



Janet T. Mills
GOVERNOR

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AUGUSTA, MAINE
04333-0001

January 10, 2020

The 129th Legislature of the State of Maine
State House
Augusta, Maine

Dear Honorable Members of the 129th Legislature:

L.D. 1104, An Act To Clarify the State's Commitments Concerning Certain Public Service Retirement Benefits, proposes to protect cost of living increases ("COLAs") for retired state employees by adding them to the list of retirement benefits that are protected by statute as solemn contractual commitments.

This bill is in response to the events of 2011 when the Legislature made substantial reductions to public employee retirees COLAs in order to balance the budget and fund other legislative policies. The fiscal note to the bill states, "Adding cost-of-living adjustments (COLA) to retirement benefits to the provisions that constitute solemn contractual commitments of the State may limit the State's future ability to decrease or eliminate the COLA provisions." This limitation, of course, is the expressed goal of the proponents and that goal is understandable in light of the prior administration's actions.

I do not disagree with the goal of protecting COLAs, but I question whether this bill ultimately protects the COLAs for the populations intended to be covered, and I question whether we have an appropriate funding mechanism to protect the COLAs that does not affect the state's bond ratings and the long-term stability of the retirement system.

I agree that public employee retirement benefits should not be looked at by budget writers as one more government program that routinely ends up on the cutting board in the Appropriations Committee in order to balance the budget. The critical issue with respect to COLAs, however, is whether, in the case of a true economic downturn, the money will be there to allow for COLAs and whether those COLAs can be financially protected without risking the diminishment of other critical benefits or without becoming a prohibited unfunded liability under Me. Const. art. IX, Sec. 18-A.

Because of these concerns I wrote the Executive Director of the Maine Public Employees Retirement System ("MePERS") on May 17, 2019, asking her to develop options for protecting the COLAs that would not also have the potential of generating a budget crisis or of creating potential harm to the state's bond ratings.



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In response, MePERS delivered a detailed report dated December 9, 2019, that offered several alternative methods for protecting the retiree COLAs and that provided the basis for a substantive discussion of a possible solution to the problem.

That report has not yet generated meaningful discussion by the proponents regarding funding of the COLAs over the long term.

There is also a question, raised in a letter from the Attorney General's Office to my office of May 17, 2019, copy attached, as to whether this bill ultimately does protect the COLAs. Describing them as "solemn contractual commitments" may not in fact prevent the Legislature from substantially reducing or eliminating COLAs in a time of economic necessity when "justified as reasonable and necessary to preserve a public purpose." *Maine Association of Retirees v. Bd. Of Trustees of the Maine Public Employees Retirement System*, 758 F.3d at 29-30.

The Office of the Attorney General also noted that the Contract Clause protection would not apply uniformly to all employees and retirees but is affected by employment and vesting status. It is far from clear that employees who have already retired have a contractual relationship with the State to serve as the foundation of such protection. See fn. 3 of the May 17, 2019 letter from the Attorney General's Office.

I remain concerned about L.D. 1104 and the solemn contractual protections that the language purports to provide. Equally concerning is the fundamental misunderstanding that surfaced during the legislative session about the Maine Public Employees Retirement System, what I requested of them regarding alternatives, as well as MePERS' fiduciary role and responsibilities in the provision of benefits.

To that end, I am asking DAFS Commissioner Figueroa to convene a working group comprised of the Maine Public Employees Retirement System, interested legislators and stakeholders, to develop a deeper understanding of the roles and responsibilities of the retirement system, the fiscal implications of policy decisions and any long-term funding mechanisms to preserve benefits.

So, while I am supportive of the goal of protecting public employee retirees' COLAs, I find the approach of this bill to be troubling and short sighted. I am allowing this bill to become law without my signature, with the understanding, in my view, that it simply does not solve the problems it purports to address and that a lot more work needs to be done.

Thank you.

