



# REPORTER

A publication of the California State University Emeritus and Retired Faculty Association

## STATUS OF COALITION LAWSUIT AGAINST AB 702

The previous issue of the *ERFA Reporter* informed the membership about the ERFA Executive Committee's resolution of July 13 that directed ERFA to oppose AB 702, the bill that authorized the State to expropriate 1.6 billion dollars of PERS funds, in addition to other acts that threatened the integrity of the PERS funds. Subsequently, the ERFA leadership helped form a coalition of state organizations concerned about the effects of AB 702. On August 1, this coalition filed a lawsuit in the Third District Court of Appeal.

A. *What does the lawsuit, filed August 1 in the Third District Court of Appeal, ask for?*

A writ mandating the Governor, the administration, and PERS to (1) disregard the provisions of AB 702 (Chapter 83) that expropriate 1.6 billion dollars of PERS money to pay employer contributions, (2) to disregard the repeal in AB 702 of the IDDA and EPDA inflation protection programs, and (3) to disregard the provisions of AB 702 that transfer the actuarial function from the PERS board to a governor appointed actuary because all of these provisions in the bill are illegal.

B. *What is the administration's response to these allegations?*

(1) The administration argues that IDDA and EPDA allowances were not a vested contractual right, but a temporary program without permanent funding.

(2) The administration claims that the provisions of AB 702 provide for a scheme of defined benefits which must be funded and which will become a vested contractual right, thereby providing for a scheme that is superior to the former program.

(3) The administration argues that the dominant practice in public and private pension systems is to credit "excess" earnings against employer contributions because the employers bear the risk of fluctuating market conditions.

C. *How does the PERS "friendly" response support the claims of the Coalition?*

(1) It refers to the California Constitution Article XVI,

Section 17, which states (a) that PERS trust funds must be used for the exclusive benefit of the beneficiaries and, thus, may not be expropriated to balance the state budget. Another section of the Constitution, Article XVI, Section 17 (b) is also cited as adding a duty to minimize employer contributions, but this section, it is claimed, does not deal with the purposes for which the funds may be used and is a general guideline, not a specific directive. The PERS response adds that in law provisions which are specific prevail over those that are general; therefore, an additional duty given to the PERS administrators is not on the same level as one given by the exclusive benefit rule.

(2) It claims that IDDA/EPDA benefits are extended by statute for as long as there is money in the accounts; thus, retirees have a vested right to continue to receive these benefits for so long as those funds are available from "surplus" earnings.

(3) It states that the retirees who are disadvantaged by AB 702 do not receive comparable benefits: (a) inflation protection is at a lower level; (b) the substituted inflation program protection is tied to the legal survival of the \$1.6 billion expropriation of trust assets. [AB 702 provides for cancellation of the IDDA protection level at 75% if a law suit succeeds in denying the State the money it took from PERS.]; and (c) retirees are not receiving any benefits from employer savings being used to avert layoffs of active employees.

(4) It argues that taking the actuarial function from the PERS board and giving it to a governor-appointed actuary endangers the future integrity of the pension system because an appointed actuary is not independent—he can be fired by the Governor without cause with only thirty days' notice, his decisions are not subject to public review and comment, and the Governor, thereby, gains significant influence over the level of state contributions to PERS.

D. *Have other officials submitted any affidavits in support of the coalition lawsuit?*

Alan Post, previously a legislative analyst for many years, provided an affidavit affirming that it is normal prac-

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tice for a board of administration of a retirement system, or other independent trustee of a system, to appoint the actuary and to review his recommendations.

*E. Has the Governor appointed "his" actuary as provided in AB 702?*

ERFA Legislative Representative Wilma Krebs reports that the Governor has selected the firm of Towers, Perrin, Forster, and Crosby as the actuary. The legislature must confirm this appointment. If confirmed, the actuary will review data used by PERS and come up with an employer contribution rate by December 1, 1991, which will become the official state rate.

Krebs advises that the actuary is "enrolled," and is, therefore, bound to adhere to the standards of the profession. Further, AB 702 makes the Governor's actuary a fiduciary, and, according to PERS Board Member Charles Valdez, the actuary is "fully responsible and personally liable" for any recommendations. If the actuary violates this trust, Valdez admonishes, there will be a lawsuit because "you can't remove the actuarial function from the trust; it is not done anywhere in the country." However, the Governor's instructions asking firms to bid for the position stated that the actuary would not take on any fiduciary responsibility beyond that assumed by any independent actuary in the scope of the contract.

