 5) This reduction by PERA was presumably for the life of the retiree, which could be 25 or more years.

Individual retirees have incurred significant financial stress due to the actions of PERA. Pam Wutz, who had retired in 2007 after the City stopped reporting the deferred compensation payments as salary, but before the City or PERA notified employees and retirees of the reduction in pensions, requested of Kim Hall at the City to return to work because she could not afford to live on her reduced annuity. Her request was denied. (See Affidavit of Pam Wutz) She has recently applied for an opening to return to work since she cannot afford to remain retired. Other retirees have retained second jobs which they had planned to retire from and are continuing to work in retirement, even though they had planned not to. (See Affidavits of David Salvesson, ¶ 6 and James Charbonneau, ¶ 12) One retiree has returned to work as a substitute teacher. (Purcell Affid. ¶ 4) One retiree's spouse is working an extra year due to the reduction in the payment by PERA. (Purcell Affid. ¶ 4) All retirees indicated that had they known their retirement payments would be reduced, they would have chosen to work longer to reach their projected retirement income, and would have delayed retirement. Several retirees had not planned to retire early, but due to the PERA estimates determined they could afford to retire early even with a significant reduction per year. They are now far below their early retirement financial expectations, and would have worked to regular retirement date had they known. Yet their decision is deemed "irrevocable" by PERA. (Charbonneau, Purcell, Wutz)

The Office of the Legislative Auditor, Financial Audit Division, released an audit report February 13, 2009, of PERA. The report concluded that, "PERA had some weaknesses in internal

control over financial reporting as noted below.” The audit included a specific finding that “PERA did not have adequate controls to assure that employers reported and remitted the correct amount of wages and retirement contributions.” The audit also found that “PERA did not regularly scrutinize employer contribution amounts to determine reporting accuracy, although it would on occasion follow up on specific questions. PERA did not more closely examine the City of Duluth’s contributions after the City contacted PERA in 2007 to ask about what could be included in employee salary amounts.” (Storaasli Affid. Ex. E-18) (Emphasis added)

Although PERA claims it provided notices to employers that deferred compensation should be excluded from salary, in fact none of the actual newsletters or the Reporting Manuals, when addressing the definition of salary, ever include the words “deferred compensation.” (Storaasli Affid. Ex. E-1 through E-7) The newsletters simply mirror the language of the statute.

PERA staff reported to the Board of Trustees on May 12, 2009, after the legislative session that the Omnibus Retirement Bill allowed the City to adopt two possible changes. PERA had modified the law to impose a statute of limitations of two fiscal years prior to the fiscal year in which a salary error is found. This limitation would apply to overpaid benefits, and anyone retiring prior to the statute of limitations would retain the benefit originally calculated. The City of Duluth could choose to adopt the new language.

PERA also had an alternative that would allow active members in the City of Duluth to receive refunds paid on “deemed” invalid salary reported for all years, while allowing retirees to have benefit reductions applied only prospectively. To date, neither solution has been adopted by the Duluth City Council. According to PERA, the estimated cost of the overpaid benefits through June 2009 is \$1,755,632. The total employer credit is estimated to be \$1,413,647. PERA reported on February 25, 2009, that the number of active members in the City of Duluth were 742, the number

of inactive members 142, and the number of benefit recipients was 466. The total employer contributions were \$1,414,340.72, and the total employee contributions without interest were \$1,137,164.73. (Storaasli Affid. ¶ E-16)

Each of the Movants, after being informed that there would be deducted from their salaries compensation they received for deferred compensation and/or contribution toward family medical, filed a Petition for Review before the PERA Board of Trustees, which has resulted in this proceeding.

ARGUMENT

I. PERA’S BURDEN OF PROOF.

PERA is seeking to discontinue retirement benefits that have been audited, granted and paid. It has long been established that burden of proof is on PERA to show that the benefits, which have been paid, should be discontinued. PERA must satisfy its burden of proof by showing by a preponderance of the evidence that the benefits should be discontinued. Among many of the cases finding that it is PERA’s burden to show by preponderance of the evidence that benefits that have been paid should be discontinued, is the administrative law decision of In The Matter of Fact/Finding Conference Regarding the Application for Continuation of Disability Benefits of Michael Stockstead 17550 Berrington Court, Glen Lake, Minnesota 1998 W.L. 879201, OAH Docket NO. 4-3600-11646-5 (July 1998).

In discussing the burden of proof, it is submitted by the retirees, that the burden of proof urged by PERA is inapplicable in the present proceeding. The office of administrative hearing cases deal with the duty of PERA to show by a preponderance of the evidence that benefits should be discontinued. That is the standard ruled upon by the administrative law judge. The standard of “arbitrary and capricious” and similar standards cited by PERA would apply, if at all, to judicial

review of the decision of the administrative law judge. Whether or not PERA is correct in its statement of the standard of judicial review, in the present hearing there is no such deference to PERA. In the present hearing, PERA has the obligation to show by a preponderance of the evidence that the existing and past benefits should be discontinued and refunded by the employees.

II. PERA IS A FIDUCIARY AND OWES FIDUCIARY DUTIES TO PETITIONER BY HOLDING THEIR RETIREMENT FUNDS.

The following statutes set forth PERA's duties and obligations to its members.

PERA is the administrator of the Firefighter's pension plans. PERA falls within the scope of Minnesota Statute 356A, dealing with public pensions and their fiduciary responsibility.

M.S. 356A.01 Subd. 12 defines a "fiduciary" as a person identified in section 356A.02. Subd 13 defines "fiduciary activity" as an activity defined in Section 356A.02 Subd. 2.

M.S. 356A.02 deals with "Fiduciary Status and Activities." Under Subd. 1, fiduciaries include any member of a governing board of a covered pension plan, chief administrative officer of a pension plan and other persons. Subd. 2 defines fiduciary activity as including, but not limited to, (Subd. 2) the determination of benefits, (Subd. 3) the determination of eligibility for membership or benefits, (Subd. 4) the determination of the amount or duration of benefits and (Subd. 5) the determination of funding requirements where the amounts of contributions. M.S. 356A.04 details the general standard of fiduciary conduct. Subd. 1 states that the fiduciary duty is owed to active, deferred and retired members of the plan, who are its beneficiaries. (Emphasis added)

It is important that M.S. 356A.04 Subd.1 specifically states that the fiduciary duty is owed to retired, deferred and active members of the plan. PERA concedes it has a fiduciary duty, but does not address its duty to members. (PERA Memorandum, ¶ 4) PERA's fiduciary duty extends beyond that standard, and includes the duty to "police" salary contributions made to the plan. Application

of Allers, 533 N.W.2d 646 (Minn. App. 1995) PERA concedes it has not done so, and that the Legislative Auditor found that PERA did not “regularly scrutinize employer contribution amounts to determine reporting accuracy.” (Storaasli Affid. Ex.E-18) Mary Most Vanek responded that “we do not have an effective way to ensure that employers interpret State statute correctly in regards to what should or should not be included in eligible salary.” She concedes “Due to limited resources we have not conducted field audits . . .” (Storaasli Affid. Ex. E-18) PERA claims it has an “extensive training program that includes online information, employer handbooks, quarterly newsletters and training sessions conducted throughout the state.” (Vanek reply to Legislative Auditor, Storaasli Affid. ¶ E-18) However, none of the newsletter articles on the definition of salary produced by PERA include the term “deferred compensation.” (Storaasli Affid. ¶ E-5 through E-7) They all used the statutory language, which on its face includes deferred compensation payments in salary. (See pp. 25-26 infra.)

PERA notified each retiree at time of retirement that his or her account would be “audited.” (See Ostman Affid. Ex. 7) Apparently such an audit did not include a determination of whether the pension was based on eligible salary. Clearly PERA will hold retirees to their irrevocable decision to draw the PERA retirement, but apparently PERA does not interpret its fiduciary duty to retirees to include any safeguards to prevent the unilateral reduction of the pension 13 years later. Its duty to pay the audited amount is not deemed by PERA to be irrevocable. However, PERA does specifically owe a statutory fiduciary duty to the retired, active and deferred members of the plan. They are the beneficiaries. Therefore, whatever duty PERA may owe to the plan integrity, to not accept unqualified distributions, it has a superior or equal fiduciary duty to the beneficiaries of the plan to deal with them properly. It would be breach of the fiduciary duty of PERA to claim that it erroneously accepted employee and employer contributions for 13 years under a mistake of fact by

PERA. There are apparently about 442 retired employees, 1,125 active employees, and 368 inactive employees who are affected by PERA's actions. (See Report of Office of the Legislative Auditor released February 13, 2009, Storaasli Affid. Ex. E-18)

The fiduciary duty to a employee beneficiary also distinguishes this case from the few reported appellate cases where one individual has urged PERA to change its interpretation of the plan, especially where the individual apparently tried to manipulate the plan. See Allers, supra. Rather, any mistakes made in the present case were made by PERA and not by the individuals. There is no question in the present case that these retirees acted in good faith and in reliance on what they were told by PERA.

M.S. 356A.04, Subd. 2 states that the prudent person standard applies to those fiduciaries. That standard applies to all of the activities of the fiduciaries.

M.S. 356A.05 details the enumerated "duties applicable to all activities." Those activities of the fiduciary must be carried out to provide authorized benefits to participants and beneficiaries, to manage the plan, in accordance to the purposes and intent of the plan documents and those activities must be carried out faithfully, without prejudice, and in a manner consistent with law and the plan document.

