MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

ASSOCIATION OF MONTANA RETIRED PUBLIC EMPLOYEES, RUSSELL WRIGG, MARLYS HURLBERT, CAROLE CAREY, I. EDWARD SONDENO, Plaintiffs, v. STATE OF MONTANA, MONTANA PUBLIC EMPLOYEE RETIREMENT ADMINISTRATION, PUBLIC EMPLOYEE RETIREMENT BOARD, GOVERNOR STEVE BULLOCK, in his official capacity, Defendants.	Cause No.: DDV-2013-788 **ORDER GRANTING PRELIMINARY INJUNCTION**

Petitioners Association of Montana Retired Public Employees and certain individual members thereof (collectively AMRPE) seek a preliminary injunction barring the Respondent State of Montana from implementing the provisions of HB 454[1] reducing the guaranteed annual benefit adjustment (GABA) applicable to retired public employees' retirement benefits. Leo Berry, Chad Adams and Julie

[1] 2013 Mont. Laws Ch. 390.

Luther represent AMRPE. The State opposes AMRPE's request. Michael Black and Stuart Segrest represent the State.

The parties have briefed the motion for preliminary injunction. The Court heard oral argument on December 12, 2013. Subsequent to the argument, the Court was advised that the Public Employees Retirement Division (PERD) needed a decision on AMRPE's motion as soon as possible and preferably before January 1, 2014 because PERD has to program its computers to take into account the GABA amount in time for the January 31, 2014 payment of benefits.

For the following reasons, the Court concludes that a preliminary injunction should be issued until the Court can hear the full merits of the case.

FACTUAL AND PROCEDURAL BACKGROUND

The Court has not yet held an evidentiary hearing on AMRPE'S petition or motion. The following facts are those necessary to the Court's conclusions and are not disputed between the parties from what the Court understands.[2]

AMRPE consists of retired Montana public employees. These employees receive retirement benefits from the State's public employee retirement system (PERS). PERS is codified at Mont. Code Ann. Title 19, ch. 2 and 3. PERS provides retirement, death and disability benefits to retired Montana state and local government employees. State and local government employees are required to participate in and contribute to PERS during their employment.

The PERS system was created effective July 1, 1945. Mont. Code Ann. § 19-3-103. For fifty years, the benefits paid through the system to any particular

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[2] The Court draws these facts from the briefs of the parties, from affidavits submitted with those briefs, and from arguments from counsel. To the extent that these facts may later turn out to be disputed, the parties are free to make a subsequent record.

retired employee remained the same; that is, if an employee received, for example, $100 per month when she retired in 1970, she would receive $100 per month throughout her retirement.

In 1997, the Montana Legislature amended the program, to take into account that flat retirement benefits necessarily lost value over time due to changes in the cost of living. The legislature adopted a program by which a person's retirement benefits were adjusted a certain percentage each year, after the retiree had been receiving benefits for a certain number of months. This adjustment was called the guaranteed annual benefit adjustment or GABA. GABA is not a cost-of-living adjustment *per se* because it is not tied to any particular change in the cost of living; the GABA percentage adjustment is applied regardless of whether the cost of living increase was larger or smaller than the GABA.

Initially, the legislature set GABA at 1.5 percent. In 2001, the legislature increased GABA to 3 percent. In 2007, the legislature reduced GABA for newly hired employees to 1.5 percent.

The PERS system[3] has been identified for several years as having substantial financial problems. When audited before the 2013 Montana Legislature, the benefits payable from PERS system never amortized, that is, the PERS system would remain perpetually out of balance with an unfunded liability.

To deal with this issue, the 2013 legislature adopted several measures. The legislature directed that funds be transferred to the system from the coal tax severance account. The legislature increased contributions to the PERS system by current employees and their employers. These increased contributions are scheduled

[3] The parties agree this is a problem of long-standing and that the legislature had failed to deal with it in any comprehensive manner before the 2013 session.

to terminate if the amortization period would not exceed 25 years without these additional contributions.

