



H.F. 2395
(Davnie)

S.F. 2213
(Torres Ray)

Executive Summary of Commission Staff Materials

Affected Pension Plan(s): TRA via MTRFA
Relevant Provisions of Law: Special legislation
General Nature of Proposal: Reversal of a retirement plan appeal determination
Date of Summary: March 2, 2008

Specific Proposed Changes

- A former Minneapolis teacher who retired in 1995 contends that a benefit estimate error occurred during counseling on which she relied to her detriment and seeks a higher retirement annuity despite MTRFA Board determination upon appeal that no error occurred and no reliance on any alleged error was justified.

Policy Issues Raised by the Proposed Legislation

1. Equitable consideration relating to the question of misinformation or error.
2. Equitable consideration relating to the question of detrimental reliance.
3. Equitable consideration of time delay in seeking relief.
4. Appropriateness of reversing an appeal with special legislation.
5. Appropriateness of special legislation instead of litigation.
6. Precedent for special legislation and adverse precedent potential from special legislation.



TO: Members of the Legislative Commission on Pensions and Retirement

FROM: Lawrence A. Martin, Executive Director *JAM*

RE: H.F. 2395 (Davnie); S.F. 2213 (Torres Ray): TRA; Annuity Increase Based on Erroneous Former MTRFA Benefit Counseling

DATE: March 2, 2008

Summary of H.F. 2395 (Davnie); S.F. 2213 (Torres Ray)

H.F. 2395 (Davnie); S.F. 2213 (Torres Ray) permits a former member of the former Minneapolis Teachers Retirement Fund Association (MTRFA) and a current Teachers Retirement Association (TRA) annuitant, Carol Jean Johnstad, to receive a \$148 per month increase in her retirement annuity, plus past post-retirement increases, back payments to August 1995, and interest on the back payment amounts, based on an alleged erroneous benefit estimate prepared by the former MTRFA that induced the person to retire early under disadvantageous circumstances.

Public Pension Problem of Carol Jean Johnstad

Carol Jean Johnstad is a 68-year-old retiree of the Teachers Retirement Association (TRA) who previously was a member of the former Minneapolis Teachers Retirement Fund Association (MTRFA) who taught for Special School District No. 1, Minneapolis, from 1982 until 1995, when she retired. Although there are factual issues in dispute, it appears to the Commission staff to be the case that prior to retirement, Ms. Johnstad had initially requested and received an estimate of her MTRFA retirement annuity based on a July 1, 1996, retirement date, then nine days later, in August 1995, by telephone and in conjunction with her financial planner, sought a revision in that retirement annuity estimate based on a 1995 retirement date, but only a generalized discussion of the extent of a reduction for an earlier retirement was apparently able to be provided by MTRFA. Ms. Johnstad then retired, effective retroactively, on July 1, 1995. Ms. Johnstad received an initial MTRFA monthly annuity of \$393.45, which was \$148 per month less than the initial benefit estimate that MTRFA had provided her for a 1996 retirement. Ms. Johnstad contends that she relied on the initial (1996 retirement date) benefit estimate, retired in 1995 in anticipation of the receipt of that initially estimated benefit amount, and should have her annuity increased to the initial estimated amount under the legal theory of promissory estoppel.

Ms. Johnstad appealed her benefit amount to the MTRFA board in 1996, but the MTRFA board rejected the appeal based on a legal analysis from the plan's legal counsel, a lawyer in private practice.

In 2006, the former MTRFA was consolidated into TRA and TRA became the successor in interest for causes of action relating to the prior plan.

Discussion and Analysis

H.F. 2395 (Davnie); S.F. 2213 (Torres Ray) increases the retirement annuity from the Teachers Retirement Association (TRA) to Carol Jean Johnstad, a 68-year-old 1995 retiree from the Minneapolis Public Schools, by \$148 per month, plus post-retirement adjustments granted since 1995, to remedy an alleged erroneous benefit estimate that was provided to her and on which she contends that she relied to her detriment.