M.S. 356A.07 Subd. 1, provides that the plan must prepare and provide each active plan participant with a summary of the benefit provisions of the plan document. The plan also must provide annual financial reports and other required details as required in Subd. 2.

Consequently, it is clear that the standards to which PERA is held are very high. PERA is a fiduciary as regards the firefighter's pension plan.

Therefore, the actions of PERA must be viewed with its high fiduciary duty in mind.

There are few cases apparently interpreting these governing statutes and the fiduciary duty

of PERA. One of those cases is Application of Allers, 533 N.W.2d 646 (Minn. App. 1995), review denied, August 30, 1995. That case dealt with a private pension plan administered by PERA. Allers had previously been a school district employee, but left to become a union member. Pursuant to statute, PERA was allowed to administer the union pension plan of Allers. However, the fiduciary duty of PERA was not discussed in any detail. The court held that PERA's action was proper. Allers had a questionable "leave of absence" from the school district, that in effect was really an early resignation. He reported a salary to the union membership that was substantially lower than the salary which he reported to PERA. PERA used the lower salary that he reported to the union membership as required by the union rules, instead of the higher salary he reported to PERA. There apparently were other games that Allers was playing to try to increase his pension improperly. None of those factors present in Allers are present here. No games were played by the firefighters with their reported salaries. They relied upon the advice that they had been given and did so reasonably. Allers did not have the claims that were present in the instant case, that he received estimates of his pension that later were retracted by PERA, on which he reasonable acted. There are numerous other factors present in the present case where were not present in Allers, which argue in favor of maintaining the pensions of the firefighters and not diminishing them as proposed by PERA. The court in Allers did refer to PERA's duty to "police" salary reports. In the present case PERA is seeking to impart the employee's contractual rights.

The fiduciary duties of PERA were also briefly mentioned in the case of Duluth Firemens' Relief Assoc. v. The City of Duluth, 361 N.W.2d, 381 (Minn. 1985). That fiduciary duty was cited briefly in footnote 4 at 361 N.W.2d 384. However, the Minnesota Supreme Court noted that the Trial Court never dealt with that issue and that therefore it was not involved in the appeal. It was not discussed further. That case therefore is not relevant to the fiduciary duty of PERA in the present

case.

Fiduciary duty is the highest standard of duty implied by law. Henry Campbell Black, et al, Black's Law Dictionary, 626 (6 Ed. 1990). M.S. 356A.04 Subd. 2 provides that PERA, as a fiduciary, shall exercise the same care that they should exercise in the management of their own affairs. PERA knowingly accepted the employee and employer contributions from about 1200 employees for a period of 13 years. PERA sent summaries of the contributions and the retirement benefits expected over the same years. PERA provided retirement benefit estimates, processed retirement applications, and provided "audited" retirement annuities to 485 retirees. For PERA to claim now that it did not have a duty to determine whether the contributions were proper, and that it could retroactively rescind those contributions after 13 more years, is a violation of its fiduciary duty. Applying the statutory fiduciary standard, that of the care that they would exercise in their own affairs, it is of course inconceivable that the PERA Board would, for 13 or more years, make or accept contributions to the retirement plans without knowing whether the contributions were proper and then after 13 years of continuous transactions, retroactively claim that the transactions should all be undone and that the retirement plan's benefits would be lost as attributed to these contributions. The application of the standard implies even more strongly that the PERA members would not have accepted the employer contributions for 13 or more years, counting on them for part of their retirement, and then forfeiting those employer contributions and the associated pension benefits for that 13 year period. It is inconceivable that the Board would agree to forfeit, not only their own contributions to the plan, but forfeit all benefit from the employer contributions made to the plans on their behalf, and give those employer benefits back to the employer without any equivalent compensation in return.

The application of the statutory standard is especially applicable to the Board members, as

opposed to the layperson plan participants. The individual plan participants of course had no specialized knowledge of the legal details of the plan. The plan participants in this case were firefighters. They were not experienced in the applicable law, actuarial valuations and other specialized knowledge that PERA has. Because PERA has all of that specialized knowledge, it is held to the standard of person who has all that specialized knowledge. This is different than the standard applicable to the firefighters, all of whom are lay persons. PERA is obligated to administer the plans, and accept contributions, with the care expected of persons with such specialized knowledge. With that specialized knowledge, they should not have accepted the employer and employee contributions, if such contributions were not permitted. PERA's position, that it did not have the obligation to say that the contributions were not proper, is not acceptable. This position is not compatible with, and is in fact in conflict with, its fiduciary duties. This position is not compatible with its specialized knowledge and expertise. Indeed, reasonable persons with prudence, discretion, and intelligence, exercising the same care that they would exercise in the management of their own affairs, if they made such a mistake, would tell the persons relying upon that mistake that PERA would accept the consequences of this mistake. This is especially true where the pensions are fully funded and PERA is not hurt by preserving the employees' pensions as they were promised.

It also is significant that PERA is not being harmed by admitting any claimed mistake and allowing the employee and employer contribution to stay within PERA. PERA treated those contributions the same as all of their contributions. The retirement benefits resulting from the employee and employer contributions were funded, just as is the case with all other contributions. PERA is not being hurt any more by accepting those contributions, then it is by any other contributions. If PERA has been hurt by the recent financial difficulties in the country, it has the

same difficulties with all other contributions. These contributions are in no way unique in how they were treated by PERA for purposes of planning, projecting retirement amounts, etc. PERA therefore has no special reason for rejecting these particular employer and employee contributions. This reinforces the conclusion that, if PERA made a mistake, that it should accept the consequences of the mistake, especially since it makes no difference to PERA financially.

PERA proposes to give the City a future credit for the employer contributions. Whether PERA attributes the employer contributions to the accounts of the employees, or to the accounts of the employer, that should not make a financial difference to PERA. PERA is a fiduciary of the employee accounts. The employer contributions should be attributed to the employee accounts, as originally intended and as provided in the labor contracts.

The court in Allers held that PERA's fiduciary duty requires PERA to be diligent in "policing" salary reports. Application of Allers, 533 N.W.2d 646 (Minn. App. 1995). PERA concedes it did not do so.

III. THE DEFERRED COMPENSATION PAYMENTS ARE INCLUDED IN "SALARY" PURSUANT TO MINN. STAT. §353.02., SUBD. 10(1)(a)

Preliminarily, it is undisputed by PERA that the determination whether the deferred compensation payments are included in salary is a question of state law. Although PERA includes in its brief numerous references to IRS statutes and regulations, and corrective procedures, fundamentally the only issue for determination by this administrative proceeding is a question of state law. PERA has no enforcement authority in this administrative proceeding to enforce IRS rules and regulations. PERA has no authority within this administrative proceeding to determine the proper operation of 457 deferred compensation plans. In fact, PERA has no involvement whatever in the operation of the deferred compensation plans at issue here. PERA only receives reports from

municipalities as to amounts directed on behalf of employees to 457 plans. To the extent that PERA is attempting to enforce any such IRS or deferred compensation provisions, this administrative proceeding has no jurisdiction over any such issues.

A. Deferred Compensation Is Specifically Listed in the Salary Definition in Minn. Stat. § 353.02, Subd. 10(1)(a).

The statutory definition of salary includes the deferred compensation payments set forth in the Duluth CBAs. The relevant provisions of the PERA statute is Minn. Stat. §353.01 Definitions:

(a). Subject to the limitations of section 356.611, “‘Salary’ means: (1) the periodic compensation of a public employee, before deductions for deferred compensation, supplemental retirement plans, or other voluntary salary reduction programs, and also means ‘wages’ and includes net income from fees; Minn. Stat. §353.01, Subd. 10(1)(a) (Emphasis added)

On its face, the statute specifically names and includes deferred compensation within salary.

Yet PERA claims it is not included.

In order to interpret statutes, the Minnesota legislature has passed a number of statutes to aid in the construction of the laws it passes.

Minn. Stat. §645.16 provides as follows:

“The object of all interpretation in construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.

When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” Minn. Stat. §645.16 (Emphasis added)

PERA reads into Subdivision 1, and repeatedly refers to the Duluth deferred compensation as “employer-paid deferred compensation.” (Emphasis added)

However, the statute on its face refers only to deductions for “deferred compensation.” There is no distinction in the statute on its face that requires the reader to conclude that “employer-paid”

deferred compensation is not included in salary. Pursuant to Minn. Stat. §645.16, PERA may not disregard the letter of the law “under the pretext of pursuing the spirit.” PERA provides no statutory or legal basis for excluding “employer-paid” deferred compensation, except that PERA has historically chosen to exclude non-employee contributions. However, that interpretation is outside the letter of the law, and is contrary to the actual statutory language. To reach that conclusion, PERA must ignore the language of the statute, which is not allowed under Minn. Stat. §645.16.