The 2013 legislature also reduced the GABA to 1.5 percent for all current employees and most significantly for this litigation, for those already receiving retirement benefits. The legislature provided for further reductions in the GABA should the system have an unfunded liability in excess of 10 percent. The result is that, with these changes, the system now is projected to amortize over about 14 years. However, because the system is not 90 percent funded, the GABA will be further reduced to 1 percent as of January 1, 2014, under the formula adopted by the legislature.

AMRPE attempted unsuccessfully to dissuade the legislature from this course of action during the legislative session. Having failed before the legislature, AMRPE initiated this present action alleging that the change in GABA is an unconstitutional impairment of its members' employment and retirement contracts with the State. By its present motion for a preliminary injunction, AMRPE seeks to prevent the State from applying the reduced GABA to their retirement benefits.

STANDARD OF REVIEW

A preliminary injunction may be issued in any of the following cases:

> (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
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> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
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> (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

> (4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition; [or]
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> (5) when it appears that the applicant has applied for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

Mont. Code Ann. § 27-19-201.

"These requirements are in the disjunctive, meaning that findings that satisfy one subsection are sufficient." *Mont. Cannabis Indus. Assn. v. State*, 2012 MT 201, ¶ 14, 366 Mont 224, 286 P.3d 1161.

AMRPE brings its motion pursuant to either subsection (1) or subsection (2) of this statute. In order to prevail at the preliminary injunction state of the proceedings, AMRPE is required to demonstrate a *prima facie* case of success on the ultimate merits. The Court need make no determination beyond whether such a *prima facie* showing has been made. In fact, it is error for a district court to determine the ultimate merits of the case at the preliminary injunction stage.

> In determining the merits of a preliminary injunction, it is not the province of either the District Court or this Court on appeal to determine finally matters that may arise upon a trial on the merits. The limited function of a preliminary injunction is to preserve the status quo and to minimize the harm to all parties pending full trial; findings and conclusions directed toward the resolution of the ultimate issues are properly reserved for trial on the merits. In determining whether to grant a preliminary injunction, a court should not anticipate the ultimate determination of the issues involved, but should decide merely whether a sufficient case has been made out to warrant the preservation of the status quo until trial. A preliminary injunction does not determine the merits of the case, but rather, prevents further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on the merits.

Yockey v. Kearns Props., LLC, 2005 MT 27, ¶ 18, 316 Mont. 28, 106 P.3d 1185 (citations omitted).

ANALYSIS

AMRPE argues that the State unilaterally reducing the GABA for those currently receiving retirement benefits is an unconstitutional impairment of the retirees' employment and retirement contracts with the State. AMRPE points to Article II, section 31 of the Montana Constitution as barring this impairment of contracts:

> Section 31. Ex post facto, obligation of contracts, and irrevocable privileges. No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature.[4]

AMRPE further notes that because this provision is found in Article II of the Constitution entitled Declaration of Rights, the rights guaranteed by this provision are fundamental rights to which this Court must apply strict, that is, the highest level of, judicial scrutiny. *Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶ 25, 349 Mont. 475, 204 P.3d 693.

For purposes of the present case, the contract between the State and its employees is discussed in Mont. Code. Ann. § 19-2-502(2):

> Benefits and refunds to eligible recipients are payable pursuant to a contract as contained in statute. The contract is entered into on the first day of a member's covered employment and may be enhanced

[4] "The contract clauses of the Montana and United States Constitutions have generally been interpreted as 'interchangeable guarantees against legislation impairing the obligation of contract.' *Carmichael v. Workers' Compen. Ct.* (1988), 234 Mont. 410, 414, 763 P.2d 1122, 1125." *Billings v. County Water Dist. of Billings Heights*, 281 Mont. 219, 935 P.2d 246 (1997). For purposes of this Order, the Court applies the same standards for both alleged constitutional violations.

> by the legislature. Unless specifically provided for by statute, the contract does not contain revisions to statutes after the time of retirement or termination of membership.