Sincerely,



Janet T. Mills
Governor



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May 17, 2019

Linda Pistner, Deputy Legal Counsel
Office of the Governor
State of Maine
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Augusta, Maine 04333

Re: L.D. 1104, *An Act To Clarify the State's Commitments Concerning Certain Public Service Retirement Benefits*

Dear Deputy Counsel Pistner:

I am writing to follow up on a recent request for advice relating to L.D. 1104, *An Act To Clarify the State's Commitments Concerning Certain Public Service Retirement Benefits*. You have asked whether if enacted into law, this bill would limit the Legislature's ability to reduce or limit cost-of-living adjustments ("COLA") under the Maine Public Employees Retirement System ("MePERS") in the future. Based upon our preliminary review of this question, the answer to the question is yes.

As you know, in 2011, the Legislature made significant changes in the calculation of COLAs, which generally reduced pension benefit payments to retirees under MePERS. The 2011 COLA amendments changed the method of calculating COLAs in two ways: 1) COLA payments for the years 2011-2013 were prohibited, subject to the condition that would allow noncumulative COLA payments in each of those years if sufficient funds remained in the retirement benefit reserve fund; and 2) the maximum COLA was reduced from 4% to 3% and the reduced COLA was limited to the first \$20,000 of retirement benefits. P.L. 2011, ch. 380, § T-21.

In *Maine Association of Retirees v. Bd. of Trustees of the Maine Public Employees Retirement System*, 758 F.3d 23 (1st Cir. 2014), a group of retirees brought a lawsuit challenging the Legislature's authority to make the 2011 COLA reductions to retirement benefits, alleging violation of the Contract Clause and the Takings Clause of the United States Constitution. The First Circuit Court of Appeals held that since COLAs did not fall within "the umbrella of benefits" that the Legislature was "contractually obligated not to reduce," and that the Legislature could reduce COLA benefits without violating the Contract and Takings clauses of the United States Constitution. *Id.* at 32. L.D. 1104, if enacted, seeks to change this holding by making COLAs

subject “solemn contractual commitments of the State protected under the contract clauses of the Constitution of Maine, Article I, Section 11 and the United States Constitution, Article I, Section 10.” 5 M.R.S. § 17801(1)(B). See L.D. 1104, Sec. 1 (adding Section 17806, subsections 1-3 to the provisions that are subject to the solemn contractual commitment of the State requirements).¹

If COLAs were added to the list of MePERS provisions subject to the “solemn contractual commitment,” the Legislature’s ability to reduce COLAs in the future would be limited. The United States and Maine Constitutions both contain provisions which limit the state’s ability to impair contracts. U.S. Const. art. I § 10, cl. 1. (“[n]o State shall ...pass any ...Law impairing the Obligation of Contracts.”). Me. Const., art. 1 § 11 (“The Legislature shall pass no bill of attainder, ex post facto law, nor law impairing the obligation of contracts...”)²

The constitutional prohibition against impairment of contract is not absolute. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 21 (1977), *Maine Ass’n of Retirees et al. v. Board of Trustees of Maine Public Employees Retirement System et al*, 758 F.3d at 29. As discussed above, to date, the cases analyzing changes to the MePERS benefits have found that the benefit changes at issue were not covered by the contract clause because there was no evidence that the Legislature intended to create a contractual commitment. See *Spiller, Parker*, and *Maine Ass’n of Retirees*. If enacted, L.D. 1104 would establish Legislative intent to make COLAs subject to the state’s solemn contractual commitment.

The determination of whether an unconstitutional impairment of contract has occurred requires analysis of the following factors: 1) is there a clear intent on the part of the Legislature to establish a contract; 2) does the law change result in an impairment of the contract; 3) is the impairment substantial; and 4) is the impairment justified as reasonable and necessary to preserve a public purpose. See *Maine Ass’n of Retirees et al. v. Board of Trustees of Maine*