B. The Legislature Refused to Exclude Employer Paid Deferred Compensation in 1994.

While PERA summarizes minor changes that were made to Minn. Stat. §353.01, Subd. 10(a)(1) in 1994, PERA omits the most critical proposed change for statutory interpretation. Attorney Jon Murphy provided to counsel in the above-captioned matter by letter dated October 16, 2009, in response to the Judge’s request for legislative history, documents responding to that request. Many of them were included by Attorney Murphy as exhibits submitted with his Memorandum. However, one additional document which was provided as an attachment to the February 22, 1995 salary study report was omitted by Mr. Murphy in his Affidavit. That document is attached to the Affidavit of Elizabeth Storaasli as Exhibit D. The document is proposed legislation in 1994 to amend the definition of salary to read as follows:

“SUBDIVISION 13. SALARY. ‘Salary’ means the periodical compensation paid to any employee before deductions for deferred compensation, supplemental retirement plans, or other voluntary salary reduction programs. It also means wages ~~and includes net income from fees~~. Lump sum sick leave payments, severance payments, lump sum annual leave payments and overtime payments made at the time of separation from state service, payments in lieu of any employer-paid group insurance coverage, including the difference between single and family rates that may be paid to an employee with single coverage, ~~and~~ payments made as an employer-paid fringe benefit, ~~and~~ workers’ compensation payments, employer contributions to a deferred compensation or tax sheltered annuity program, and amounts contributed

under a benevolent vacation or sick leave donation program are not salary.³

It apparent from this proposed legislation that an attempt was made to specifically denominate “employer contributions to a deferred compensation” (emphasis added) program as not salary, and the amendment was not passed.

The words of the statute are clear, and thus require no further interpretation. However, introduction of this proposed legislation, and the refusal of the legislature in 1994 to amend the statute to specifically exclude employer-paid deferred compensation from salary, underscores the plain language of the statute as not excluding employer-paid deferred compensation.

C. The Attorney General Rules Deferred Compensation is Salary for PERA Purposes if it is Part of the Employee’s “Total Compensation.”

A 1984 opinion of the Attorney General makes clear that deferred compensation funds that are part of an employee’s total compensation are includable in salary for PERA purposes. An Attorney General’s Opinion of the State of Minnesota was issued to the City of Mankato on February 22, 1984, as Opinion 59-A-41.

The City of Mankato had made contributions to a deferred compensation plan on behalf of the City Manager. The payment was agreed upon between the City Manager and the City Council as a part of the City Manager’s total benefit and compensation package. Initially, the City Manager and City Council agreed an amount equal to 5% of the City Manager’s salary would be contributed to the deferred compensation plan directly by the City. By virtue of this contribution by the City, the City Manager’s salary was 5% lower than it otherwise would have been. In 1983, the City

³ This proposed legislation was provided by Attorney Murphy as part of his packet. Presumably any proposed legislation to amend the definition of salary by PERA would have addressed all plans, particularly after the report made by the Legislative Commission that year addressing plans statewide and nationwide. Inexplicably, Murphy’s letter included only this proposed legislation.

Manager and City Council agreed that the City Manager would receive an additional 5% less in salary, and the City would contribute an amount equal to 10% of the City Manager's salary to the deferred compensation plan. The City Manager was a member of PERA. The question posed to the Attorney General was whether a city, as part of its benefit and compensation plan for its chief administrative officer, may make payments to a deferred compensation plan by allocating public funds for such payments in lieu of making equivalent salary payments. The Attorney General concluded that pursuant to statute, cities may exercise discretion in expending public funds to compensate their employees for services and in determining the amount and timing of the compensation. (Citing Minn. Stat. §471.615 and Minn. Stat. §352.96.) The Attorney General concluded that:

“These sections taken together, in our opinion, express the clear legislative intent to authorize political subdivisions to direct funds to certain annuity and deferred compensation plans on behalf of employees who so request. However, such payments must be made from funds which are part of the employee's compensation and, but for the request, would be payable to the employee.”

The Attorney General concluded that if the payments otherwise qualify as the purchase of an annuity, the payments must be structured as to demonstrate they are made voluntarily out of the salary of the manager and not in addition thereto.

Most importantly, however, the opinion concludes with a footnote which reads as follows:

“FN2. See, e.g., Minn. Stat. §353.01, Subdivision 10, which provides in part: Subdivision 10 Salary. ‘Salary’ (for the purposes of laws governing the PERA) means the periodical compensation of any public employees, before deductions for deferred compensation or supplemental retirement plans. (Emphasis added)

The facts submitted state that these payments were made ‘on behalf of the city manager’ as part of the manager's total ‘compensation package.’ Thus there is some indication that the payments could be considered as includable in the Manager's ‘salary.’ However, the facts submitted contain no indication that they have formerly been treated, for any purposes, by the city as ‘salary’ to the manager.”

The rule set forth in this opinion must then be adapted to the circumstance where the total compensation package of employees is determined by their union representative in negotiation for a CBA with the city. Clearly the total compensation package of City of Duluth employees is set forth in their CBAs. The CBA history, as set forth by John Hall, makes clear that the City wished to extend an extra quarter percent or half percent to the Supervisors Association for the contract year 1995. However, the City was unwilling to offer it as a percentage of salary due to the effect on other bargaining units, and wished to avoid the compounding of percentage increases or “creep,” and therefore chose instead to include in the compensation of the employees a deferred compensation plan. It is impossible to argue that the deferred compensation provision of the CDSA plan in 1995 and its progeny in the other Duluth bargaining units is not part of the employees’ “total compensation package.” It is impossible to conclude that the deferred compensation provision is not part of employees’ “total salary.” When the deferred compensation plan was first initiated in the CDSA contract, there was no option to direct any portion of that payment toward family medical reimbursement. The genesis of the deferred compensation plan is clearly as part of total compensation. PERA clearly viewed it as such when PERA advised the City to include it as salary on employee paystubs and salary reports to PERA, as reported by Jackie Morris, Les Bass, Genie Stark and John Hall.

It is also indisputable that the deferred compensation amounts were consistently included on employees’ paystubs beginning in the 1990's and continuing through 2007. Paystubs submitted by employees show this to be the rule. (Affidavits of Keenan, Belanger, Brown, Charbonneau, Hall, Bass, Ostman.) Additionally, later on when employees were given the option to direct a portion of the deferred compensation payments toward the cost of family medical, the amount thus paid was still shown on the paystub as income. Presumably the employees may have even been subject to tax

withholdings on that amount. (Affidavit of John Keenan)

The Attorney General's opinion expressed concern over the reduction of the employee's salary by 5% and 10%, but such reductions did not take place with the deferred compensation funds included by the City of Duluth and PERA in employees' salary. The deferred compensation was included as salary on the paystubs.

In addition to the funds being included as income on employees' paystubs, the deferred compensation payments were always subject to withdrawal by the employee, subject to penalties and taxation, and to withdrawal as loans. 457 plans allow such access by employees, and the City of Duluth employees had access to those funds. Several of the retirees had utilized their deferred compensation funds for military buy-back toward PERA while they were active employees. (Michog Affid. ¶ 3; Belanger Affid. ¶ 4)

The Duluth deferred compensation plan never required any match payment to be made by either employer or employee, and if employees made contributions in addition to the collectively bargained payment, they were never split out on employees' paystubs. There was only one payment towards deferred compensation shown as a deduction on the deduction side of the paycheck. (Morris Affid. ¶ 11)

The policy issues and cases cited by PERA supporting the exclusion of deferred compensation from salary all revolve around individual situations of alleged collusion between a highly paid employee and an employer. Due to the 1984 statute preventing public employees from receiving higher pay than a percentage tied to the Governor's salary, numerous public employers and their highly compensated employees had tried various schemes to get around the law. The Allers case addresses a fact situation where the employee is manipulating both the employer and PERA to obtain a greater high five salary average in order to obtain a higher retirement annuity. That is a far

different scenario than presented by PERA in this case. Here the employer and employees entered into written collectively bargained labor agreements providing for total compensation in full view of city government, elected officials, and the public. PERA had full access to all supporting documentation from the commencement of the benefit in 1995 until the supposed “discovery” of the “error” in 2007. Here there was no collusion by the employer and employees/retirees to mislead PERA. If there is any manipulation here, it arises from the employer designing new software to specifically recreate records which had been destroyed in order to obtain greater financial benefit for the years 1997 through 2005. The ultimate result is that the total compensation which was specifically bargained between the City and the employees in their CBAs is being disgorged from the employees and forfeited, for the purpose of solving the City’s budgetary stresses. Such a result cannot be supported based upon the speculative interpretation of Minn. Stat. §353.01, Subd. 10(1), set forth by PERA. PERA has never faced an appeal of this magnitude, affecting over 450 beneficiaries whose monthly retirement pensions have been reduced by up to \$250 per month for life, and who PERA proposes must pay back up to \$20,000 each. The statute does not support such a draconian result, and the Attorney General’s Opinion makes clear the deferred compensation may be salary for PERA if part of “total compensation.”

