

IN THE SUPREME COURT OF THE STATE OF ALASKA

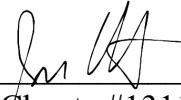
PETER METCALFE, Individually)
and On Behalf of All Others Similarly)
Situating,)
)
Appellant,)
)
vs.)
)
)
STATE OF ALASKA)
)
Appellee.)
_____)

Supreme Court No. S-17157
Superior Court No. 1JU-13-00733 CI

APPEAL FROM THE SUPERIOR COURT
FIRST JUDICIAL DISTRICT AT JUNEAU
THE HONORABLE KEVIN G. MILLER, JUDGE

BRIEF OF APPELLANT
PETER METCALFE

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The State of Alaska, this _____
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AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Constitution Article XII, § 7. Retirement Systems

Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

AS § 14.25.062 Reinstatement indebtedness [Repealed June 30, 2010]

A member who has received a refund of contributions in accordance with AS 14.25.150 forfeits corresponding credited service under AS 14.25.009 - 14.25.220. A member may elect to reinstate credited service associated with the refund by repaying the total amount of the refund. If an election is made under this section, an indebtedness to the plan in the amount of the total refund shall be established. Compound interest at the rate prescribed by regulation shall be added to the reinstatement indebtedness from the date of the refund to the date of repayment or the date of retirement, whichever occurs first.

AS § 14.25.150(a) Refund upon termination

(a) Except as provided in (b) of this section, a terminated member is entitled to a refund of the balance of the member contribution account. A member is not entitled to a refund of supplemental contributions except as provided in AS 14.25.160(a).

AS § 14.25.150(d) Refund upon termination [June 30, 2010 to present]

(c) A member who has received a refund of contributions in accordance with this section forfeits corresponding credited service under AS 14.25.009-14.25.220.

AS § 39.35.200(a)

(a) Except as provided in (c) of this section, an inactive employee, not on leave-without-pay status or layoff status, is entitled to receive a refund of the

balance of the employee contribution account.

AS § 39.35.200(d) [June 30, 2010 to present]

(d) An employee who receives a refund of contributions in accordance with this section forfeits corresponding credited service under AS 39.35.095-39.35.680.

AS § 39.35.350 Reinstatement of Credited service [Repealed June 30, 2010]

(a) An employee who receives a refund of contributions in accordance with AS 39.35.200 forfeits corresponding credited service under AS 39.35.095 - 39.35.680.

(b) An employee may reinstate credited service associated with a refund by repaying the total amount of the refund. A former member who received a total refund of the former member's contribution account balance because of a levy under AS 09.38.065 or a federal tax levy may reinstate credited service in the same manner as an employee. Interest accrues from the date of the refund until repayment of the refund or retirement, whichever occurs first. Payments shall be applied first to accrued interest and then to principal.

(c) Any outstanding indebtedness that exists at the time an employee is appointed to retirement necessitates an actuarial adjustment to the benefits payable based on service reinstated under this section.

AS 39.35.680 Definitions (Excerpts)

(1) "active member" means an employee who is employed by an employer, is receiving compensation for seasonal, permanent full-time, or permanent part-time services, and is making contributions to the plan;

...

(10) "credited service" means the number of years, including fractional years, recognized for computing benefits that may be due from the plan;

(11) "deferred vested member" means an inactive member who meets the five-year credited service requirement to qualify for a retirement benefit;

...

(20) “former member” means an employee who is terminated and who has not received a refund from the plan or an employee on leave-without-pay status or layoff status;

...

(22) “member” or “employee”

(A) means a person eligible to participate in the plan and who is covered by the plan;

(B) includes

(i) an active member;

(ii) an inactive member;

(iii) a vested member;

(iv) a deferred vested member;

(v) a nonvested member;

(vi) a disabled member;

(vii) a retired member;

(viii) an elected public officer under AS 39.35.381;

(C) does not include

(i) former members;

....

(25) “non-vested member” means an active or inactive member who does not meet the five-year credited service requirement to qualify for a retirement benefit;

...

(43) “vested member” is an active member who meets the five-year credited service requirement to qualify for a retirement benefit.

Senate Bill No. 141 of 2005 (Excerpt)

Sec. 111. AS 14.25.061(c), 14.25.062; and AS 39.35.350 are repealed.