The proposed legislation raises several pension and related public policy issues for potential consideration and discussion by the Commission, as follows:

1. Equitable Consideration – Question of Misinformation or Error. The policy issue is whether or not there was an error in preparing benefit estimates by the Minneapolis Teachers Retirement Fund Association (MTRFA) staff for Carol Jean Johnstad or whether or not misinformation was provided to Carol Jean Johnstad. Ms. Johnstad's legal counsel, in 1996, disputed MTRFA's characterization of its staff's benefit estimates, indicating that the initial \$540 per month annuity amount was understood by Ms. Johnstad to be for a July 1, 1995, retirement and indicating that the subsequent benefit estimate by telephone conversation was simply a confirmation of the earlier benefit estimate amount. Although the affidavit of Ms. Johnstad's financial advisor was not included in information provided by the

Teachers Retirement Association (TRA) to the Commission staff, it appears that the financial advisor's affidavit supports Ms. Johnstad's recollection. The affidavit from Ms. Johnstad's financial advisor was an affidavit, not a deposition, may have been assembled by Ms. Johnstad's lawyer rather than by the financial advisor personally, and was not subject to any cross-examination or other factual challenge during the process. The MTRFA legal counsel provided the factual account of the sequence of benefit estimates recited in the public pension problem section of this document. The Commission should consider taking whatever testimony it needs to resolve the factual questions about the retirement date basis for the benefit estimates and the estimate amounts. If there was no error in estimating a 1995 retirement by the MTRFA staff or no misinformation provided by MTRFA, there would be no basis for the detrimental reliance underlying the promissory estoppel claim of Ms. Johnstad. If there was an error, there could be a basis.

2. Equitable Consideration – Question of Detrimental Reliance. The policy issue is whether or not there was detrimental reliance by Carol Jean Johnstad on an error or misinformation on the part of the Minneapolis Teachers Retirement Fund Association (MTRFA). Without reliance to a person's detriment, any error would be a harmless error. Counsel for Ms. Johnstad, in 1995, argued that the fact of Ms. Johnstad retiring in 1995 rather than in 1996 constituted the detriment suffered by her and occurred solely because she relied on the initial MTRFA benefit rationale amount. The factual determinations of the MTRFA legal counsel suggested that Ms. Johnstad was seeking a means to retire in 1995 rather than 1996 and that was the reason for her seeking of the second benefit estimate during a telephone conversation initiated from her financial planner's office in Wisconsin. If a 1995 retirement by Ms. Johnstad was a goal rather than a detrimental occurrence she was compelled to accept, then Ms. Johnstad's promissory estoppel argument should fail. The Commission should take whatever testimony it needs to resolve whether the 1995 retirement was a goal that Ms. Johnstad was seeking to facilitate or was a detriment as her legal counsel unsuccessfully argued to the MTRFA board in 1995.
3. Equitable Consideration—Extent of Time That Elapsed Since the Initial Benefit Dispute. The policy issue is the length of time that has elapsed since Carol Jean Johnstad retired, since she had a difficulty with her former Minneapolis Teachers Retirement Fund Association (MTRFA) retirement annuity, and since she appealed to the MTRFA board, without taking any subsequent steps to resolve the issue, and leaving the Commission to resolve factual issues almost 13 years later. Ms. Johnstad contends that she was not previously aware that she had an option to seek special legislation to resolve her complaint. The Commission will need to ascertain whether Ms. Johnstad's contention is believable and whether or not memories and other evidence have become too old to allow it to establish the facts needed to reach a fair conclusion in the dispute.
4. Appropriateness of Reversing a Pension Plan Governing Board Appeal Determination by Special Legislation. The policy issue is whether it is appropriate for the Legislature to reverse the determination of a pension plan governing board in an appeal. A reversal would be appropriate if the determination of the governing board in the appeal was clearly erroneous or if the appeal process was sufficiently flawed so to invalidate its result. The Commission will need additional testimony to determine whether or not the 1996 determination by the former Minneapolis Teachers Retirement Fund Association (MTRFA) Board of Trustees was clearly erroneous. The procedural steps of the MTRFA Board of Trustees appeal process are unclear. There is documentation that the former MTRFA board heard from Ms. Johnstad and from her attorney as part of the appeal and accepted documents from Ms. Johnstad. It appears from the documentation that the dispute then was referred to the MTRFA legal counsel, who appears to have been supplied with all of the relevant documents, but who does not appear to have been present at the hearing before the MTRFA board. The Commission may need to take additional testimony about the MTRFA appeals process to determine its adequacy in this case.
5. Appropriateness of Special Legislation in Lieu of Litigation. The policy issue is whether or not it is appropriate for the Legislature to substitute special legislation for litigation as a means of resolving the dispute of Carol Jean Johnstad. Although Ms. Johnstad retained a lawyer in 1995 who assisted in her appeal to the governing board of the former Minneapolis Teachers Retirement Fund Association (MTRFA), she apparently elected not to pursue her legal argument of promissory estoppel in subsequent litigation before the Hennepin County District Court when the MTRFA board rejected her appeal. Special legislation can be an inexpensive means to resolve a dispute, but the limited fact finding capabilities of the Legislature and potentially flexible and variable evidentiary standards and procedural rules of the legislative process may make special legislation a poor substitute for litigation.