IV. THE DEFERRED COMPENSATION PAYMENTS ARE NOT INCLUDED IN THE EXCEPTIONS TO SALARY IN MINN. STAT. §353.01, Subd. 10(1)(b)

The statutory definition of salary also contains a section identifying specific exclusions from salary. Subdivision 10(1)(b) reads as follows:

“(b) Salary does not mean:

- (1) fees paid to district court reporters, unused annual vacation or sick leave payments, in lump-sum or periodic payments, severance payments, reimbursement of expenses, lump-sum settlements not attached to a specific earnings period, or workers’ compensation payments;
- (2) employer-paid amounts used by an employee toward the cost of insurance

coverage, employer-paid fringe benefits, flexible spending accounts, cafeteria plans, health care expense accounts, day care expenses, or any payments in lieu of any employer-paid group insurance coverage, including the difference between single and family rates that may be paid to a member with single coverage and certain amounts determined by the executive director to be ineligible;

(3) the amount equal to that which the employing governmental subdivision would otherwise pay toward single or family insurance coverage for a covered employee when, through a contract or agreement with some but not all employees, the employer:

(i) discontinues, or for new hires does not provide, payment toward the cost of the employee's selected insurance coverages under a group plan offered by the employer;

(ii) makes the employee solely responsible for all contributions toward the cost of the employee's selected insurance coverages under a group plan offered by the employer, including any amount the employer makes toward other employees' selected insurance coverages under a group plan offered by the employer; and

(iii) provides increased salary rates for employees who do not have any employer-paid group insurance coverages;"

The principles of statutory construction apply toward this statute as well as to the first portion (Subd. 10(1)(a)) of the statute. Movants submit that the words of the law in their application to this situation are clear and free from all ambiguity, and it is not necessary to look past the letter of the law as set forth in Minn. Stat. §645.16.

The two payments that are at issue were both set forth clearly in each CBA. Initially in the CDSA 1995-1996 contract, the only payment was deferred compensation. Subsequent to that first contract the other contracts then provided for the election by eligible employees of the portion of the deferred compensation payment to be applied toward the cost of the family medical reimbursement plan. Those are the only two benefits at issue.

Turning to Subdivision (b), none of the items listed in Subdivision (1) are relevant to exclude these payments. Neither payment is "fees paid to district court reporters," "unused annual vacation or sick leave payments," "severance payments," "reimbursement of expenses," "lump sum settlements," or "workers' compensation payments." Accordingly, Subdivision (1) does not apply.

With regard to Subdivision (3), it applies to a situation where an employer makes "a contract

or agreement” with some but not all employees related to family insurance coverage. It does not apply for several reasons.

Firstly, the medical reimbursement plan which is a “pay-as-you-go” plan operated by the City of Duluth on a “self-insured” basis, is not “insurance coverage.” The City makes only a promise to reimburse approved medical and hospitalization payments, but does not provide “insurance coverage.”

Additionally, the City has never provided or paid for family insurance coverage for covered employees. Employees who are eligible may elect to participate in a family medical reimbursement plan, but it is not insurance coverage. No portion of that plan has ever been paid for by the City.

Subdivision (3) addresses a situation where the employer contracts differently with some employees than others. That situation has not applied to any of the CBAs in question here. Accordingly, Subdivision (3) does not apply and may be excluded.

Subdivision (2) is the section upon which PERA relies for its claim that the payments to deferred compensation and contribution toward family medical reimbursement are excluded from the definition of salary.

PERA does not claim that either payment is part of a “flexible spending account,” or “cafeteria plan” or “health care expense account” or “daycare expense.” Therefore, the three remaining possible applicable exclusions are “employer paid amounts used by an employee toward the cost of insurance coverage,” “employer-paid fringe benefits,” and “payments in lieu of any employer-paid group insurance coverage.” For numerous reasons, none of these exclude the payments set forth in the CBAs hereto.

A. Employer-Paid Amounts Used by an Employee Toward the Cost of Insurance Coverage.

As made clear in the Affidavit of Bryan Brown, Assistant City Attorney between 1975 and 2000, and City Attorney between 2000 and 2008, who was intimately involved in the development of the City of Duluth benefit plans, since the early 1980's the City of Duluth has not provided "insurance coverage" to employees. At all time relevant herein, the City did not contract for or provide insurance benefits for its employees. The plain language of this exception requires "insurance coverage." The City terminated this insurance coverage in the early 1980's due to an unfunded liability for its sick leave bank which was going to have to be listed on its financial statements. The City and its collective bargaining units agreed to extinguish the sick leave bank in exchange for the City operating its own "pay-as-you-go" medical reimbursement plan. The City by law is not, and cannot be, an insurer. The City does not contract with any insurers. (See Stark Affid. ¶ 6; Brown Affid. ¶ 3) The City only agrees to pay certain claims that are presented by employees on a "pay-as-you-go" basis. The City hires an administrator for the medical reimbursement plan, but said administrator is not in any way an insurer. Even if an eligible employee does elect to direct a portion of the deferred compensation payment toward family medical reimbursement, that plan is paid for completely by payroll deduction, and the City has no involvement in payment for any portion of that plan. Additionally, as set forth in the Affidavit of John Keenan, in Duluth if an employee did elect to utilize some of the deferred compensation money toward payment for the family medical reimbursement, it still showed on the income side of the paystub as income toward insurance supplement. In conclusion, there is no "insurance coverage," and thus the payments cannot be excluded under this statutory language.

B. Employer-Paid Fringe Benefits.

PERA specifically concedes that “PERA recognizes that its law does not define the term, “fringe benefit.” (PERA Memorandum of Law, pg. 14, fn. 6) Pursuant to the Rules of Statutory Construction, however, in order for PERA to meet its burden to prove that the deferred compensation payments and contribution to family medical payments are “fringe benefits,” the statute must have some definition. Since PERA concedes it does not, it has failed to meet its burden to prove that these payments are excluded as fringe benefits. Since deferred compensation is specifically referred to in Subdivision (a) as included in the definition of salary, it is illogical for PERA to presume that it may be likewise excluded as a “fringe benefit” even though the words deferred compensation are not included in Subdivision (2). Under the Rules of Statutory Construction, PERA has a high standard to meet since deferred compensation is specifically included in the definition of salary, and not mentioned in Subdivision (2). Even if PERA claims that the contribution towards family medical reimbursement is a fringe benefit, the family medical reimbursement plan has never been paid for by the employer. The plan is only available to eligible employees with dependents, and must be elected and paid for by the employee. In such circumstance, the employee may divert a portion of the deferred compensation payment, but no benefit is provided by the employer. As John Hall states in his Affidavit, there was no actual linkage between deferred compensation and medical premiums other than timing similar to a car dealer advertising a lower price but state “after your trade or \$2,000 down.” (Hall Affid. ¶ 8) It is essentially a stand alone plan, paid completely by the employee, but the employee may choose to divert some payment from deferred compensation to the cost of that plan along with payroll deduction from salary. The plan itself cannot be called a “fringe benefit” since the employer is not providing any portion of it.

C. Payments in Lieu of Any Employer-paid Group Insurance Coverage, Including the Difference Between Single and Family Rates That May Be Paid to a Member with Single Coverage.

It is an impossibility for the deferred compensation amounts or the contribution toward family medical reimbursement to be excluded under this clause. As previously noted, the City of Duluth provides no “employer-paid group insurance coverage,” since the City of Duluth is not an insurer, and has not contracted with any insurers to provide medical insurance coverage. The City’s plan is a “pay-as-you-go” medical reimbursement plan, not insurance. There can be no payments “in lieu of” insurance coverages that are not offered and do not exist. In addition, the only employer paid medical reimbursement is the single coverage provided at no charge for all employees. The statutory language contemplates that some individual would receive cash instead of the single coverage provided by the City. No such facts are in evidence, and no such payments ever existed. Employees were eligible for the City’s single medical reimbursement plan, and no person ever waived such coverage or received payments in lieu of such coverage. Accordingly, that subsection of the statute is not applicable.

In conclusion, the deferred compensation payments and the payments toward family medical reimbursement are not excluded from Minn. Stat. §353.01, Subd. 10(b) and by the Rules of Statutory Construction, the words of the law in their application to an existing situation are clear and free from all ambiguity. Had the legislature wished to exclude these payments from the statutory definition of salary, it could have done so. It has chosen not to do so. PERA has the option to present proposed legislation to the legislature each year, and typically does so. The Court must interpret the lack of legislation addressing this particular situation as the intention to include it. The letter of the law that does not exclude deferred compensation and payments toward family medical reimbursement should not be disregarded under the pretext of pursuing the “spirit” of the law.

Minn. Stat. §645.19 gives directions on how provisos and exceptions should be construed.

It provides as follows:

“Provisos shall be construed to limit rather than to extend the operation of the clauses to which they refer. Exceptions expressed in a law shall be construed to exclude all others.” (Emphasis added)

A number of exceptions as to what salary does not include are written into Minn. Stat. §353.01, Subd. 10. The explicit exceptions that other types of flexible spending accounts, cafeteria plans, are excluded from the definition of “salary” leads to the conclusion that deferred compensation and contribution toward family medical reimbursement payments should not be excluded from salary.

