

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. _____

The City of Concord
41 Green Street, Concord, NH 03301,

County of Belknap,
34 County Drive, Laconia, NH 03246,

and

Mascenic Regional School District
30 Tricnit Road Unit 5, New Ipswich, NH 03071

on Behalf of Themselves And Those Similarly Situated,

Petitioners,

v.

The State of New Hampshire
133 Capitol Street, Concord, NH 03301,

and

The New Hampshire Retirement System
54 Regional Drive, Concord, NH 03301

Respondents

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

Now come the Petitioners, the City of Concord, the County of Belknap, and the Mascenic Regional School District, in their own right and on behalf of those similarly situated as municipal, county and school-district participants in the New Hampshire Retirement System, and petition this Court for declaratory and injunctive relief, and for an award of damages. The Petitioners request the Court: (1) to find that the increased retirement contributions imposed on Petitioners by the State in the 2010-2011 budget constitute an unfunded mandate in violation of Part I, Article 28-a of the New Hampshire

Constitution; (2) to order the State to pay its full contribution share to the New Hampshire Retirement System; and (3) to require the State or the New Hampshire Retirement System to reimburse Petitioners and class members for their increased payments. In support thereof, Petitioners state as follows.

Introduction

This is a petition for declaratory judgment, injunctive relief, and money damages brought by Petitioners on behalf of a class of similarly situated municipalities, counties, and school districts. Petitioners allege that Section 52 of Chapter 144, New Hampshire Laws of 2009 (“Section 52”), which amends RSA 100-A:16, II to reduce the State contribution and increase Petitioners’ contributions toward employee retirement benefits, is an unfunded mandate that violates Part I, Article 28-a of the New Hampshire Constitution. As of July 1, 2009, Petitioners and their respective class members have been required to pay increased contributions, and those contributions will increase again as of July 1, 2010. Unless this section is invalidated, Petitioners and their respective class members will bear an estimated \$27,000,000 in additional costs over the current biennium.

Petitioners seek a declaratory judgment from this Court that Section 52 is unconstitutional and invalid. They also seek an injunction ordering the State to pay its full contribution to the New Hampshire Retirement System. Finally, the Petitioners seek an award of money damages equal to the difference between payments made under Section 52 and those owing under the prior statutory formula.

Parties

1. Petitioner City of Concord is a municipal corporation with a street and mailing address of 41 Green Street, Concord, NH 03301.
2. Petitioner County of Belknap is a county with a street and mailing address of 34 County Drive, Laconia, NH 03246.
3. Petitioner Mascenic Regional School District is a school district with a street and mailing address of 30 Tricnit Road Unit 5, New Ipswich, NH 03071
4. Respondent the State of New Hampshire has a mailing address of 133 Capitol Street, Concord, NH 03301.

5. Respondent the New Hampshire Retirement System is a qualified pension trust with a street and mailing address of 54 Regional Drive, Concord, NH 03301.

Jurisdiction and Venue

6. The Court has jurisdiction over this petition pursuant to RSA 491:22 and 491:7

7. Venue lies in Merrimack County because the City of Concord is located there.

Class Action Allegations

8. The proposed class of municipalities, counties, and school districts that participate in the New Hampshire Retirement System is so numerous that joinder of all of them is impracticable.

9. As alleged herein, there are questions of law and/or fact common to the class which predominate over any questions affecting only individual members.

10. The claims of the Petitioners are typical of the claims of municipalities, counties, and school districts in the proposed class.

11. The Petitioners will fairly and adequately protect the interests of the class.

12. A class action is superior to any other available methods for the fair and efficient adjudication of the issues presented.

13. Petitioners' attorneys have experience handling complex civil and constitutional litigation and will adequately represent the interests of the class.

Background Facts

The New Hampshire Retirement System

14. The New Hampshire Retirement System (the "System") was created in 1967 in an effort to harmonize and coordinate a series of separate retirement systems covering different categories of public employees.

15. At the time of the System's creation, four separate statewide retirement programs for public employees were in place: the New Hampshire Teacher's Retirement System, the New Hampshire

Policemen's Retirement System, the New Hampshire Permanent Firemen's Retirement System, and the Employees Retirement System of the State of New Hampshire.

16. Each system had its own governing board and administrative staff. The rules governing benefits differed between the systems, as did the cost sharing ratio between the State and the participating entities for police, firefighters, and teachers.

17. The System brought all four systems under a single regulatory authority with a single board of trustees, and a single administrative staff.