6. Precedent. The policy issue is whether or not there is any prior special legislation comparable to that of the Carol Jean Johnstad and whether or not, if enacted, this special legislation would likely be a precedent for similar future special legislation. The Commission staff cannot identify a comparable situation of an alleged erroneous benefit estimate as the sole underlying argument for proposed special legislation, either enacted or otherwise. If this proposed special legislation was enacted, it undoubtedly would be a precedent for any proposed special legislation claiming that a benefit recipient received an erroneous benefit estimate on which the person relied to their detriment.

MTRFA Board Minutes
1/17/96

6. Auditors.
Diane Syverson and Kathy Wells, from the Minnesota State Auditors Office, attended the meeting and gave a review of the MTRFA's 1995 fiscal year ending audit.

7. Jean Johnstad.
Jean Johnstad, MTRFA member, and her attorney Carolyn Nestingen, of Briggs and Morgan, attended the meeting. Jean Johnstad requested that the MTRFA re-visit her case.

Norm Moen moved to refer Jean Johnstad's case to Bob Butterbrodt, MTRFA legal counsel, with the history, correspondence, and all calculations that have been completed on her account at the MTRFA. Doug Hanson seconded the motion and it was approved unanimously by roll call vote.

8. Investments.
The Board reviewed the performance and asset allocation report for time periods ending December 30, 1995.

9. Committee Reports.
 - a) Finance Committee.
On the motion of Doug Hanson and seconded by Norm Moen, the finance report on pages 10-12 in the Monthly Board Booklet was approved by roll call vote. Doug Hanson, Norm Moen, Larry Risser and Ann Downing voted for the motion. Judy Paine and Herb Wilms voted against the motion.

 - b) Membership and Annuity.
On the motion of Doug Hanson and seconded by Norm Moen, the membership and annuity report on pages 8-9 in the Monthly Board Booklet was approved unanimously by roll call vote.

 - c) Legislative Committee.
The report was given in the executive director's report.

 - d) Administrative Committee.
The Board went into executive session to discuss staff salary increases.

10. Miscellaneous.
Staff will draft a policy removing from the outstanding list any outstanding checks that are more than one year old.

Upon motion duly made and seconded, the Board adjourned at 12:00 p.m.

STATEMENT OF POSITION: JEAN JOHNSTAD

This is not a claim for benefits due under the terms of the Minneapolis Teachers Retirement Fund Association ("MTRFA".) Ms. Johnstad does not dispute that the pension she has been awarded is the pension she would be entitled to receive based upon the terms of the plan and her compensation history since 1990.

Rather this is a claim of promissory estoppel, brought because Ms. Johnstad relied to her detriment upon pension calculations made by the MTRFA in deciding to terminate her teaching career and to file for her retirement annuity during 1995 rather than waiting until a subsequent year.