Attorney Thomas F. Andrew submitted a Memorandum of Law in support of Movants for unused personal leave as salary in this proceeding. In his Memorandum, pages 8 and 9, Andrew argued with regard to statutory exceptions as follows:

“In Brandt v. Hallwood Management Company, 560 N.W.2d 396 (Minn. App. 1997) the Court was asked to interpret Minn. Stat. §41.051 that establishes a two year statute of limitation for a person making claims for injuries “. . . arising out of defective and unsafe condition of an improvement to real property . . .” In Brandt the unsafe condition was caused by a company involved in the demolition of the property. The court concluded that demolition work did not fall within the ordinary definition of the work “construction”. The Court also based its ruling upon an interpretation of Minn. Stat. §645.19 and in doing so the Court stated as follows:

The statute specifically delineates those individuals afforded protection under it. Conspicuously absent is any mention of individuals who perform demolition work. ‘Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others.’ Maytag Co. v. Commissioner of Taxation, 218 Minn. 460, 463, 17 N.W.2d 37, 40 (1944) (citations omitted); Minn. Stat. §645.19 (1996) (“Exceptions expressed in a law shall be construed to exclude all others.”) The legislature failed to include, either intentionally or by mistake, those individuals who perform demolition work within the meaning of Minn. Stat. §41.051. We cannot now do so. It is well established that when construing statutes, a reviewing court ‘cannot supply that which the legislature purposely omits or inadvertently overlooks.’ Northland Country Club v. Commissioner of Taxation, 308 Minn. 265, 271, 241 N.W.2d 806, 809 (1976) (citation omitted). (Emphasis added)

Similarly, in Board of Education Minneapolis v. Public School Employees Union Local No. 63, 233 Minn. 144, 45 N.W.2d 797 (1951) the Court was asked to construe Minn. Stat. §185.19 that prohibited the granting of injunctions in labor disputes except that it “. . . shall not be held to apply to policemen or firemen or any other public officials charged with duties relating to public safety.” In this case the public employees involved were school janitors. In denying an injunction against the janitors the court stated:

This interpretation of the statute is in accord with the well-settled rule that where a statute designates an exception, proviso, saving clause, or a negative, the exclusion of one thing includes all others. (Emphasis added)” (Andrew Memorandum, pgs. 8 and 9)

Minn. Stat. §353.01, Subd. 10(b), states a number of exceptions to the definition of salary, not including “deferred compensation” or “payments toward family medical reimbursement.” These specific designations of exceptions such as flexible spending accounts, cafeteria plans, health insurance expense accounts, daycare expenses, etc., mean that “deferred compensation” and “payments toward family medical reimbursement” must be included within the definition of salary as “the exclusion of one thing includes all others.”

V. THE RECREATED SALARY NUMBERS PROVIDED TO PERA BY THE CITY OF DULUTH ARE NOT CORRECT AND RELIABLE, AND IT IS ARBITRARY AND CAPRICIOUS FOR PERA TO RELY UPON KNOWN INCORRECT NUMBERS

The Manager of Payroll/Personnel Systems of the City from the late 1980's to 2008, Jackie Morris, in her Affidavit states that the City had insufficient computer memory to retain payroll record details for any periods prior to 2005. They had to choose which data to keep, and they kept the payroll totals, and deleted the payroll detail from prior to 2005. According to Jackie Morris, the payroll detail is reliable only from 2005 forward.

In the e-mail from Chris Arcand at PERA to Jackie Morris on September 18, 2008, requesting the initial data, Chris stated, “We ask only that you provide information that would be reasonable for the City to compile. For instance, if your records are archived or inaccessible beyond

three years, we ask that you only go back three years through the date that you stopped taking the inadvertent contributions.” (Morris Affid. ¶ 15) Even though PERA only requested three years, the City of Duluth created a special software program to attempt to recreate the records that had been deleted. The individual designing the software contacted Jackie Morris numerous times after she was placed on leave for help in order to complete the software. Jackie Morris indicates that even once the software was created, it required interpretation in working with the old software programs. No one currently working at the City of Duluth had experience with any of the older software programs. Jackie Morris does not believe that any of the recreated numbers prior to the year 2005 are trustworthy and reliable.

An example of the difficulties with the numbers provided by the City of Duluth is the request for the PERA file by Paul Ostman. Mr. Ostman made a request for the file on or about May 1, 2009. On or about May 5, 2009, PERA directed a letter to him indicating a reduction in the calculation of his benefit, and a substantial reduction in the amount he would be required to pay back. The annuity amount was decreased by approximately \$30 a month, and the payback amount was reduced from \$7,500 to about \$1,000. The letter from PERA attempting to explain the reason for change is unintelligible. The PERA representative admits that it is extremely difficult to understand. (Ostman Affid. ¶ 19)

Jim Charbonneau had all his old paystubs and made a spreadsheet. There are numerous errors and mistakes in the numbers provided by the City to PERA compared to his. (Charbonneau Affid. ¶ 7, 8) Doug Michog also determined the City’s calculations for his military buy-back were wrong. (Michog Affid. ¶ 3)

Another example of the unreliability of the City of Duluth numbers is the comparison of the charts produced for each retiree. Paul Ostman’s chart is attached as Exhibit 14 to his Affidavit.

Numerous other retirees have also attached these charts to their Affidavits. The chart purports to be the total of deferred compensation, payment towards family medical, etc., available for each year from 1997 through 2007. Since all the firefighters were under the same contract, the numbers listed in their charts should be identical. The numbers are not identical between the retirees, and the numbers listed do not even match the total of the benefits that were written in the contract. These charts are proof without a doubt that the City's recreation of the numbers is incorrect, unreliable, and PERA's reliance on these numbers knowing them to be incorrect, is arbitrary and capricious. As a fiduciary, PERA has an obligation to the employees and retirees to conduct their activities in accordance with the law in pension plan documents. Minn. Stat. §356A.05. PERA has a duty to diligently police salaries reported by governmental subdivisions in order to determine that the amounts reported are consistent with the PERA plan documents. See Application of Allers, 533 N.W.2d 646 (Minn.Ct.App. 1995), review denied August 30, 1995. See also Legislative Audit Report. (Storaasli Affid. Ex. E-18)

The City apparently determined to use PERA as a foil in order to avoid its contractual liabilities to employees and retirees. Although the City was notified that PERA would be satisfied with calculations going back to only 2005, the City took upon itself to recreate numbers back to the year 1997. PERA has not used the due diligence required of a fiduciary in determining the accuracy and reliability of the recreated payroll numbers provided by the City of Duluth. The sole beneficiary of this recreation of payroll numbers is the City of Duluth, in that it will receive payback and credit of the employer portion that should instead result in additional annuity for the retirees.

PERA, as a fiduciary for the employees and retirees, should not allow itself to be used as a foil for such inappropriate and overreaching actions by a public body.

VI. THE RETIREES' EQUITABLE CLAIMS BAR PERA FROM REDUCING ANNUITIES IN PAY STATUS AND DEMANDING REFUNDS

In the PERA Memorandum, reference is made several times to the principle that there is no harm to the retiree if sums are refunded, if the retiree never had a right to have those sums contributed to the retirement plan in any event. Therefore, using that principle, if the retiree receives everything that the retiree is entitled to anyway, the retiree is not harmed. "No harm, no foul." However, that principle does not have applicability in the present case.

It is established through the Affidavits submitted by the former retirees, salary and benefits were very carefully negotiated by bargaining units over many years. In 1995 and subsequent contracts, the City (by Karl Nollenberger) quite specifically and carefully negotiated that the employees would receive set salary and in addition a specific dollar amount of deferred compensation. Therefore, with salary, deferred compensation and other benefits, the employer paid a certain cost per employee. The employees, retirees, bargaining units and City were well aware of this. If the parties had known that the contributions were to be retroactively removed from salary 15 years later, they would have negotiated replacements in their total compensation package. If the contributions towards deferred compensation are now retroactively excluded from the retiree's total compensation, the retirees have lost a significant part of their bargained for package. The employees were guaranteed certain payments including salary and deferred compensation in the contracts. Receiving the deferred compensation was a promise of the City and a condition of their continuing employment. If those payments were removed, the unions would have negotiated for something else of comparable cost and value.

What is proposed by PERA at this time is to return the retiree PERA contributions based upon the alleged "illegal" salary back to the retirees. However, it is also proposed that the employer

contributions be returned to the City of Duluth. PERA proposes that the retirees' annuities be reduced by the disallowed retiree and employer contributions. This will result in substantially reduced retirement benefits ranging up to \$250 per month over a life expectancy up to 25 years. The retirees bargained for the value of both their own contributions and the employer's contributions, together with the increase in retirement sums that would result. Returning the retiree's contributions to the retirees, returning the employer's contributions to the employer, and reducing the retirement benefits is not a matter of returning to each what is their own. The retirees were entitled to all of those values. That is what they negotiated for. That is what the City agreed to pay them. Consequently the examples submitted by PERA are not apposite.

There are two obvious ways to make the retirees whole. One is to keep things as they were. It is submitted that PERA does have the authority, under its discretion, to keep all the benefits, and pay the retirees their retirement that they were promised and that they had counted on. PERA admits that the definition of salary is purely an issue of state law, and the IRS is satisfied with retroactive plan modification. There is no detriment to PERA from doing so. Those retirement benefits were already funded. All of the payments have been made.

The second choice would be to give the retirees their contributions, plus the employer's contributions, plus interest, plus have the City pay the retirees any remaining difference in their retirement benefits or the amortized value of those decreases in benefits. There is no reason for the retirees to be the ones to lose.

It also should be noted that the City would have a windfall if it were to receive, and keep, the employer's contributions. The City agreed to pay the retirees the sums that were received by PERA. They were paid from the City's coffers as a contract obligation. The City has no claim to those funds, but merely held them in trust. The City agreed by contract to pay those sums for the benefit

of the retirees. For the City to receive those sums back would result in a forfeiture of the retirees' contracted right, and a windfall to the City. That obviously is not fair. It is not equitable. It is unconstitutional for PERA to deprive the retirees of their bargained for payments without due compensation, since they were promised both the employer's contributions and the increase in their retirement values.