¹ In addition to *Maine Association of Retirees v. Bd. of Trustees of the Maine Public Employees Retirement System* case, impairment of contract claims relating to changes in the benefits available under the state retirement system have been rejected by the Law Court in *Spiller v. State*, 627 A.2d 513 (Me. 1993) and by the First Circuit in *Parker v. Wakelin*, 123 F.3d 1 (1st Cir. 1997). In *Spiller*, the Law Court rejected an impairment of contract claim challenging 1991 benefits changes to the state retirement system, which excluded payment for unused leave for sickness or vacation from earnable compensation, increased the minimum age for retirement with full benefits from 60 to 62, and increased the penalty for retirement before the full age on the grounds that there was no clear indication of legislative intent to create immutable contractual rights for state employees. In *Parker v. Wakelin*, the First Circuit rejected an impairment of contract claim by teachers challenging 1993 benefits changes which increased member contributions from 6.5% to 7.65%, established a cap on salary increases permitted in calculating the level of benefits, created a waiting period for COLA adjustments, increased the retirement age, increased the early retirement penalty, and eliminated the per diem payment of up to thirty days of unused sick or vacation time in calculating retirement benefits. In *Parker*, the Court held that there was no evidence of Legislative intent to establish benefits as a contractual right prior to the point of retirement. Following the *Parker* decision, the Legislature enacted P.L. 1999, ch. 489, § 3 which rewrote 5 M.R.S. § 17801 to establish specific commitments protected by the Contract Clauses of the U.S. and Maine Constitutions. L.D. 1104 would add COLAs to the list of provisions in § 17801 that are constitutionally protected.

² The taking of property without compensation and without due process of law is prohibited by Me. Const. art. I, § 21 and U.S. Const. amend. XIV.

Public Employees Retirement System et al., 758 F.3d at 29-30; *Buffalo Teachers Federation et al. v. Tobe et al.*, 464 F.3d 362, 368 (2nd Cir. 2006), *cert. denied*, 550 U.S. 918 (2007). For example, in *Buffalo Teachers*, the Second Circuit Court of Appeals held that the severe fiscal crisis facing the city of Buffalo was sufficient to justify a temporary wage freeze which impaired existing labor contracts. In contrast, in *Association of Surrogates et al. v. State of New York*, 940 F.2d 766 (2nd Cir. 1991), the Second Circuit struck down New York's attempt to address the state's fiscal crisis by enacting legislation creating a payroll lag, which delayed the payment of state employees' wages in violation of an existing collective bargaining agreement. The Court found a violation of the Contracts Clause, holding that other reasonable alternatives were available to address the state's fiscal crisis. As these cases demonstrate, the analysis of impairment of contract claims is fact specific and is done on a case by case basis.

If L.D. 1104 were enacted, and at some point in the future the state faced a fiscal crisis, the Legislature's ability to reduce COLAs would be limited by application of impairment of contract analysis discussed above. While the Legislature could repeal the provisions of L.D. 1104 and reduce COLAs for new employees, the Legislature's ability to reduce COLAs for others would be limited. For those employees or retirees who had vested or retired during the time the solemn contractual commitment for COLAs was in effect, any substantial reduction would be subject to the contract clause and takings analysis outlined above.³

I trust this information is helpful. If you have further questions, please do not hesitate to contact me.

Sincerely,



Susan P. Herman
Deputy Attorney General

cc: Mary Anne Turowski

³ It is not clear whether employees who had retired prior to the effective date of L.D. 1104, would be covered by the contractual commitment language in L.D. 1104. An argument could be made that 5 M.R.S. § 17853 (2018), which provides that the law in effect at the time of a member's termination of service shall govern the member's service retirement benefit, would make the contractual commitment for COLAs inapplicable to retirees who retired prior to L.D. 1104's effective date. In addition, the analysis in *Maine Association of Retirees v. Bd. of Trustees of the Maine Public Employees Retirement System* supports this argument. *Maine Association of Retirees v. Bd. of Trustees of the Maine Public Employees Retirement System*, 758 F.3d at 30-31 (analyzing statute in existence at the time service requirements were satisfied and determining COLAs were not covered as contractual commitment for pre-1999 retirees). The result for this class of employees is uncertain should L.D. 1104 be enacted.