AMRPE points to the second sentence of this statute as defining the contract between the State and its employees and eventual retirees. Under this provision, the terms of the contract are established on the first day of an employee's covered employment. This contract may be enhanced by the legislature. This, according to AMRPE, is what the GABA does.

Prior to the enactment of HB 454, GABA was described in Mont. Code Ann. § 19-3-1605: "Subject to subsection (2), on January 1 of each year, the permanent monthly benefit payable during the preceding January to each recipient who is eligible under subsection (3) must be increased by the applicable percentage provided in subsection (4)." This is an enhancement of a retiree's contract with the State. HB 454 made substantial amendments to subsections (4) and (5) of this statute as set forth above, resulting in the reduction of the GABA to 1.0 percent for current employees and retirees already receiving benefits.

The State, on the other hand, argues that the third sentence of § 19-2-502(2) authorizes the legislature to make downward revisions of the GABA and to apply those revisions retroactively to retirees. Without deciding this ultimate issue, the Court concludes that a unilateral downward revision of the GABA made applicable to those already retired may run afoul of the foregoing constitutional prohibition against the legislature passing laws impairing the obligation of contracts. The use of the word "impair" in the Constitutional provision indicates a negative[5] revision on the contract, while the word "enhance" in the statute connotes a positive

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[5] "Impair" is defined as "to damage or make worse by or as if by **diminishing in some material respect**." http://www.merriam-webster.com/dictionary/impair (emphasis added). The reduction in the GABA percent is a diminishment in some material respect in the retirees' retirement.

revision. The constitution does not bar enhancements of contracts; it does bar impairments of contracts.

In *Coate v. Omholt*, 203 Mont. 488, 662 P.2d 591 (1983), the Montana Supreme Court discussed the application of the contract clause to the compensation of public employees and quoted with favor from a California Supreme Court decision:

> In *Olson v. Cory (1980)*, 27 Cal.3d 203, 164 Cal.Rptr. 217, 609 P.2d 991, the California Supreme Court interpreted the impairment clauses as it affects the judiciary's right to salary set by statute. The court held that a judge entering office does so partly in consideration of the salary benefits then offered by the state for that office. The court held that if those salary benefits are reduced by the legislature during a judge's term of office or during the unexpired term of a predecessor judge, the judge is nonetheless entitled to the contract for benefits during the remainder of the term. In applying the impairment clause the court stated:
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> "Public employment gives rise to certain obligations which are protected by the contract clause of the Constitution. [Citations omitted.] Promised compensation is one such protected right. [Citations omitted.] Once vested, the right to compensation cannot be eliminated without unconstitutionally impairing the contract obligation. [Citations omitted.] When agreement of employment between the state and public employees have been adopted by governing bodies, such agreements are binding and constitutionally protected." 164 Cal.Rptr. at 220-21, 609 P.2d at 994.

Id., 203 Mont. at 501, 662 P.2d at 598.

The State, by virtue of Mont. Code Ann. § 19-2-502(2), tells prospective state employees that their employment contract is entered into on the first day of their employment. The State further advises these prospective employees that eventual retirement benefits are payable pursuant to this "contract as contained in statute." Lastly, by statute, the State told these prospective employees that their eventual retirement benefits would be adjusted by the GABA. Having made these representations and promises to prospective employees and specifically having told these prospective employees that their employment contract is entered into on the first day of their employment, for the State later to change the terms of this contract unilaterally and negatively arguably constitutes an impairment of this contract. *See, Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1104 (impairment of contract under federal constitution when State passed law delaying payment of wages by 1 to 3 days six times a year, citing in part "a line of cases from other jurisdictions that, with one exception, have "agreed that a unilateral reduction in contractually established, future state employee salary obligations constitutes substantial impairment for Contract Clause purposes.")

The State further argues that a reduction in GABA does not constitute a reduction in the retirees' benefits, that the retirees continue to receive the full base amount of their PERS retirement benefit, *citing* the definition of "benefit" contained in Mont. Code Ann. § 19-2-203(10). The Court is not persuaded. Again, the legislature defines the employment contract between State and employee for purposes of the retirement system as arising on the first day of the employee's employment as it may be enhanced by the legislature. The GABA does not change the definition of "benefit;" it merely applies an enhancement to those benefits.