The deferred compensation was paid upon assurances at the bargaining table and afterward by the City that these contributions were proper and legal. They were also paid after the City checked with PERA and received confirmation from PERA how to set up the deferred compensation payments. The payments were subject to audit by the Office of State Auditor yearly, and specifically in 2001 were approved by the Office of State Auditor. To deprive the retirees of these sums, and to disgorge contract promises back to the City, is outrageous, and improper and illegal. Any decision by PERA to do so would be arbitrary and capricious. It also is unconstitutional and illegal to deprive these retirees of their property.

VII. MINNESOTA CASES REGARDING DEPRIVING RETIREES OF BARGAINED FOR BENEFITS

There have been several recent cases dealing with the legality of depriving retirees of bargained for compensation. Some of these cases have dealt with decisions by government authorities to discontinue payment of the same level of health benefits to retirees, that it had been paying them. The courts have reached different results, depending upon the specific language of the contracts. See Housing and Redevelopment Authority of Chisholm v. Norman, 696 N.W.2d 329 (Minn. 2005) and Adams vs. Independent School Dist. No. 316, 2008 WL 2573660 (Minn.App. 2008) (holding that the employer cannot retroactively deprive the retirees of bargained for benefits); Savela v. City of Duluth, St. Louis County District Court File 69DU-CV-08-1793, Order of the

Court of December 2, 2009 (holding that the agreements do not guarantee the retirees a continuation of the level of health benefits that they had upon retirement, and that the City of Duluth could pay the retirees their health benefits in the same manner as it was paying those benefits for current retirees). All of those cases recognize that a public employer cannot deprive a retired retiree of the bargained for benefit. The pivotal issue in those cases was not whether you could do so, but what benefits the retirees were guaranteed in the collective bargaining agreement.

In the present case the retirees were guaranteed the dollar value of the contributions to deferred compensation, and those contributions were solely for the benefit of the retiree. Those employer contributions cannot now be taken back from the retirees.

Similarly, insofar as the retirement annuities were stated in the statements from PERA, those annuity levels must also be maintained and cannot be taken back from the retirees.

There is no ambiguity in what was bargained for. The contributions were specific and unambiguously bargained for. The value and the increase in the retirees' annuities was known quite specifically and was bargained for. Those values cannot be taken back from the retirees.

VIII. PERA'S PROPOSAL CONSTITUTES AN UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT

The relief sought by PERA includes return to the City of Duluth of a portion of the City's payment towards the retirees' retirement benefits. It is clear that those contributions by the City were for the private benefit of the retirees. Those payments for the benefit of the retirees should not remain the property of the City of Duluth.

The constitutionality of an amending statute, impairing the rights of a retiree, was considered in Christensen v. Minneapolis Municipal Retirees Retirement Board, 331 N.W.2d 740 (Minn. 1983). That held that a statute seeking to change the benefits to be received by a retired officer would be

an unconstitutional impairment of contractual obligations.

In Christensen v Minneapolis Municipal Retirees Retirement Board, 331 N.W.2d 740 (Minn. 1983), the Supreme Court directly considered the issues of promissory estoppel and unconstitutional impairment of contractual obligations. The Court specifically held that promissory estoppel did apply to the State, prohibiting altering a pension owed to a public retiree who was already retired and receiving his pension. The Court specifically held that the amending statute was invalid as it was an unconstitutional impairment of contractual obligations.

Christensen dealt with the issue of whether a retired public retiree's pension could be discontinued by an act of the legislature changing the eligibility requirements. The Plaintiff had worked for the City of Minneapolis for at least ten years before he retired in 1974. He was a contributing member of the Minneapolis municipal retirees retirement fund. He became entitled to the pension benefits upon his retirement in 1974, having served the requisite ten years.

In 1980, the Minnesota legislature changed some of the retirement laws and imposed a new minimum age requirement for entitlement to benefits. Under the new law, he was not eligible to receive pension benefits. His pension benefits were discontinued. The Plaintiff apparently had considered the fact that he could get a pension after working for ten years, as both an inducement to work, and when to retire.

Christensen rejected the validity of any statement in PERA statutes, or other terms, which purport to not create a contractual right. Christensen held that public retirees have a right to the offered pension, that this right is protectable, and that this right cannot be abrogated by statements that there is no contract right.

The Court rejected its prior "gratuity" analysis and stated quite specifically that promissory estoppel does apply, even if there were no contract rights. It found that promissory estoppel applies

where a promise is illusory. The Court held that promissory estoppel applied, and the retiree had a right to the benefits, where the retiree began employment and then later retired in reliance on the promise of the pension.

The Christensen case also held that the deprivation of the retirees' pension rights was an unconstitutional impairment of contract. See U.S. Constitution, Article I, Section 10, Clause 1. See also Minnesota Constitution, Article I, Section 11. The Court specifically held that the Minnesota Constitution's prohibition against the impairment of contract applied to implied-in-law obligations created by promissory estoppel. 331 N.W.2d 750.

The Christensen Court applied the three part test of Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed. 2d 569 (1983). The first test is whether there was a substantial impairment of a contractual obligation. The severity of impairment increases the level of scrutiny by the Court. If there is a substantial impairment, then the second step is that the State must demonstrate a significant legitimate public purpose behind the legislation. Third, the State's actions are examined in the light of this public purpose to see whether the adjustment of public rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate of the public purpose justifying the legislature's adoption. The Court held that the three part test was applied with more scrutiny where the State seeks to impair a public contract, than it is with private contracts. The Christensen Court held that the retirees' need to be secure in their retirement benefits overrode the State's concern in correcting any inequities in the pension plan. The Court held that the need for a minimum age requirement was not so compelling, or such a reasonable condition to the public purpose, as to justify impairment of the State's obligation. There was no claim that the impairment of the pension fund was in jeopardy. The interests of the State in correcting previous errors could be served by less drastic alternatives. The Court held that the statute

failed on the third prong of the three part test.

As applied to the present case, the same results should be reached. This certainly is a severe impairment of the contractual obligation. The public retiree's pension rights are being very substantially reduced. It should be noted that in Christensen, the retiree had only paid \$7,051.51 in to the retirement fund, but had received benefits of \$27,380.86. The actual value of the retirement allowance as of the date that the payments were terminated was \$73,872.61. Therefore, the Court explicitly rejected the claim that the retiree was receiving too good of a bargain, given the value of his contributions. In the present case, the retirees are receiving substantial reductions in their present and future retirement benefits. Some monthly payments are reduced by \$250 and retirees are told to pay back \$15,000. Some retirees have had to continue second jobs. One tried to return to work, was refused, and has now applied again.

Moreover, in the present case, the retirees are losing the benefit of the employer contributions as well as their own contributions. If the employer contributions, together with interest, were credited to the retirees, then the impairment of the last amount of the retirement benefits would still be a violation of promissory estoppel and the constitutional rights of the retirees under the Christensen holding. However, where the retirees do not even get the value of the City's contributions, and those contributions go back to credit the City, the error is even more egregious.

With the second test, the State must demonstrate a significant and legitimate public purpose. There is little public purpose in not allowing the retirees to receive their pensions. Those pensions were already funded by the retiree and the retiree contributions. Whether or not those contributions are allowed is a matter of bookkeeping. The retirees' pensions are fully funded by the past employee and employer contributions. It does not impair the PERA system. The IRS has no objection to the retirees receiving their full pension benefits since the definition of salary is purely an issue of state

law, and the plan may be amended retroactively. The retirees submit that the public purpose in not allowing the employer contributions and the pension benefits is quite modest.

The third test is “whether the adjustment of the rights and responsibilities of the contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.” 103 S. Ct. At 705-06 (brackets in original). Christensen, supra, at 331 N.W.2d 751. The legislation certainly fails the third test. Especially outrageous is the return of the employer’s contributions credit to the City. If there were a proper significant purpose in requiring a refund of the retiree and employer’s contributions, the employer’s contributions should go back to the retirees, not back to the City. The employer’s contributions towards the retiree’s pension value were part of the total compensation package for the retirees. The City has already paid those sums. The retirees were to receive pension benefits based upon those sums. Sending those sums, together with interest, back to the City is not a reasonable condition appropriate to the public purpose. As with Christensen, if errors were made, and if action were required properly to correct errors, correcting those errors could be served sufficiently by less drastic alternatives, as required by Christensen, supra. As stated in Christensen, “The State’s concern in correcting inequities in the City’s pension plan must yield to the retiree’s need to be secure in his expected retirement benefits.” Christensen, supra at 331 N.W.2d 751. Those comments are applicable in the present case as well. The retirees should be entitled to keep the retirement fund value of both the employee and employer contributions. Anything less is an unconstitutional impairment of contract.

The action proposed by PERA under the statutes is a violation of these constitutional rights. The retirees are entitled to the employer contributions, together with appropriate interest. Taking those sums out of the pensions, and reducing the pension benefits is also a violation of those rights.

IX. PERA'S PROPOSAL CONSTITUTES AN TAKING OF PRIVATE PROPERTY

In addition to violation of the constitutional guarantees preventing impairment of contract, PERA's action, and the statute, also violate the constitutional prohibitions against the taking of private property for public purposes without just compensation. This right against taking private property without just compensation is guaranteed by Article 1, Section 13 of the Minnesota Constitution. It is also guaranteed by the Fifth Amendment of the United States Constitution. In the present case, PERA proposes that the employer contributions for the benefit of the retirees are to be returned to the City, not to the retirees. The action proposed by PERA under the statutes is a violation of these constitutional rights. The retirees are entitled to the employer contributions, together with appropriate interest. Taking those sums out of the pensions, and reducing the pension benefits is also a violation of those rights.