18. The System has both mandatory and elective coverage. The System provides mandatory coverage for State employees, as well as all teachers and permanent police¹ and firefighters employed by municipalities, counties, and school districts. These employees are entitled by right to the System's benefits. RSA 100-A:1, 100-A:3. The System also allows municipalities, counties, and school districts to elect to have their remaining employees – those who are not teachers, police or firefighters – participate in the System. RSA 100-A:20.

19. Municipalities, counties, and school districts are responsible for paying the full employer contribution for employees who are elective participants in the System. The State and municipalities, counties and school districts share the cost of the employer contribution for those employees who are mandatory participants in the System. The contributions for elective participants are not at issue in this matter.

20. When participation arises through statutory directive, continued participation in the System is a "condition of employment" for all covered employees. RSA 100-A:3. Municipalities, counties, and school districts are then required to pay their statutory share of the employer contribution.

21. The System describes two classes of employees. Group I includes teachers and state, county and municipal employees. Group II includes police and firefighters. RSA 100-A:1, X.

22. Rights under the System vest after ten (10) years of employment (RSA 100-A:10), and include both service retirement benefits, often called "pension" benefits (available to Group I employees

¹ County correctional officers are considered "permanent police" under the statute.

after 30 years and to Group II employees after 20 years), and disability retirement benefits. RSA 100-A:5; 100-A:6.

23. The amount of money needed to fund the System is established by actuarial valuations for each biennium. RSA 100-A:16. The System is funded by employee contributions, employer contributions, and earnings on the investment of the System's assets.

24. Contributions are calculated as a percentage rate to be applied to an employee's earnable compensation. The employee contribution percentage rates are set by statute; the rate for teachers has been 5% since 1988, and the rate for police and firefighters has been 9.3% since 1977. RSA 100-A:16, I. Deductions are made from employee paychecks according to the applicable percentage. *Id.*

25. The employer contributions² toward the System's obligations are also calculated as percentages to be applied to the employees' earnable compensation. The employer contribution rates are set by the System's Board of Trustees based on the funds needed by the System as determined by the actuaries on a biennial basis or when required by the legislature. By rule, payments are due to the System on a monthly basis. NH ADC Ret. 303.01.

Shared Payments for Teachers, Police and Firefighters

26. From its inception in 1967, the State and the political subdivisions have shared the responsibility for the employer contributions for Group II members (police and firefighters) and teachers (but not other Group I employees).

27. From 1977 until 2009 (32 years), the State was responsible for 35% of the employer contribution for these employees, with the municipality, county, and school district employers responsible for the remaining 65%. RSA 100-A:16, II (Supp. 2008).

28. In the intervening 32 years, Petitioners have adopted their budgets in accordance with this shared financial responsibility.

² The employer contribution rate has two components. One is the "normal contribution" and the second is the "accrued liability contribution," which is intended to redress any shortfall between the System's assets and its anticipated liabilities. RSA 100-A:16, II.

29. In 2009, the General Court passed Chapter 144 (HB2), Section 52 which amends RSA 100-A:16, II, (b), effective July 1, 2009, relative to the employer contributions for Group II members, as follows:

(b) The contributions of each employer for benefits under the retirement system on account of group II members shall consist of a percentage of the earnable compensation of its members to be known as the "normal contribution," and an additional amount to be known as the "accrued liability contribution;" provided that any employer, other than the state, **shall pay 70 percent of such total contributions for state fiscal year 2010, and 30 percent thereof shall be paid by the state for state fiscal year 2010, and that beginning with state fiscal year 2011 any employer, other than the state, shall pay 75 percent of such total contributions, and 25 percent thereof shall be paid by the state,** and that beginning with state fiscal year 2012, and every state fiscal year thereafter, any employer, other than the state, shall pay 65 percent of such total contributions, and 35 percent thereof shall be paid by the state....

(Emphasis added.)

30. Functionally identical changes were made to RSA 100-A:16, II (c), also effective July 1, 2009, addressing the employer contributions for teachers.

31. The amendments to RSA 100-A:16, II modified the sharing formula and thus obligate Petitioners to pay 70% (up from 65%) of the employer contribution in fiscal year 2010, and 75% (up from 65%) in fiscal year 2011.

32. The impact of these statutory changes on the actual required contributions by Petitioners is demonstrated by comparing the rate notice prepared by the System before the passage of Section 52 with the revised rate notice distributed after enactment, as summarized in the attached chart.