STATEMENT OF JURISDICTION

Appellant Peter Metcalfe appeals from the June 14, 2018 final judgment issued by Superior Court Judge Kevin G. Miller, *pro tempore*. This Court has appellate jurisdiction pursuant to AS § 22.05.010 and Appellate Rule 202(a).

PARTIES

The Appellant is Peter Metcalfe (“Metcalfe”) both individually and on behalf of the class of persons (“the Class”) who became Alaska Public Employees’ Retirement System (“PERS”) or Teachers’ Retirement System (“TRS”) members between January 1, 1961 and July 27, 2005, at some point, left PERS or TRS qualifying employment, received a refund of their retirement contribution to PERS or TRS, and did not return to PERS or TRS qualifying employment before June 30, 2010. The Appellee is the State of Alaska.

ISSUES PRESENTED

Alaska Constitution article XII, section 7 protects the requirements for eligibility for retirement benefits.¹ At the time they initially enrolled in PERS or TRS, AS 39.35.350 and AS 14.25.062 allowed Metcalfe and the Class to become statutory “former members” for a period of time while still being able to later meet the requirements for eligibility for the level of benefits offered to them at their initial enrollment in those systems. Did the superior court err in deciding: 1) that the repeal of AS 39.35.350 and AS 14.25.062 as applied to Metcalfe and the Class did not diminish or impair an “accrued benefit” protected by Alaska Const. Art. XII, section 7, and 2) that Metcalfe and the Class do not fall within the class of persons protected under Alaska Const. Art. XII, section 7 because they are “former members” rather than “members” as statutorily defined?

¹ See *Hammond v. Hoffbeck*, 627 P.2d 1052, 1058 (Alaska 1981).

STATEMENT OF THE CASE

This is the second appeal in this matter challenging the legislative repeal of two statutes that allowed “former members” of the Public Employees’ Retirement System of Alaska and the Teachers’ Retirement System to meet the requirements for eligibility for retirement benefits at the “Tier” level they previously qualified for based on their initial enrollment in those systems.

The State of Alaska maintains two public retirement systems, the Public Employees’ Retirement System (“PERS”) and the Teachers’ Retirement System (“TRS”). [Exc. 2]. For employees that joined those systems before July 1, 1996, both systems provided a defined benefit plan including health, disability, pension and other retirement benefits that depended on when a given employee first enrolled in PERS or TRS. [Exc. 2]. Over time, the level of defined benefits available to new members of these retirement systems decreased, splitting into two “tiers” of defined benefits, eligibility for which depended on when an individual first became a PERS or TRS member and a third tier that did not provide defined benefits. [Exc. 2-3, 13; R. 81-82]. Public employees who first joined those systems between January 1, 1961 and June 30, 1986 were eligible for a defined benefit plan commonly referred to as “Tier 1.” [Exc. 2, 13; R. 81-82]. Those who joined after June 30, 1986 but before June 30, 1996 were eligible for a defined benefit plan commonly referred to “Tier 2.” [Exc. 2, 13; R. 81-82]. Those who joined after June 30, 1996 were eligible for retirement benefits under “Tier 3.” [Exc. 3, 13; R. 81-82].

Appellant Peter Metcalfe (“Metcalfe”) enrolled in PERS in 1980 while working for the State of Alaska. [Exc. 4]. This made him eligible to receive the level of benefits later referred to as “Tier 1” upon his eventual retirement should he meet the other requirements for eligibility [Exc. 5.] The minimum requirement was that he earn five years of “credited service” within the system to be eligible to receive benefits from the system upon reaching retirement age.¹ Credited service was earned through employment with the State of Alaska,² or another qualifying employer.³ During qualifying employment, both the PERS member and their employer made contributions on the employee’s behalf to the system.⁴ At any point, after leaving PERS or TRS eligible employment, a PERS or TRS member was entitled to receive a refund of their portion of the contributions.⁵ The employer’s contributions on their behalf remained in the system. [Exc. 14]. After receiving the refund, the member was no longer statutorily defined as a “member” but rather as a “former member.”⁶

¹ See AS 39.35.370, AS 39.35.680(10) (definition of “credited service”).

² See AS 39.35.300.

³ See AS 39.35.310.

⁴ See AS 39.35.170, AS 39.35.270.

⁵ See AS 39.35.200, AS 14.25.150.

⁶ See AS 39.35.680(20) and (22).