Ms. Johnstad was given information from MTRFA employee and retirement counsellor David Bushlack in a meeting in July of 1995 that her monthly pension would be approximately \$540 per month should she retire in July of 1995. Mr. Bushlack told her he would be unable to precisely fix the annuity amount until he knew her retirement date, but he indicated that his estimates would be close. This statement was repeated the following week in a conference telephone call between Mr. Bushlack, Ms. Johnstad and her financial advisor Harry Masek. (See attached affidavit of Harry Masek.)

Despite her requests that the actual pension be calculated and sent to her, no such calculation was done until August 11, 1995, a month later and one day following the MTRFA's receipt of her retirement annuity application. Before her application was filed, Mr. Bushlack urged her to file her resignation form with the school district to be effective as of June 30, 1995, so that she could then receive a 2% COLA for the upcoming year which she would not receive if she requested a resignation date later than June 30.

Relying on this advice, Ms. Johnstad filed her application on August 10, still having received only Mr. Bushlack's "close" estimate of her monthly annuity. That Friday, August 11, she met with Mr. Bushlack and, for the first time, was informed that the actual retirement annuity to which she was entitled was \$389.92 per month, \$150 less than she expected.

As a result of her reliance on Mr. Bushlack's estimate and the MTRFA's delay in sending out the actual calculation, Ms. Johnstad no longer has a teaching position with the Minneapolis School District and has a retirement benefit at least \$150 per month less than estimated. Clearly with correct information given to her in a timely fashion she would have delayed her retirement for a year.

This reliance on the advice of the MTRFA is costly to Ms. Johnstad. She receives monthly annuity payments for life that are \$150 less than she expected or would otherwise have received had she been informed and had the opportunity to delay her retirement.

Using her life expectancy as set forth in Internal Revenue Service tables, at age 55, she can anticipate living for 28.6 years. If she had retired at age 56 and received a monthly annuity of \$540 for her estimated lifetime, she would have received total payments of \$179,496. That is \$45,648 more than she will receive under the current annuity. Had she been correctly informed of her options, there is no question that she would have delayed her retirement for one year.

Detrimental reliance, or promissory estoppel is a state law claim which requires three points to be shown: an incorrect statement, reliance on that statement to the detriment of the person relying, and resulting damages. All of these are present in this case. Ms. Johnstad should be awarded the amount she lost due to her reliance on MTRFA information, \$45,648 and, in addition, she should be awarded her consequential damages and costs, including attorneys fees for having to pursue this claim in order to receive what she had been led to believe she would receive.

The TRA Board of Trustees recognized promissory estoppel as a basis for recovery in *Teachers Retirement Association v. John A. Schoen* and ISD No. 735, OAH Docket Nos. TRA-88-001-PR and 9-3700-1694-2. In that case, based upon the incorrect advice of the TRA counsellor, the Board of Trustees concluded that the plaintiff would "incur prejudice and detriment" if required to repay annuities for a year in which, after retirement, he worked, assigning all of his income over to the school district. The Board, affirming the findings and recommendation of an administrative law judge, held that "Schoen's and the school district's reliance on the advice and representations of a TRA official was reasonable since the manager for retirement services was an experienced TRA counsellor authorized to advise TRA members on retirement planning." p. 6 of the Order.

Other cases supporting equitable estoppel against a public agency include *Brown v. Minnesota Department of Public Welfare*, 368 NW 2d 906, 910 (Mn. 1985) and *Mesaba Aviation Division v. County of Itasca*, 258 NW 2d 877, 879 (Mn. 1977).

There are several possible resolutions to this dilemma, including the following three:

1. The MTRFA could increase the amount of her benefit, recognizing that due to promissory estoppel it is estopped from taking any adverse action against her when the advice it gave was the cause of Ms. Johnstad's reasonable decision to retire this year.

2. Ms. Johnstad could be permitted to pay in additional contributions to make up for the reduction in earnings and contributions in her 1990-91 sabbatical year. This would raise her five year average salary to the level estimated by Mr. Bushlack.

3. If a teaching position in the Minneapolis Public Schools were available, Ms. Johnstad could return to work for one additional year, delay her retirement and earn additional service and earnings credit, retiring at her anticipated annuity level in 1996 or 1997. This, of course, is problematic at this time for two reasons. No positions are available and the school year is already half over.