The Fifth Amendment of the United States Constitution, as well as Article I, Section 13 of the Minnesota Constitution, provides that private property shall not be taken for public use without "just compensation." "Just compensation" means cash fair market value of the property taken. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 472, 93 S.Ct. 791, 792, 35 L.Ed.2d 1 (1973). These principles were affirmed in City of Rochester v. Northwestern Bell Telephone Co., 431 N.W.2d 874. At issue there was whether a lessee would share in a condemnation award, sharing the award proceeds with a lessor. The Minnesota Supreme Court held that the automatic termination clause of the lease terminated the interests of the lessee upon condemnation, and that the lessee had no right under the lease for a loss of the leasehold interest. That is quite different from the case here, where the City's payments were made for the benefit of the retirees. The retirees had an absolute right to those benefits. If PERA could not accept those payments by the City, then those payments should go to the retirees, not back to the City. Paying

them back to the City constitutes an unconstitutional taking for public use without just compensation to the retirees. Any implication that the statutes hold to the contrary would be unconstitutional. Therefore, if the City's payments are to be refunded, they must be refunded to the retirees, not to the City.

X. PERA'S REDUCTION OF RETIREES' PENSION PAYMENTS IS BARRED BY LACHES.

PERA addressed the doctrine of laches. As PERA notes, the crucial issue is whether there has been such unreasonable delay in asserting a known right, resulting in prejudice to others, that the relief prayed for should be denied. Winters v. Kiffmeyer, 650 N.W.2d 167 (Minn. 2002). The cases cited by PERA about laches not applying if there is merely a seeking of a legal remedy upon a legal right, are not germane. Moreover, the retirees in the present case specifically are seeking equitable relief.

Laches does apply here. PERA was consulted in 1994 (Morris Affid. ¶ 2, Stark Affid. ¶ 2; Bass Affid. ¶ 4) about the deferred compensation plan of the City included in the 1995-1996 CDSA contract. PERA responded that the deferred compensation should be included as salary and advised the City how to list it on payroll. In reliance upon that, contributions continued to be made both by the retirees and by the City and included in salary for PERA purposes. If the City or the retirees had been told that the plan was not proper, then those contributions could have been stopped. This is especially important to the retirees since they would have sought to obtain the City's payments in some other form, by way of other consideration to be given to the retirees. Now, it is proposed that the City's contributions be forfeited by the retirees and that those contributions revert back to the City, and their annuities be unilaterally reduced.

PERA knew at the outset about the contribution arrangements. It did nothing to assert its

rights to notify the City and/or bargaining units and employees that it would demand that they change those compensation arrangements. Its failure to do so has obviously resulted in great prejudice to the retirees, where their pension benefits are to be reduced and where the employer contributions are to be forfeited by the retirees. PERA has a fiduciary duty to the retirees. It has sat upon its legal rights and its duty as a fiduciary to the great prejudice of the retirees. It therefore would be inequitable to grant the relief requested by PERA. The Office of Legislative Auditor made a specific finding that PERA “did not have adequate controls to assure that employers reported and remitted the correct amount of wages and retirement contributions. (Storaasli Affid. E-18)

PERA cites to Morris v. McClary, 43 Minn. 346, 46 N.W. 238 (1890). In the Morris case there was an adverse position claimed. This case was decided in 1890. It was a statutory action to determine adverse claims to real estate. The court held that, if a party asserted an equitable claim, then laches might shorten the time to seek a remedy, to make that time less than would be provided by the statute of limitations. A period of 20 years was required at that time under the statutes for disseisin. In that case the adverse possession depended upon constructive possession by virtue of a deed. The court held that the deeds did not transfer title and constitute adverse possession for the period of 20 years, and the claim to possession therefore failed. There was no issue of equitable relief or laches in that case. Therefore, that case does not apply in the present case to imply that laches does not prevent the relief sought by PERA. Equitable relief is specifically sought by the retirees. Indeed, PERA in its statement of issues at the Prehearing Conference properly listed laches and estoppel as equitable issues. It is proper in so stating the issues.

PERA also cites the case of Bahr v. City of Litchfield, 404 N.W.2d 381 (Minn.App. 1987). In that case there was a challenge by employees to the procedures followed in posting positions for two sergeant openings and certifying the appointments. The plaintiffs claim that proper procedures

were not followed in certifying a position. The Civil Service Commission Act provided for a six year statute of limitations for challenging the certification. The plaintiff had actual notice of the appointments to fill the vacancy, but the City had not followed the statutory procedure of providing written notice of the appointment, so as to set the statutory time limitation running. The plaintiffs did file a writ of certiorari. Plaintiffs claimed that the 60 day time limit for filing a petition for certiorari did not begin to run, because the plaintiffs were not personally served with written notice of the appointments, as was required by the statute and the Commission's rules. The City claimed that the petition for certiorari was barred by laches since the plaintiffs knew about the appointments, even if the written notice was not given as was required. The court held that actual notice of the postings was not sufficient and that the failure to give the proper written notice allowed the plaintiffs to seek relief. Therefore, in that case, the City was seeking to use laches as a way to avoid its responsibility to properly post the jobs. The court properly held that the employer's actual notice did not allow the City to avoid its duty to properly give written notice.

The Barr case therefore has no application to the present case and the employees' right to claim laches on the part of PERA.

Moreover, the Court of Appeals' decision cited by PERA was appealed to the Minnesota Supreme Court. The Minnesota Supreme Court reversed. See Barr v. City of Litchfield, 420 N.W.2d 604 (Minn. 1988). The Supreme Court did not deal with the issue of laches. Rather, the Supreme Court held that posting the notice of appointment was all that was required. The Supreme Court held that written notice to each of the plaintiffs individually was not required. Therefore, although the plaintiffs' writ of certiorari was served within six years, it was not served within 60 days of the posted decision. Therefore, the Supreme Court dismissed plaintiffs' case on the basis that they did not meet the requirement of seeking certiorari within 60 days of the posting of the

notice of appointment. Again, Barr has no application in the present case so as to limit the retirees' claims of laches.

PERA also cites the case of State of Minnesota, ex rel Speaker of House of Representatives, Honorable Steve Sviggum, et al, v. Hansen in His Official Capacity as Commissioner of Finance, 732 N.W.2d 312 (Minn.App. 2007). The quotation from the case included by PERA is basically correct. However, the implication is wrong. The court held that laches could apply in that case. The court held that there was no showing of prejudice as a result of the delay in asserting rights. There also was a finding that the court could not conclude that the legislature unreasonably delayed the assertion of their rights. Because they did not unreasonably delay the assertion of their rights, and because there was no prejudice, laches did not apply. Given the court's discussion, it is obvious that the doctrine of laches can apply if the proper facts exist. Those facts for the assertion of laches do exist in the present case.

XI. PERA IS ESTOPPED FROM REDUCING THE RETIREES' PENSIONS

The Minnesota Supreme Court has specifically held that promissory estoppel does apply to promises of pension. See Christensen v. Minneapolis Municipal Retirees Retirement Board, 331 N.W.2d 740 (Minn. 1983). In that case the court held that promissory estoppel did apply where a former elective officer was promised a pension. That offer was binding upon the State. The court held that an employee who had already retired and was receiving his pension had the right to rely on the promise of that pension. The court also held that an amending statute was invalid and could not impair the obligations to the retired officer, as an amending statute seeking to impair those contractual obligations would be an unconstitutional impairment of contractual rights. The court specifically held that promissory estoppel may be applied against the State with respect to a public employee's retirement, to the extent that justice requires. 331 N.W.2d at 749. That case recognized

that “the state reasonably expects its promise of a retirement program to induce persons to accept and remain in public employment, and persons are so induced, and injustice can be avoided only by enforcement of that promise. Promissory estoppel, like equitable estoppel, may be applied against the State to the extent that justice requires.” Id. Those comments are precisely appropriate in the present case.

XII. ALLEGREZZA DECISION

There is a relevant decision from the Office of Administrative Hearings by Judge George Beck in the case of In the Matter of the Retirement Benefits of William G. Allegrazza, Sr., 1995 WL 937283, Case 1-3600-9270-5 (March 1, 1995). It held that PERA was estopped from reducing the benefit amount it was presently paying to the retiree. A copy is attached.

In that case the employer retired and began receiving his retirement annuity. PERA later stated to him in a letter that they had made an error and that they were incorrectly overpaying him. The employee testified that, if he had been advised about the correct retirement amount prior to retiring, he would have waited two or three years to retire and would have selected the PERA plan that would have been approximately the same as the earlier PERA estimate. That opinion cited the Christenson case. It noted the restatement of Contracts in stating, “A promise which the promissor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” This is also noted in Christensen v. Minneapolis Municipal Retirees Retirement Board, 331 N.W.2d 740, 749 (Minn. 1983).