At the time Metcalfe enrolled, AS 39.35.350 (and AS 14.25.062, the corresponding statute in TRS) provided that if he, or any other PERS member, accepted a refund of their contributions, he would forfeit his credited service, but had the option of reinstating that credited service if he returned to eligible employment in the future and repaid his refunded contribution with interest.⁷ Metcalfe accepted a refund of his PERS contributions in 1981 pursuant to AS 39.35.350. [Exc. 5, 16]. While AS 39.35.350 was law, Metcalfe could have returned to eligible employment after June 30, 1986, and, after repaying his refunded contributions, still be eligible to eventually retire at the Tier 1 level of benefits.⁸

On May 23, 2005, the Alaska Legislature passed Senate Bill 141 (“SB 141”) which “closed” Tiers 1, 2, and 3 to new members, and established new “defined contribution plans.”⁹ Employees who became members of PERS or TRS after July 1, 2006 were only eligible to participate in the new defined contribution plan set out under AS 39.35.700 - 39.35.990.¹⁰ AS 39.35.350 and AS 14.25.062 were repealed, effective June 30, 2010.¹¹ Individuals who had previously accepted a refund of their contributions

⁷ See AS 39.35.350.

⁸ See AS 39.35.350, Exc. 5, Exc. 16.

⁹ See Ch. 9, §§ 133, 149 FSSLA 2005

¹⁰ See AS 39.35.700, AS 39.35.720.

¹¹ See Ch. 9, §§ 133, 149 FSSLA 2005

thus had a five-year period in which to return to eligible employment and repay their refunded contributions before their previously credited service was permanently forfeited.

¹² No offsetting benefit was provided.¹³

In October 2012, Metcalfe received a response from the Division of Retirement of Benefits to a request he made regarding his PERS retirement benefits eligibility. [Exc. 5].

The letter stated in part:

Under the terms of SB 141 the provision that allowed members to reinstate service by repaying their refunded PERS contributions (Alaska Statute 39.35.350) was repealed effective July 1, 2010.

Since you received a refund of your contributions are not eligible to reinstate this service, any entitlement based on your prior PERS service is forfeit. [Exc. 5].

On June 27, 2013, Metcalfe filed a Complaint in Superior Court alleging that the repeal of AS 39.35.350 and AS 14.25.062 violated his rights and that of other similarly situated individuals protected by Alaska Constitution article XII, section 7. [R. 360-375].

The complaint was initially dismissed on statute of limitations grounds and Metcalfe appealed. [R. 251-273, R. 436]. On November 4, 2016, the Court issued its Opinion on the first appeal, dismissing Metcalfe's claims for contract damages but reversing and

¹² *See id.*

¹³ *See id.*

remanding for further proceedings as to Metcalfe's claim for declaratory judgment and injunctive relief.¹⁴

Following remand, on December 21, 2016, Metcalfe filed an Amended Complaint for Declaratory Judgment and Injunctive Relief (Exc. 1-11) and a Motion for Civil Rule 23(C)(1) Certification of Class Action (R. 121). The State filed its Answer to the amended complaint on January 27, 2017. [Exc. 12-21]. The State also filed a limited non-opposition to Metcalfe's motion for class certification on the same date. [R. 106]. The superior court issued an order on February 13, 2017, certifying the matter as a class action with the Class defined as follows:

Every person who became an Alaska Public Employees' Retirement System ("PERS") or Teachers' Retirement System ("TRS") member between January 1, 1961 and July 27, 2005 who, at some point, left PERS or TRS qualifying employment, took a refund of their retirement contributions to PERS or TRS, and did not return to PERS or TRS qualifying employment before June 30, 2010. [R. 92-93].

On July 19, 2017, Metcalfe served the State with a Rule 30(b)(6) deposition notice requesting that the State produce for deposition witnesses to speak on a number of topics regarding PERS, TRS, reinstatement, and Division of Retirement and Benefits policies and procedures regarding reinstatement. [Exc. 54-57]. On July 26, 2017, the State filed and served a Motion for Summary Judgment. [Exc. 22]. On July 28, 2017, Metcalfe filed a motion under Civil Rule 56(f) requesting that the superior court continue Metcalfe's

¹⁴ See *Metcalfe v. State*, 382 P.3d 1168 (Alaska 2016).

time to oppose the State’s Motion for Summary Judgment until thirty days after Metcalfe had conducted the previously noticed 30(b)(6) depositions. [Exc. 47-53]. The State filed an opposition on August 18, 2017. [Exc. 62-69]. Metcalfe filed his Reply on August 23, 2017. [Exc. 70-73]. On September 6, 2017, the superior court issued an order denying Metcalfe’s request for a continuance pursuant to Rule 56(f) (but granting an extension requested in the alternative due to previously scheduled travel). [Exc. 74].