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VIA FAX

February 20, 1996

Karen Kilberg, Executive Director
Minneapolis Teachers Retirement
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815 Peavey Building
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Minneapolis, MN 55402

Re: Carol Jean Johnstad

Dear Karen:

Ms. Johnstad has made a claim for increased pension benefits, or alternative relief, based upon a theory of promissory estoppel. She claims her decision to retire in 1995 was in reliance upon certain representations made to her in a telephone conversation with David Bushlack of the retirement office. Because her actual retirement benefit is not as high as she expected it would be based upon that telephone conversation, she believes MTRFA should be held to the higher benefit.

Promissory estoppel is an equitable doctrine which implies a contract where none exists in fact. It says that a promise which the promisor should reasonably expect to induce reliance on the part of the promisee, and which in fact does induce reliance, is binding if injustice can be avoided only by enforcement of the promise. The Restatement (Second) of Contracts, Sec. 90.

In applying the doctrine of promissory estoppel to government and quasi-government agencies, the courts of Minnesota have fashioned a balancing test which weighs the equities of the circumstances against the public interest that would be frustrated by the estoppel. Mesaba Aviation Div. v. County of Itasca, 258 N.W.2d 877 (1977). Two questions are relevant to this inquiry: (1) What has been promised? and (2) to what degree and as to what aspects of the promise has there been reasonable reliance? Christensen v. Minneapolis Mun. Employees Retirement Board, 331 N.W.2d 740 (Minn. 1983).

Karen Kilberg
February 20, 1996
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Ms. Johnstad met with Mr. Bushlack in the retirement office on July 10, 1995. On that day the computer was down and Mr. Bushlack manually prepared an estimate of Ms. Johnstad's retirement annuity using a projected retirement date of July 1, 1996. The monthly annuity figure Ms. Johnstad says she relied upon was \$541. There is no evidence of any discussion that day of a retirement date in 1995.

On July 19, 1995, Ms. Johnstad telephoned the retirement office from the office of her financial planner in Waukesha, Wisconsin. She asked what her benefit would be if she resigned in 1995. Mr. Bushlack said he could not give an accurate figure without looking at her file. He described the reduction factors as being a lower high five average salary and one less year of service than was used in the estimate furnished on July 10th. Neither Ms. Johnstad nor the financial planner requested that Mr. Bushlack pull the file to calculate an accurate figure. There is evidence that the financial planner suggested a 10% reduction factor for planning purposes, based upon his experience with other plans.

Ms. Johnstad's file contains a computer-prepared estimate, dated July 19, 1995. This was evidently prepared in the wake of the July 10th conference. This printed estimate also projects a retirement date of July 1, 1996, and shows a monthly annuity figure of \$552.68 based upon 14 years of service. The years of service appears to be in error. Ms. Johnstad's actual service credit as of her 1995 retirement was 12 years. The file does not indicate when this estimate was sent to Ms. Johnstad if at all. Since it did not exist when she was in the retirement office on July 10th and could not have been received by mail before she called the retirement office on July 19th, she could not be said to have relied upon it in making her retirement decision.

On July 21, 1995, Ms. Johnstad set in motion her retirement effective June 30, 1995. She was notified that the Board of Education accepted her resignation on August 8, 1995, whereupon she scheduled an appointment with Mr. Bushlack for August 11, 1995. At that meeting she learned that her monthly annuity would be \$393.45, which is \$148 less than the estimate prepared manually on July 10th.

The difference between the actual annuity and the earlier estimate is accounted for mainly by the fact that in 1991 Ms. Johnstad was on a sabbatical at half pay. The sabbatical would not have affected the high five for a retirement in 1996, but it substantially reduced her high five average on a 1995 retirement. A portion of the difference is also attributable to the difference in years of service credited for purposes of the retirement formula.

The 1991 sabbatical was not known to Mr. Bushlack when Ms. Johnstad first inquired about a 1995 retirement during the July 19th telephone conversation.

Ms. Johnstad is aggrieved at the difference between the life annuity estimate she says she relied upon (\$541) and the actual amount (\$393). She also complains of delays in getting