As noted, a district court's review of a motion for preliminary injunction is not to rule on the ultimate merits of the facts or legal arguments. It is merely to determine whether the petitioner has made a colorable, *prima facie,* showing of a violation of a constitutional right, and if so, to preserve the status quo and to minimize the harm to all parties pending full trial. *Yockey.*

The Court is persuaded that AMRPE has met this standard; it has made a *prima facie* showing that the application of the statute reducing retirees' GABA adjustment violates its members' rights under the contract clauses of the Montana and United States Constitutions. *Billings v. County Water Dist. of Billings Heights*, 281 Mont. 219, 935 P.2d 246 (1997).

Specifically, the Court concludes, pursuant to *Billings*, that AMRPE has made a *prima facie* showing that the State's unilateral change to the GABA for existing current retirees is a substantial impairment of their employment and retirement contracts with the State. Second, while the State may have a significant and legitimate purpose for the law,[6] *Billings*, 281 Mont. at 228, 935 P.2d at 251, AMRPE has made a *prima facie* showing that the law imposes unreasonable conditions which are not reasonably related to achieving the legitimate and public purpose. AMRPE suggests a number of alternate remedies to the issue of the PERS funding situation not adopted by the State in favor of the reduction of the GABA for current retirees. Among these alternate remedies are continuing the increased contribution by current employees and employers, using some of the State's recognized budget surplus to fund the PERS system, using some of the State's other trust funds to fund the PERS system, and raising taxes. It must be kept in mind as well that in considering whether the State can defend this statute, the Court is to use strict scrutiny.[7]

To be clear, the Court is not concluding that the State cannot reduce the GABA. The State did just this with its 2007 amendment reducing the GABA to 1.5 percent for newly hired employees. The State did in that enactment what it has not done in this enactment—made the reduction applicable only to newly hired

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[6] The Montana Constitution requires public pensions be funded on an actuarially sound basis. Mont. Const., Art. VIII, § 15.

[7] The parties dispute the ultimate burden of proof as to each of the three factors in *Billings*. Because the Court is not now deciding the ultimate issues raised in AMRPE's complaint, the Court need not decide this question at this time. The Court is merely deciding that AMRPE has made a *prima facie* showing that the State may not be able to defend the challenged statute.

employees, without changing the GABA for existing retirees. Under that law, a newly hired employee knew as of "the first day of a member's covered employment" what the terms of his employment and retirement contracts with the state were. Mont. Code Ann. § 19-2-502(2); there was no impairment change to previously entered contracts.

For the foregoing reasons, the Court concludes that a preliminary injunction should be issued to prevent the State from implementing the reduction in GABA adjustments. Persons receiving retirement benefits and eligible for GABA should receive the full amount of those adjustments.[8]

IT IS ORDERED that:

1. AMRPE's motion for a preliminary injunction is GRANTED.

2. The State is preliminarily enjoined from enforcing the amendments to Mont. Code Ann. § 19-3-1605 reducing the GABA due PERS retirees. The State shall pay all eligible PERS retirees the 3 percent or 1.5 percent GABA for which they qualified prior to the passage of HB 454.

3. This preliminary injunction shall remain in effect until further order of the Court. This preliminary injunction is entered without prejudice to either party upon further proceedings herein.

DATED this 20 day of December 2013.

JAMES P. REYNOLDS
District Court Judge

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[8] At oral argument, the Court inquired of AMRPE what should happen if it should not ultimately prevail on its claims in this proceeding. Would its members have to pay back the "overpaid" GABA? AMRPE advised that there is a statute by which the PERS system can recoup overpaid benefits from retirees. Mont. Code Ann. § 19-2-903(3).

c: Leo Berry/Chad Adams/Julie Luther
Michael Black/Stuart Segrest

JPR/d