On September 18, 2017, Metcalfe filed his Opposition to the State’s Motion for Summary Judgment with supporting affidavits. [Exc. 75-113]. On September 29, 2017, the State filed its Reply. [Exc. 114-129.] Oral argument was held on November 15, 2017. On May 10, 2018, the superior court issued a decision granting summary judgment. [Exc. 130-134]. The superior court found that 1) the protections of Alaska Const. Art. XII, § 7 did not apply to Metcalfe and the class because they are “former members” and not “members” as statutorily defined and that 2) the repeal of AS 39.35.350 did not diminish or impair an accrued benefit protected by Art. XII, § 7. [Exc. 132-133].

STANDARD OF REVIEW

A grant of summary judgment on a matter of law is reviewed de novo.¹⁵ In conducting de novo review, the Supreme Court adopts “the rule of law that is most persuasive in light of precedent, reason, and policy.”¹⁶

ARGUMENT

Alaska Constitution, article XII, section 7 protects against diminishment or impairment the requirements for eligibility for retirement benefits.¹⁷ When Metcalfe and the other members of the Class joined PERS or TRS, they had the option of fulfilling the credited service requirements to qualify for retirement benefits without continuously being a “member” of those systems as defined by statute. The provisions that granted reinstatement had the practical effect of allowing them to meet the requirements for eligibility to eventually receive benefits over a period of time that included accepting a refund of their contributions and being classified as a “former member” of those systems. Reinstatement thus provided an additional option for meeting the requirements of eligibility for retirement benefits, whether that was Tier 1, 2, or 3, that they qualified for based on their initial enrollment in PERS or TRS.

¹⁵ See *State v. Alaska Democratic Party*, 2018 WL 4041195 at *3 fn. 19 (Alaska 2018).

¹⁶ See *id.* (quoting *State v. Green Party of Alaska*, 118 P.3d 1054, 1059 (Alaska 2005)).

¹⁷ See *Hammond*, 627 P.2d at 1058.

Metcalf and other members of the Class's acceptance of a refund of their contributions and resulting statutory classification as "former members" did not extinguish their vested right in their level of retirement benefits created by article XII, section 7. At the time of their initial enrollment in PERS or TRS, the State offered a path to retirement at a given level of benefits that allowed for a period spent as a "former member." That path was only available to them because of their initial membership in PERS or TRS. Because the Class's right to the set of requirements they needed to fulfill to retire vested immediately upon enrollment, and the State offered a way to meet those requirements that allowed for a period of time spent as a "former member," that path to eligibility became part of the contractual relationship between the State and the Class protected by article XII, section 7. Accordingly, the Class's status as "former members" did not extinguish their vested rights under article XII, section 7 because the option to become a "former member" and still meet the requirements for eligibility was an integral part of those rights.

The superior court therefore erred in deciding that the Class is not protected by article XII, section 7 in this claim. The repeal of AS 39.35.350 and AS 14.25.062 effectively changed the requirements for eligibility for retirement benefits from what they were at the time that Metcalf and each member of the Class initially enrolled in PERS or TRS. That change was to their detriment, and as such the repeal violates article XII, section 7 of the Alaska Constitution.

I. The repeal of AS 39.35.350 and AS 14.25.062 as applied to the Class violates article XII, section 7 of the Alaska Constitution by changing the requirements for eligibility for retirement benefits by reducing the ways in which Metcalfe and the Class could meet those requirements.

Article XII, section 7 of the Alaska Constitution prevents the State from diminishing or impairing an individual's accrued benefits in the state's retirement systems.¹⁸ The right to a given level of benefits vest on employment and enrollment in such systems, rather than at the time of eligibility to receive those benefits.¹⁹ The protected "accrued benefits" of those systems are "defined broadly."²⁰ They may "arise by statute, from the regulations implementing those statutes, and from the [Division of Retirement and Benefits'] practices."²¹ Past cases have protected requirements for eligibility for benefits,²² the actuarial tables used in calculating benefits,²³ the method of

¹⁸ See *Hammond*, 627 P.2d at 1055-57.

¹⁹ See *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882, 886 (Alaska 2003).

