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NANCY SWEENEY
CLERK DISTRICT COURT

2016 SEP -9 AM 11:32

FILED

BY _____
DEPUTY

IN THE MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

DAN HERTEL, as Personal Representative
of the Estate of Rosemary Olsen,

Plaintiff and Petitioner,

v.

MONTANA PUBLIC EMPLOYEE
RETIREMENT ADMINISTRATION,

Defendant and Respondent.

Cause No. ADV-2016-760

Dept: _____

(small)
**PETITION FOR JUDICIAL REVIEW
AND COMPLAINT FOR
DECLARATORY JUDGMENT**

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Dan Hertel, Personal Representative of the Estate of Rosemary Olsen, in that capacity and as assignee of the claims of Carey Olsen and the Estate of Joseph Olsen, seeks judicial review of a final decision issued by the Public Employees' Retirement Board of the State of Montana, which oversees the Montana Public Employee Retirement Administration (MPERA). For simplicity, both the Board and the Administration will be referred to collectively as MPERA except where otherwise noted. Before MPERA, the proceeding was styled *In the Matter of Joseph Olsen*.

In the alternative to the petition for judicial review, if MPERA's interpretation of the relevant statutes is otherwise correct as a matter of law, then Hertel seeks a declaratory judgment that the statutes relied on by MPERA in its ultimate decision are unconstitutional because they violate Article II, §§ 4 and 17, and Article VIII, § 15 of the Montana Constitution.

Pursuant to § 2-4-702, and § 27-8-101 *et seq.*, the basis for this petition and request for declaratory judgment is as follows.

1. This matter concerns a final agency decision of the Montana Public Employees' Retirement Board ("Board"), and this Court has jurisdiction under § 2-4-702, MCA.
2. Venue is proper in this Court because MPERA maintains its principal office in Lewis and Clark County.
3. Joseph Olsen worked for the State of Montana for well over twenty years, and retired January 1, 2011.
4. The State has a mechanism which permits employees to purchase "service credits" to increase the amount of their retirement benefits.
5. Joseph first purchased service credits in 1989 and then made a series of purchase credits over the following two decades.
6. In December 2010, approximately three weeks prior to his retirement, Joseph purchased \$84,881.66 worth of service credits.
7. As of his retirement, Joseph had spent \$97,320.47 purchasing service credits over the course of his career.
8. Upon his retirement, Joseph selected an "Option 2" plan, which gave him a defined monthly benefit payment for his lifetime and for the lifetime of his wife, Rosemary. In this context, Rosemary is referred to as a "contingent annuitant."
9. For context, an "Option 1" plan is identical except that it is a defined benefit for the life of the retiree only.

10. Joseph died in March of 2011—less than three months after his retirement.
11. Thereafter, Rosemary was provided a form by MPERA titled “Designation (or Change) of Beneficiary by Retiree.” On that form, Rosemary designated her and Joseph’s son, Carey, as the primary beneficiary “to receive any final retirement benefit payment upon my death.”
12. Rosemary died on December 9, 2012—less than two years after Joseph’s death.
13. Soon thereafter, MPERA sent Carey a letter stating he was entitled to the “balance of \$121,948.94 remaining from her account.” It further informed him that the balance would be payable to him upon return of the included forms along with a certified copy of Rosemary’s death certificate.
14. In a letter the following month, the amount was reduced to \$118,026.64, to reflect the amount of the monthly benefit payment paid to Rosemary for December 2012.
15. In early 2013, the required forms were signed and returned to MPERA.
16. In August of 2013, MPERA sent Carey a letter stating that the two letters were “in error,” and that he was entitled to nothing.
17. In light of the fact that MPERA paid the full December 2012 benefit rather than the pro rata amount representing the nine days Rosemary was alive during that month, MPERA told Carey it would not attempt to “recoup” the alleged overpayment.
18. Carey then instituted a series of informal appeals with MPERA, all of which were rejected.
19. The matter then proceeded to a contested case hearing and, for the first time, was before a non-MPERA adjudicator from Agency Legal Services.
20. Because there were no material facts in dispute, Carey suggested the parties skip the contested case hearing and proceed directly to judicial review. MPERA declined to agree to that course of action.

21. The parties then conducted written discovery, and filed cross-motions for summary judgment.
22. The Hearing Examiner ruled in favor of Carey, and determined that he was entitled to the remaining principal balance of his father's retirement account for a number of reasons. She issued a Proposed Order for Final Agency Decision to that effect.
23. The Hearing Examiner did not reach the question of whether Carey was entitled to pre- and post-judgment interest, or attorney fees under the bad faith statute at § 25–10–711.
24. Both sides filed exceptions to the Hearing Examiner's Proposed Order.
25. Carey argued that the Hearing Examiner erred in failing to conclude that Carey was entitled to pre- and post-judgment interest at the statutory rate of 10%.
26. MPERA agreed with Carey that, if the Hearing Examiner was correct, he was entitled to pre- and post-judgment interest, but MPERA disputed the interest rate.
27. At the same time, however, MPERA argued that the Hearing Examiner erred as a matter of law in determining that Carey was entitled to the remaining principal balance.
28. The Public Employee Retirement Board heard oral argument on the exceptions, and then issued a Final Order—drafted entirely by MPERA's attorneys—concluding that Carey was not entitled to the remaining principal balance.
29. The Final Order did not discuss or distinguish the conclusions of law contained in the Hearing Examiner's Proposed Order.

Count I—Petition for Judicial Review

30. Plaintiff/Petitioner incorporates the preceding paragraphs as if fully set forth in this part.
31. It is undisputed that if an Option 1 retiree dies with a remaining principal balance in his account, then MPERA will pay his designated beneficiary or estate that balance.
32. In contrast, it is MPERA's position that if an Option 2 retiree and their contingent annuitant die with a remaining principal balance, that amount is *not* paid to the

designated beneficiary or the estate, and is instead forfeited into the state retirement system.