33. In a notice dated September 11, 2008, the traditional 65/35 split resulted in the following employer contribution rates for fiscal years 2010 and 2011:

a) For teachers, the Petitioners rate was to be 6.96% of earnable compensation, with the State's contribution rate at 3.74%;

b) For police, the Petitioners rate was to be 12.68%, with the State's rate at 6.83%;

c) For firefighters, the Petitioners rate was to be 16.05%, with the State rate's at 8.64%.

34. On June 30, 2009, following passage of Section 52, the System sent a notice to Petitioners reflecting the Petitioners' increased share of the employer contribution from 65% to 70% in fiscal year 2010 and 75% in fiscal year 2011, resulting in the following employer rates:

a) For teachers, the Petitioners pay a rate of 7.49% of earnable compensation in fiscal year 2010, and 8.02% in fiscal year 2011, while the State's rate drops to 3.21% in fiscal year 2010 and 2.68% in fiscal year 2011;

b) For police, the Petitioners pay a rate of 13.66% in 2010, and 14.63% in 2011, while the State's rate drops to 5.85% in fiscal year 2010 and 4.88% in fiscal year 2011;

c) For firefighters, the Petitioners pay a rate of 17.28% in 2010, and 18.52% in 2011, while the State's rate drops to 7.41% in fiscal year 2010 and 6.17% in fiscal year 2011.

35. The Petitioners have been paying the increased rates since enactment of Section 52.

36. The General Court received testimony from the System that the modification in the sharing formula would increase local expenditures by Petitioners by approximately \$9,000,000 in fiscal year 2010, and by \$18,000,000 in fiscal year 2011, or an estimated \$27,000,000 over the biennium.

Withdrawal from the System

37. RSA 100-A:3, I(a) provides that all teachers, permanent police, and permanent firefighters shall become members of the System as a condition of employment. While the law provides a mechanism for employers to withdraw their elective employees from the System, *see* RSA 100-A:43, they are not permitted to withdraw teachers, police or firefighters from the System.

New Hampshire Constitution Part 1, Article 28-a

38. In 1984, Part I, Article 28-a was added to the New Hampshire Constitution. It provides:

[Art.] 28-a. [Mandated Programs.] The state shall not mandate or assign any new, ~~expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.~~

Article 28-a was adopted by the voters of the State to protect citizens from increased property taxes due to additional costs imposed on them by the State and over which they would have no control.

39. As the New Hampshire Supreme Court has held, Article 28-a “was designed to provide a safety net to save cities and towns from the burden of coping with new financial responsibilities, not of their own creation, and to permit them a stronger grasp of their fiscal affairs.” *New Hampshire Municipal Trust Workers’ Compensation Fund v. Flynn*, 133 N.H. 17, 27 (1990). To that end, Article 28-a “was designed to prohibit the State from placing additional obligations on local government without either obtaining their consent or providing the necessary funding.” *Id.* at 22.

40. Article 28-a is violated when a statute includes “both a mandate of responsibility to the political subdivision and a requirement of additional local political subdivision expenditures by virtue of the mandate.” *Town of Nelson v. N.H. Dep’t of Transportation*, 146 N.H. 75, 78, 767 A.2d 435 (2001).

Count One – Declaratory Judgment

41. Petitioners incorporate herein the allegations of paragraphs 1 through 40 of this Petition.

42. Part I, Article 28-a of the New Hampshire Constitution prohibits the State from making any expansion or modification of financial responsibilities borne by political subdivisions that result in additional local expenditures, unless the State fully funds the cost of those expanded or modified responsibilities, or those additional expenditures are affirmatively approved by a vote of the political subdivisions.

43. In 1977, seven years prior to the passage of Part I, Article 28-a in 1984, the State set the share of the employer contribution required of Petitioners at 65%.

44. The increases in these rates adopted in Section 52 have resulted in and will continue to result in mandated increased costs to the Petitioners for their required participation in the System.

45. Section 52 does not provide State funding for the expanded or modified financial responsibilities of Petitioners. To the contrary, the sole purpose of Section 52 is to shift financial responsibility from the State to the Petitioners and the class members.

46. No Petitioner has approved, by vote or otherwise, the increased expenditures imposed by Section 52 for fiscal years 2010 and 2011.

47. For these reasons, Petitioners respectfully request that the Court enter judgment declaring that Section 52 is an unfunded mandate in violation of Article 28-a.