²⁰ See *id.* at 884-85.

²¹ See *McMullen v. Bell*, 128 P.3d 186, 190-91 (Alaska 2006).

²² See *Hammond* at 1058.

²³ See *Sheffield v. Alaska Public Employees' Ass'n*, 732 P.2d 1083, 1089 (Alaska 1987).

calculating benefits,²⁴ the “security and integrity of the funds available to pay future benefits,”²⁵ and the level of health care coverage provided.²⁶

In determining whether an accrued benefit has been diminished or impaired, this Court has stated that “the form of the change should be disregarded in favor of its impact.”²⁷ Article XII, section 7 thus protects “the practical effect of the whole complex of provisions” related to retirement.²⁸ When the State makes changes to one of its retirement systems after an employee enrolls in the system, “the employee may choose to accept the new system or may opt to keep the benefits in effect at enrollment.”²⁹ Alternatively, the State may make unilateral changes so long as it ensures that “any changes in the system that operate to a given employee’s disadvantage” are “offset by comparable new advantages to that employee.”³⁰

²⁴ See *Flisock v. State, Div. of Retirement & Benefits*, 818 P.2d 640, 643 (Alaska 1991).

²⁵ See *Municipality of Anchorage v. Gallion*, 944 P.2d 436, 445 (Alaska 1997).

²⁶ See *Duncan*, 71 P.3d at 888.

²⁷ See *Sheffield*, 732 P.2d at 1087.

²⁸ See *Metcalfe*, 382 P.3d at 1174 fn. 18 (citing *id* (quoting *Opinion of the Justices*, 303 N.E.2d 320, 327 (1973))).

²⁹ See *McMullen*, 128 P.3d at 191.

³⁰ See *Metcalfe*, 382 P.3d at 1174 (citing *Hammond*, 627 P.2d at 1057).

A. AS 39.35.350 and AS 14.25.062’s provisions for reinstatement of credited service allowed someone with membership in PERS or TRS to meet the requirements for eligibility to retire over a period of time that included time spent as a “former member.”

In *Hammond v. Hoffbeck*, one of the first cases interpreting article XII, section 7, this Court held that “the vested benefits protected by Alaska Const. Art. XII, section 7, necessarily include not only the dollar amount of the benefits payable, but the *requirements for eligibility* as well.”³¹ Prior to their repeal on June 30, 2010, the provisions in AS 39.35.350 and AS 14.25.062 that provided for reinstatement of credited service had the practical effect of allowing a person with membership in those systems to meet the requirements for eligibility to receive benefits over a period of time that included time spent as a “former member” as statutorily defined after accepting a refund of contributions. To do so, they had to fulfill two additional requirements relative to if they had not accepted the refund: they 1) had to return to PERS or TRS eligible employment, and 2) repay their refunded contributions with interest.³² However, once that was done, the availability of benefits to them was otherwise identical to if they had not accepted the refund.

When the Legislature repealed AS 39.35.350 and AS 14.25.062, it moved the provisions that called for forfeiture of credited service to AS 39.35.200(d) and AS

³¹ *Hammond*, 627 P.2d at 1058 (emphasis added).

³² *See* AS 39.35.350 [repealed June 30, 2010] and AS 14.25.062 [repealed June 30, 2010].

14.25.150(d), but did not similarly resurrect the reinstatement provisions.³³ With the exception of a five-year grace period, this change also applied to former PERS or TRS members who had already accepted a refund of their contributions.³⁴ In the absence of the reinstatement provisions, that same person who previously could be a “former member” for a period of time and still eventually retire at tier level they initially qualified for, now permanently forfeits their credited service and the corresponding tier level. Consequently, whether viewed as removing an option to satisfy the requirements, or viewed as adding an additional requirement that an individual never become a “former member” for any period of time, the repeal made it more difficult to meet the requirements for eligibility to receive retirement benefits.

B. Thee repeal of AS 39.35.350 and AS 14.25.062 as applied to the Class violates article XII, section 7 of the Alaska Constitution.

When Metcalfe and the members of the Class first enrolled in PERS or TRS, their rights to level of retirement benefits offered to them through those systems immediately vested.³⁵ That level of benefits was determined by the practical effect of the whole complex of provisions related to retirement,³⁶ including the requirements that needed to

³³ See Ch. 9, §§ 133, 149 FSSLA 2005.

³⁴ See *id.*

³⁵ See *Duncan*, 71 P.3d at 886.