33. The law requires that Option 1 and Option 2 must be “actuarially equivalent.”
34. MPERA has successfully argued at the Montana Supreme Court that the only difference between Option 1 and Option 2 is that because Option 2 is calculated for two lives rather than one, the monthly payments are lower for those who select Option 2.
35. There is no statutory authority for MPERA to withhold remaining principal balances from the beneficiary or estate of an Option 2 retiree and their contingent annuitant when both die with a remaining principal balance.
36. Instead, MPERA has a constitutionally-mandated fiduciary duty to retirees and their beneficiaries.
37. MPERA’s interpretation of the statutes is wrong as a matter of law.
38. The statutes do not provide that an employee’s direct contributions are subject to forfeiture, regardless of which Option the employee chooses.
39. The forms provided to Joseph Olsen were contracts of adhesion; the forfeiture was outside Joseph’s objectively reasonable expectations; and such forfeiture is oppressive, unconscionable, and against public policy.
40. MPERA and the Board applied the wrong standard of review—if it applied any standard at all—when it rejected the conclusions of law contained in the Hearing Examiner’s Proposed Order.
41. Petitioner/Plaintiff has been harmed by MPERA’s interpretation of the law.
42. Petitioner/Plaintiff is entitled to the remaining principal balance plus pre- and post-judgment interest as a matter of law.
43. Petitioner/Plaintiff is entitled to attorney fees for MPERA’s bad faith litigation tactics, which include, but are not necessarily limited to:

- a. Initially citing and relying on statutes that were amended during the 2013 legislative session, even though the 2011 versions of the statutes are operative under the facts of this case.
- b. Arguing that the Olsens should have reasonably expected to forfeit any remaining principal balance even though, during the 2013 legislative session, MPERA's Chief Legal Counsel testified that the relevant statutes were "confusing to read" and that Option 1 was "not defined anywhere."
- c. MPERA's litigation position that neither Carey Olsen individually, the Estate of Joseph Olsen, or the Estate of Rosemary Olsen had standing to challenge MPERA on this issue.
- d. In its letter to Carey Olsen reneging on its promise to pay him the remaining principal balance, MPERA informed him that under § 19–2–903(3), MPERA had the "authority to recoup the December 2012 benefit payment that should not have been processed." That statute, however, does not give MPERA the authority to "recoup" the payment from someone in Carey's position.
- e. Attempting to introduce completely irrelevant evidence that is dated *after* Joseph's death regarding the interest rate to be applied to the pre- and post-judgment interest calculation.

Count II—Declaratory Judgment

44. Plaintiff/Petitioner incorporates the preceding paragraphs as if fully set forth in this part.
45. If the Court concludes that the Board correctly interpreted the relevant statutes, then those statutes are unconstitutional.
46. Specifically, the Board determined that if §§ 19–3–1210 and 19–3–1501 (2011) allow MPERA to retain remaining principal balances of Option 2 retirees, or transfer those balances to the general retirement fund.

47. If MPERA's interpretation of those statutes are correct, then they are unconstitutional in a number of ways.
48. First, Option 1 and Option 2 retirees are similarly situated in all practical ways, other than that Option 1 benefits are calculated for one life and Option 2 benefits are calculated for two lives. Therefore, if the beneficiaries and estates of Option 1 retirees are entitled to remaining principal balances upon the death of the retiree, then the beneficiaries and estates of Option 2 retirees and their contingent annuitants must likewise be entitled to remaining principal balances upon the death of the retiree and the contingent annuitant. Any other result violates the equal protection guarantee of the Montana Constitution at Article II, § 4.
49. Alternatively or additionally, if MPERA is right, the statutes violate the right to due process, because they are arbitrary, capricious, and not reasonably related to any legitimate or significant state interest.
50. Alternatively or additionally, if MPERA is right, the statutes compel MPERA and the Board to violate its constitutional obligations to retirees as both a fiduciary and trustee under Article VIII, § 15 of the Montana Constitution.
51. Plaintiff/Petitioner expressly takes no position on whether the 2013 statutory amendments cured any constitutional deficiencies in the statutory scheme.
52. Following assignment of a case number, notice will be provided to the Attorney General of this alternative constitutional challenge as provided for in Rule 5.1, Mont. R. Civ. P.

Prayer for Relief

Based on the foregoing, Plaintiff/Petitioner respectfully requests the Court grant the following relief:

- A. For a determination and judgment that Plaintiff/Petitioner is, as a matter of law, entitled to the remaining principal balance of Joseph Olsen's retirement account based on the statutes in effect at the time of Joseph's retirement;

- B. Alternatively, for a declaratory judgment that the relevant statutes are unconstitutional as applied to Option 2 retirees/contingent annuitants under the facts of this case, and therefore Plaintiff/Petitioner is entitled to the remaining principal balance of Joseph Olsen's retirement account;
- C. For pre- and post-judgment interest as allowed by law;
- D. For attorney fees based on MPERA's bad faith, under the Uniform Declaratory Judgments Act, under the Private Attorney General Doctrine, and as a matter of equity; and
- E. For any other relief the Court deems just and proper.

September 9, 2016.

WORDEN THANE P.C.

/s/ Jesse Kodadek
Jesse C. Kodadek

CERTIFICATE OF SERVICE

I certify that on September 9, 2016 I served a true and accurate copy of the foregoing on:

Melanie Symons
Bill Holahan
Montana Public Employee Retirement Administration
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Helena, MT 59620-0131
bholahan@mt.gov

/s/ Jesse Kodadek
Jesse C. Kodadek