Count Two – Injunctive Relief

48. Petitioners incorporate herein the allegations of paragraphs 1 through 47 of this Petition.

49. Section 52 violates Part 1, Article 28-a of the New Hampshire Constitution, is invalid, and therefore cannot be enforced according to its terms.

50. As a result, Petitioners respectfully request that the Court enjoin the State and the System from demanding payment from Petitioners and class members for the increased contribution rates prescribed by Section 52. Petitioners further request that the State and the System be required to impose only payments consistent with the traditional 65/35 apportionment in effect since before 1984.

51. Petitioners also request that the Court require the State to fulfill its own payment obligation to the System consistent with the traditional 65/35 apportionment in place prior to passage of Section 52.

Count Three – Injunctive Relief

52. Petitioners incorporate herein the allegations of paragraph 1 through 51 of this Petition.

53. Petitioners respectfully request that the Court require the System to reimburse Petitioners for the increased payments made since July 1, 2009 pursuant to Section 52's requirements, together with accrued interest on the overpayments.

54. In the alternative, Petitioners respectfully request that the Court require the System to grant a credit to Petitioners and the class members in an amount equal to the overpayment, plus accrued interest.

Count Four – Money Damages

55. Petitioners incorporate herein the allegations of paragraphs 1 through 54 of this Petition.

56. To the extent not addressed or resolved through Petitioners' requests for injunctive relief, Petitioners respectfully request an award of damages from the State and/or the System sufficient to put them in the same financial position they would have been in had Section 52 not been enacted.

Count Five – Attorneys Fees

57. Petitioners incorporate herein the allegations of paragraphs 1 through 56 of this Petition.

58. Section 52 and the amendments it makes to RSA 100-A:16 are a violation of Part I, Article 28-a of the New Hampshire Constitution.

59. Petitioners brought this action to “vindicate[] . . . important constitutional rights” embodied by Article 28-a. *Claremont School District v. Governor*, 144 N.H. 590, 598 (1999).

60. Invalidating Section 52 will confer a substantial benefit upon the general public, because Petitioners represent the interests and objectives of citizens across the state.

61. Accordingly, Petitioners respectfully request that the Court award them their reasonable attorneys' fees and costs in pursuing this action.

WHEREFORE, Petitioners respectfully request that the Court:

- A. Certify a class of municipal, county and school district participants in the New Hampshire Retirement System and approve Petitioners as representatives of such class;
- B. Declare that Section 52 and the amendments it makes to RSA 100-A:16 violate Part I, Article 28-a of the New Hampshire Constitution, and, as a consequence, are of no further force or effect;
- C. Enjoin the State and the System from requiring payment from Petitioners and the class members under the amended contribution schedule, and require the State to resume its 35 percent payment obligation to the System;
- D. Require the State and the System to reimburse Petitioners and the class members for the difference in payments made under Section 52 and the prior apportionment, plus interest, or, in the alternative, to credit those amounts against future monthly payments;

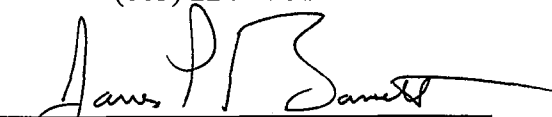
- E. To the extent necessary, award damages sufficient to reimburse Petitioners for their overpayments under Section 52;
- F. Award Petitioners their reasonable attorneys' fees and costs in vindicating this important Constitutional right; and
- G. Award such other and further relief as justice requires.

Respectfully submitted,

City of Concord, County of Belknap,
and Mascenic Regional School District
By their Attorneys,

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Dated: March 8, 2010

By 
James P. Bassett, NH Bar #358
Jeffrey C. Spear, NH Bar #14938

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EMPLOYER RETIREMENT CONTRIBUTION RATES

Employee Group	Certified Employer Rates FY 2010/2011 BEFORE Passage of HB 2 Local 65% - State 35%	Certified Employer Rates FY 2010 AFTER Passage of HB 2 Local 70% - State 30%	Certified Employer Rates FY 2011 AFTER Passage of HB 2 Local 75% - State 25%
Teachers:			
Local	6.96%	7.49%	8.02%
State	3.74%	3.21%	2.68%
Total	10.70%	10.70%	10.70%
Police:			
Local	12.68%	13.66%	14.63%
State	6.83%	5.85%	4.88%
Total	19.51%	19.51%	19.51%
Fire:			
Local	16.05%	17.28%	18.52%
State	8.64%	7.41%	6.17%
Total	24.69%	24.69%	24.69%