³⁶ See *Metcalfe*, 382 P.3d at 1174 fn. 18.

be met in order to be eligible for retirement benefits.³⁷ For Metcalfe and each member of the Class, the requirements for eligibility could be met over a period of time that included receiving a refund of contributions and being a “former member,” so long as they eventually returned to eligible employment and repaid the refunded contributions with interest. Members of the Class relied on that option for meeting the eligibility requirements in making the decision to accept a refund of their contributions.³⁸

The repeal of AS 39.35.350 and AS 14.25.062 eliminated the provisions that provided for reinstatement of credited service. As applied to the Class, the repeal in effect made it more difficult for the Class to meet the requirements for eligibility to eventually receive the level of retirement benefits they qualified for at the time they enrolled in PERS or TRS to their detriment. The Class went from being able to meet the requirements for eligibility as set out when they initially joined, to being ineligible, and no offsetting benefit was provided in exchange for that loss.

The superior court therefore erred in deciding that the repeal of AS 39.35.350 and AS 14.25.062 as applied to Metcalfe and the Class did not diminish or impair an accrued benefit of PERS or TRS. The repeal Class removed a valid way of fulfilling the requirements for eligibility to retire at a given level of benefits that had existed at the time Metcalfe and the Class first enrolled in PERS or TRS. This Court should find that the the

³⁷ See *Hammond*, 627 P.2d at 1058.

³⁸ Exc. 104-105 (affidavit of V. Fate Putnam).

repeal of AS 39.35.350 and AS 14.25.062 as applied to Metcalfe and the Class violates article XII, section 7 of the Alaska Constitution.

II. “Former members” of PERS and TRS still have a contractual relationship with the State protected by article XII, section 7 because the offer of retirement benefits at the time they enrolled included the option to spend a period of time as a statutory “former member.”

The superior court erred in deciding that article XII, section 7 does not protect the Class because they are “former members” of PERS or TRS: “Because the the plaintiffs are not members, they have no contractual relationship with the state and thus the protections afforded under Article XII, §7 do not apply.³⁹ The superior court incorrectly equated “member” as statutorily defined with “membership” in section 7. The superior court also incorrectly concluded that there was no contractual relationship. The State’s offer of eventual retirement benefits when each member of the Class first enrolled included allowing the requirements for eligibility for those benefits to be met over a period of time that included time spent as a “former member” as statutorily defined. That eligibility requirement became part of the contractual relationship created by article XII, section 7 between the Class and the State. Because that contractual relationship allowed for the Class to spend some period of time as a “former member” and still meet the requirements for eligibility to retire at their initial tier level of benefits, Metcalfe and the Class’s status as “former members” did not extinguish the contractual relationship and does not deprive them of the protection of article XII, section 7.

³⁹ Exc. 132.

A. “Membership” in article XII, section 7 is determined by the substance of the relationship between the State and an individual, not by the statutory definition of “member.”

While a PERS or TRS “member” as *statutorily* defined has “membership” in those systems for purposes of article XII, section 7, it does not follow that someone who is not a statutory “member” cannot have constitutional “membership” in the sense of a contractual relationship regarding retirement benefits. The scope of constitutional protection is not limited by the term or label that the State uses in a statute, even if that term happens to be similar or identical to the term used in the constitutional language. Rather, as reflected in the Court’s reasoning in prior article XII, section 7 cases, “membership” has a functional definition: it is a generic term for when an individual is offered retirement benefits from a public retirement system. The following passage from *Duncan v. Retired Public Employees of Alaska, Inc.* describes how article XII, section 7 creates a contractual relationship and protects accrued benefits without ever using the term “member” (or “membership”):

Under [article XII, section 7], retirement benefits are regarded as an element of the bargained-for consideration given in exchange for an employee’s assumption and performance of the duties of his employment. An employee’s right to benefits under retirement systems vest on employment and enrollment in the system rather than at the time when an employee becomes eligible to receive those benefits. This means that system benefits offered to retirees when an employee is first employed and as improved during the employee’s tenure may not be diminished or impaired.⁴⁰

⁴⁰ See *Duncan*, 71 P.3d at 886 (internal citations and quotation marks omitted).

Article XII, section 7 creates a contractual relationship when retirement benefits are offered through a retirement system to a public employee in Alaska. That relationship exists whether the State calls that employee a “member,” “teammate,” or anything else. The creation of the contractual relationship is triggered by the substance of the interaction between the parties. The terms used by the State may be relevant to determining whether the relationship exists, but are not dispositive.