*F. What occurred at Congressman Pete Stark's Congressional Hearing on August 19 in San Leandro of relevance to the provisions of AB 702?*

Congressman Stark pointed out (1) the Federal income tax deduction is based on the exclusive use of funds in a pension trust for retirement purposes and (2) ERISA [Employees Retirement Income Security Act] does not cover state and local government employees. He posed these questions: (1) should public employees have access to the Federal courts in disputes about their retirement programs? and (2) should state officials be subject to civil and criminal penalties if they "misuse" public pension funds?

At the hearing a witness representing the Institute of Industrial Relations, UC Berkeley, said (1) that Congress should define clearly that any contribution made by an employee to a pension plan is deferred compensation, or the employee's money; (2) that Federal law should state clearly that the actuarial function should be an exclusive function of the independent board responsible for the retirement funds; and (3) that Federal legislation should protect the right of employees to have representation on the governing board of a public pension system.

Jack Matheny, CSEA representative, stated (1) that Federal guidelines should make clear that a majority of the members on a pension board should represent retirees and employees; and (2) that Federal rules should protect public funds from the political takeover of the actuarial function.

ERFA President Milt Dobkin spoke and responded to

several question Congressman Stark asked:

**STARK:** Does the California State Constitution and state laws provide certainty that public employee retirement funds are to be used solely and exclusively for the benefits of retired persons qualified under the plan as required by the Internal Revenue Code?

**DOBKIN:** Not currently. That's why ERFA and other state organizations have joined in the current legal challenge.

**STARK:** What about the Governor's diversion of these funds from their intended purpose?

**DOBKIN:** We are fighting the diversion and would appreciate the assistance of national legislation protecting pension funds from raids.

**STARK:** Is Federal legislation required to insure protection of retirement savings of working men and women?

**DOBKIN:** The presence of such legislation could discourage governors and state legislatures from attempting to ignore state constitutional protection by threat or manipulation.

**STARK:** Should retirees be able to go to federal courts to seek protection?

**DOBKIN:** Yes. The presence of the opportunity to do so could have a salutary effect on governors and state legislatures.

**STARK:** Should there be civil and/or criminal penalties for those who take public pension funds for purposes which do not benefit participants of the system.

**DOBKIN:** Yes. Such provisions might make it unnecessary to sue for protection of funds. [At one point during Dobkin's testimony Congressman Stark asked for and received an explanation of the fact that elimination of IDDA and EPDA benefits would hurt the oldest retirees and those whose actual dollar benefits had deteriorated most. Until this point in the testimony which had been given the magnitude of the impact of AB 702 on the oldest retiree appeared not understood.]

*G. Have any other developments occurred that may have relevance to this battle to protect PERS funds?*

1. Employers (State of California and various county and city agencies who provide funds to PERS for employees) have for the first time in over five years had their obligatory contributions to PERS increase because of the lower gains from PERS investments, use of the forty year term, and poor economic assumptions.

2. Four PERS employees have filed for permission to circulate a petition to recall Governor Wilson.

(Information for this story provided by Wilma Krebs, Jack Byrom, and Milt Dobkin.)

**ERFA NOW NEARLY 1500 MEMBERS**

CAMPUS	TOTAL	CAMPUS	TOTAL
BAKERSFIELD	5	POMONA	72
CHICO	85	SACRAMENTO	93
DOM. HILLS	20	SAN BERNAR.	16
FRESNO	86	SAN DIEGO	150
FULLERTON	74	SAN FRANCISCO	103
HAYWARD	60	SAN JOSE	125
HUMBOLDT	77	S.L. OBISPO	49
LONG BEACH	172	SONOMA	27
LOS ANGELES	118	STANISLAUS	17
NORTHRIDGE	139	<b>TOTAL</b>	<b>1,488</b>

**CORRECTION**

In the last issue of the *The ERFA Reporter* in the article "Academic Senate Update" the date in the following sentence in the original was in error and should have read as follows: "Because Federal Law PL 99-952 will remove maximum age limits for professors and teachers on January 1, 1994, the Senate urged the CFA and campuses to revise policies to conform."

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