The retiree relied upon the PERA’s estimates. He was entitled to rely upon PERA’s estimates. He sustained a reduced benefit of about \$3,200 per year. The judge noted the prejudice sustained by the retiree, who cannot regain the employment that he gave up, based upon the

representations of the PERA staff which led him to retire early. The judge held that the equities favored the retiree. The judge held that he was justified in relying on the credibility of the retiree's statement that he would have continued to work, that the doubt should be resolved in favor of the retiree and against the agency since the agency's mistake created the problem. All those conclusions are appropriate here. The retirees were justified in relying on PERA's representations, and are entitled to keep not only their own contributions, but the City's contributions as well. If they had been told that they could not keep the City's contribution, they would have negotiated for comparable consideration in other form from the City. The City would not have been harmed since it would have been paying out the same amount. Therefore, promissory estoppel favors the retirees and requires that PERA not be entitled to the claimed refunds. In the present case as well, the retirees cannot now get the City to re-employ them so that they could restore the lost pension amounts. The Affidavits make clear that retirees herein relied on PERA's statements in deciding to retire, and would not have retired if they had known their monthly payments, which had been "audited" by PERA, would be reduced by up to \$250 per month. They have been refused re-employment, and many have had to return to work or continue second jobs to make ends meet.

See also, Law Enforcement Labor Svcs., Inc. v. County of Mower, 483 N.W.2d 696 (Minn. 1992). In that case a county which had advised retirees in writing that it would pay their health insurance premiums, was estopped from depriving retirees of those promised benefits.

As in Allegrezza, the retirees in the present case relied upon statements from PERA regarding their retirement benefits. They relied upon those estimates in deciding when to retire. The affidavits of the retirees demonstrated that they would have continued to work if they had known that their benefits would have been reduced so substantially. They also would have negotiated to receive other compensation from the City if they were not entitled to use the City's contributions towards their

retirement benefits for their own use. The circumstances present in the instant case are similar to those present in Allegrezza and should lead to a similar result.

XIII. THE STATUTE OF LIMITATIONS BARS PERA FROM REDUCING ANNUITIES IN PAY STATUS AND DEMANDING REFUNDS

A. History of the Legislation on the Statute of Limitations under Minn. Stat. §353.27.

PERA argues that no statute of limitations should apply. It notes that prior to 1990, Minn. Stat. §353.27 contained a three year statute of limitations. It is argued that the statute was amended in 1990 to allow erroneously taken deductions to be refunded “at any time.” Minn. Laws 1990, Ch. 570, Art. 11, Sec. 5.

The language “at any time” was deleted in 2006. After the 2006 amendment, § 353.27, Subd. 7(c) read, “Employer contributions and retiree deductions taken in error from amounts which are not salary under section 353.01, subdivision 10, are invalid upon discovery by the association and must be refunded as specified in paragraph (d).” Paragraph (d) speaks of discovery of the receipt of erroneous deductions and contributions under paragraph (a), clause (2). However, that paragraph specifically speaks about contribution made for a person “who otherwise does not qualify for membership under this chapter” See Minn. Laws 2006, Ch. 271, Sec. 16. There is no doubt that the present retirees did qualify for membership. The only issue raised is whether the contributions were made in error. The retirees submit that Minn. Stat. §353.01, Subdivision 10, permits the payment of the retiree and employer contributions. Therefore, they should not be refunded pursuant to the statute.

PERA is correct in noting that the law was amended again in 2009. There is now again a three year limitation on the correction of erroneous contributions and deductions. There was an additional statute dealing with the City of Duluth and whether it would elect to fall under the three

year statute. See Minn. Laws 2009, Ch. 169, Sec. 50 and Sec. 49. PERA apparently construes these sections to mean that the City effectively did not accept the three year statute of limitations. Whether or not the City did so, does not affect the constitutional and contractual rights of the retirees to the employer's contributions. The constitutional issues are briefed infra. Moreover, if PERA is right that it is not bound by the three year statute of limitations, then the statute of limitations defaults to the prior 2006 version of the statute where the language "at any time" was removed. If PERA is correct that the language "at any time" was intended to abolish any statute of limitations, then the removal of that language obviously would restore the applicable statute of limitations. The statute of limitations before the language inserting "at any time" was three years.

Moreover, there are numerous other statutes of limitation which may apply. Minn. Stat. §547.07(2) provides a two year statute of limitations under a statute for a penalty or forfeiture. Minn. Stat. §541.07 also provides for a two year statute of limitations for recovery of wages or damages or fees or payroll errors or penalties in Minn. Stat. §541.07(5). That statute provides for a three year statute if the violation is willful. Minn. Stat. §541.07(5) defines wages as all remuneration for services or employment.

Minn. Stat. §541.05(2) provides for a six year statute of limitations for liabilities under statute. M.S. 541.05(1) provides for a six year statute of limitations for contract claims. Minn. Stat. §541.05(4) provides for a six year statute of limitations for recovery of personal property or damages to personal property.

The retirees claim that the two year statutes of limitations applies.

PERA argues that there is no statute of limitation applicable to administrative proceedings. It notes the unpublished, and therefore without precedential value, case of Nicholson v. Independent Sch. Dist. #636, 1992 WL 48113 (Minn.App. 1992) (unpublished). That case noted that where the

applicable law does not contain a time limitation on administrative actions, the courts have not provided one. In the present case there are specific statutes that deal with such time limitations. Several applicable sections of Minn. Stat. §541.07 have been cited. The statement in PERA's brief that "where the applicable law does not contain a time limitation on administrative action, the courts have not provided one" is not a quote from the case. The case dealt with a teacher who in 1969 and 1970 allegedly sexually abused a male high school student. This is not learned until the student disclosed this in the year 1990. The teacher, Nicholson, then was investigated. The school board decided to terminate the teacher. Nicholson said that the acts happened too long ago. The court noted specifically that in prior cases it had allowed the consideration of sexual intercourse with a minor student of 16 years prior to the incident as still relevant. It also noted that misconduct 13 years prior to the hearing was also relevant in another case. The retirees submit that Nicholson has no application to this case and that it was rightly decided. Teachers who sexually abuse their students should be subject to discipline even where the sexually abused student understandably did not disclose the wrongdoing for many years.

PERA also cites the case of Har-Mar, Inc. v. Thorsen & Thorsen, Inc., 300 Minn. 149, 218 N.W.2d 751 (1974). That case dealt with an arbitration proceeding demanded by an architectural firm against a developer. The courts simply held that, in view of the special nature of arbitration proceedings, that the six year limitation statute did not begin to run regarding the arbitration, until there was a demand for arbitration. That case is well decided. As applied to the present case, it would mean that the two year statute of limitations in Minn. Stat. §541.07 would not begin to run until there is a demand by PERA for a refund. Har-Mar did not hold that there was no statute of limitation. It merely held that the period of limitation did not begin on arbitrations until there was a demand for arbitration and a refusal to arbitrate.

PERA also cites Lucas v. American Family Ins. Co., 403 N.W.2d 646 (Minn. 1987). That case dealt with the issue of whether pre-arbitration award interest was recoverable in an arbitration. The court held that pre-award interest was not available on an award made by an arbitrator. However, Minn. Stat. §541.05 and the statute of limitations was not mentioned in the case. The Har-Mar case was mentioned, but only for the proposition that an arbitration was not a judicial proceeding for purposes of issue preclusion. Therefore, the retirees submit that the Lucas case does not stand for the proposition urged by PERA and is inaposite.

Note as well the case of Jacobson v. Board of Trustees of the Teacher's Retirement Association, 627 N.W.2d 16 (Minn. App. 2001). That case held that a claim of unconstitutional impairment and retirement rights had to be brought within six years. It therefore appears that six years is the longest statute of limitations that could apply to PERA's claims. Even shorter statutes of limitation should apply. The present challenge is brought within six years of the last amendments

Minn. Stat. §353.08 provides that the Board can sue and be sued. Venue is in Ramsey County. Therefore, enforcement of the Board's orders, and challenges to them, can be made in Court. Statutes of limitation surely apply to such actions as well.

XIV. CONCLUSION

PERA has the burden of proof to prove that benefits must be reduced. The statute defining salaries specifically includes deferred compensation payments as salary, and the exclusions from salary do not specifically list deferred compensation payments, or payments made toward family medical reimbursement that is not insurance. The remedy proposed by PERA, that is disgorging benefits back to 1997 for over 450 retired employees, is not supportable by law. The payroll documentation provided to PERA by the City of Duluth was recreated after it had been deleted, is not accurate, and for PERA to rely upon it is arbitrary and capricious. PERA's disgorgement of

pension payments in pay status deprives the retirees of a bargained for benefit, and constitutes a windfall to the City. It constitutes an unconstitutional taking of private property and an unconstitutional impairment of contract. PERA's proposed action is barred by laches, estoppel, and the statute of limitations.

PERA's proposed action is unprecedented. PERA proposes to disgorge from more than 450 retirees a significant portion, up to \$250 per month, of their retirement pension, for a period going back up to 13 years. PERA proposes to require retirees, who entered into an "irrevocable" decision to retire based upon PERA now-incorrect estimates, to pay back sums up to \$20,000 from their now reduced monthly payments. The sole beneficiary of this action is the City of Duluth, who will receive a windfall in excess of \$1.4 million dollars of money that was paid in good faith according to its promises in a collective bargaining agreement. PERA is proposing to aid and abet the City in this unconscionable act, based on "recreated" and incorrect data.

The Administrative Law Judge should find that the deferred compensation contributions as set forth in the collective bargaining agreements with the City of Duluth, and the payments toward the cost of family medical reimbursement are considered salary and properly included in salary reports and calculations by PERA. PERA's Motion should be denied, and Movants' Motion should be granted.

Dated: February 12, 2010

Respectfully submitted,

/s/ Elizabeth A. Storaasli
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