B. Once a contractual relationship is created by article XII, section 7, an individual’s right to the accrued benefits of that relationship are protected under the terms set by the relationship.

Because “membership” is determined by the substance of the exchange between the State and the employee, whether there is a contractual relationship at any given point in time is determined by the substance of the retirement benefits offered by the State at the time of enrollment. Once the section creates a contractual relationship between the state and a new employee, the employee’s rights to the benefits of that relationship immediately vest.⁴¹ As discussed, these vested rights are to the level of retirement benefits offered at enrollment as determined by the practical effect of the whole complex of provisions related to retirement, *including* eligibility requirements.⁴² In other words, a new employee is entitled to satisfy the requirements for eligibility for benefits in any manner allowed by the retirement system at the time of their initial enrollment. If the

⁴¹ *See, e.g., id.*

⁴² *See Metcalfe*, 382 P.3d at 1174 fn. 18, *Hammond*, 627 P.2d at 1058.

system allows the employee to be a “former member” as defined by the system and still ultimately satisfy the eligibility requirements, then that period is part of the contractual relationship.

Article XII, section 7 thus protects the benefits accrued through membership in Alaska’s public retirement systems--it does not limit itself to the accrued benefits of “members” as statutorily defined. If the benefit does not require the beneficiary to be a statutory “member,” then neither does article XII, section 7’s protection. And, the State will continue to owe performance under that contractual relationship, even if that performance is contingent on conditions that may never occur, or the performance is owed to an intended third-party beneficiary who was never a “member” of the system:

The terms “vested right” and “expectancy” are troublesome terms that have often been used to explain a decision without explaining it. The ideas behind them are so variable and uncertain as to make their use both deceptive and confusing. It is clear that the fact that rights are future and conditional does not prevent their recognition and protection; they are within the protection of the Constitutional provision against impairment of obligation by a State.

A contract creating such rights is legally effective according to its terms; if the payment of money is promised therein, *to either the promisee or a third party beneficiary*, the existence of a ‘contract right’ is not denied merely because the money is *payable in the future and only on the happening of an uncertain event or because some one has a power of termination or modification*. If a right has to be “vested” in order to be recognized and protected, these rights are vested. *It is immaterial whether the parties “expect” or “hope” that payment will take place.*⁴³

⁴³ *State v. Allen*, 625 P.2d 844, 848 (Alaska 1981) (quoting 3A A. Corbin, *Corbin on Contracts*, section 626, at 10-11 (rev. ed. 1960)) (emphasis added). *See also Ennen v. Integon Indem. Corp.*, 268 P.3d 277, 283, 84 (Alaska 2012) (intended third-party beneficiary to contract may enforce rights under the contract).

Thus, whether an individual has a contractual right enforceable under article XII, section 7 depends on the substance of the benefits offered at enrollment, not the individual's statutory status at the time of the claim. While in many instances, statutory status will be dispositive because the right to the benefit was extinguished by the rules of the system, that is not the case here.

Here, the provisions that provided for reinstatement were contained in the same, fairly short, statutes that would otherwise cause a forfeiture of credited service.⁴⁴ As discussed, the practical effect of the reinstatement provisions at the time each member of the Class first enrolled in PERS or TRS was to allow them to meet the requirements for eligibility for their tier level of retirement benefits while spending a period of time as a statutory "former member." By operation of article XII, section 7, this manner of satisfying the requirements of eligibility became part of the contractual relationship created upon their initial membership in PERS or TRS. Because becoming a "former member" did not extinguish their eligibility, it also did not extinguish their right to protection under article XII, section 7. They were still on a valid path that may lead to retirement that the State owed them a duty not to impair. Accordingly, the superior court erred in deciding that Metcalfe and the Class are not protected by article XII, section 7 because they are statutory "former members" of PERS or TRS.

⁴⁴ See AS 39.35.350 [repealed June 30, 2010], AS 14.25.062 [repealed June 30, 20110].

CONCLUSION

For all the foregoing reasons, Appellant respectfully requests that this Court reverse the decision of the superior court granting summary judgment in favor of the State of Alaska and hold that the repeal of AS 39.35.350 and AS 14.25.062 as applied to Metcalfe and the Class violates article XII, section 7 of the Alaska Constitution.