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IN THE SUPREME COURT FOR THE STATE OF ALASKA

PETER METCALFE, Individually and on Behalf of All Others Similarly Situated, Appellant, vs. STATE OF ALASKA, Appellee.	Supreme Court No. S-17157

Trial Court Case No. 1JU-13-00733 CI

CERTIFICATE OF TYPEFACE AND FONT SIZE

I hereby certify that Appellant's Reply Brief was written and printed in typeface Times New Roman with font size 13. This includes all text and footnotes.

Dated: Friday, January 25, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2019, a true and correct copy of Appellant's Reply Brief, Request for Oral Argument, and Certificate of Typeface and Font Size were served via US Mail and email on the following:

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

REPLY BRIEF OF APPELLANT PETER METCALFE

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Filed in the Supreme Court of
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Day of _____, 2019.
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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AS § 39.35.350 Reinstatement of Credited service [Repealed June 30, 2010]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

ARGUMENT

At issue is not whether reinstatement of credited service is, by itself, an "accrued benefit," it is whether the repeal of the statutes that provided for reinstatement diminished or impaired an "accrued benefit" generated through membership in PERS or TRS.[1] This is a subtle, but significant, distinction. The State's brief asks the Court to consider PERS' long-lived statutory mechanism providing for reinstatement of credited service in a vacuum. Its analysis excises reinstatement from the context of the rest of the retirement system and from its effects on the other components of that system. The State then concludes, after erroneously applying different principles of law, that reinstatement of credited service, considered in a vacuum, is not a protected benefit.

A. The repeal diminished or impaired both the overall benefit of the system that Metcalfe and the Class initially entered and the value of the refund of contributions that they elected to receive.

The State's analysis is insufficient because this Court has long held that the Alaska Constitution protects the level of rights and benefits of public retirement *systems* as determined by the "practical effect of the whole complex of provisions" related to retirement.[2] In evaluating whether the repeal of AS 39.35.350(b) diminished or impaired an accrued benefit, the reinstatement provision cannot be considered divorced of its

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[1] *See, e.g.,* Appellant Br. at viv.

[2] *See Metcalfe v. State*, 382 P.3d 1168, 1174 fn. 18 (Alaska 2016) (citing *Sheffield v. Alaska Pub. Emps.' Ass'n*, 732 P.2d 1083, 1087 (Alaska 1987)).

context or its relationship to the other components of the retirement system. Considered in context, as discussed in Metcalfe's Opening Brief, the repeal of reinstatement impaired the choices available to Metcalfe and the Class at the time they first enrolled in PERS to satisfy the requirements to retire at a certain level of benefits.

Relatedly, the repeal also diminished the value of the refund of employee contributions that Metcalfe and the Class received. The ability to elect to receive refund of employee contributions is itself a benefit of the system because it is a form of deferred compensation.[3] There is a substantial difference between the decision to elect to receive a refund of employee contributions when the corresponding forfeiture of credited service is permanent and irrevocable versus that decision when there is a mechanism, in the same statute, to reinstate that credited service. Chiefly, in the latter case, the election is neither permanent nor irrevocable, and is therefore more valuable. Thus, from a practical standpoint, the repeal immediately diminished the value to Metcalfe and the Class of a) having enrolled in PERS (or TRS) at a specific point in time and accruing credited service, and b) having elected to receive a refund of their employee contributions.

B. Electing to receive a refund of employee contributions did not extinguish the contractual relationship between the Class and the State.

In evaluating the State's contention that AS § 39.35.350(a)'s provision for forfeiture of credited service completely extinguished the article XII, section 7

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[3] *See* Appellee Br. at 18 ("Once a former member left state employment, the former member received all compensation—deferred or otherwise—that the former member was entitled to receive.")

contractual relationship between a member of the Class and PERS (or TRS), one must consider that for decades it was the very next paragraph in that section—AS § 39.35.350(b)—that provided a mechanism for reinstatement of that credited service.[4] As this Court has recognized, benefits protected by article XII, section 7 are defined broadly and can "arise by statute, from the regulations implementing those statutes, and from the [Division of Retirement and Benefits'] practices."[5] Although the State asserts that reinstatement was only "a way for the State to entice individuals with state experience to return to public service,"[6] in practice, it was reasonable for PERS members, active, inactive, and former, to regard it as a feature of the system, and rely upon in making their decisions regarding their careers and retirement.[7] The reasonableness of their reliance on it was only reinforced by the continued, decades-long availability of that statutory mechanism, and lack of any temporal limitations in the statute on its use.

It cannot be said, therefore, that Metcalfe and each and every member of the Class intended to permanently "abandon" any relationship with PERS by electing to receive a refund of their employee contributions.[8] Their decision, and the legal consequences of

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4 *See* AS § 39.35.350(a), (b) [repealed June 30, 2010].

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

6 *See* Appellee Br. at 10.

7 Exc. 104-105.

8 *See, e.g.,* Appellee Br. at 13 ("They left state employment and abandoned the State's retirement systems.")

that decision, have to be evaluated in the context of the presence of a mechanism to reinstate the forfeited credited service in the very next paragraph of the statute. As argued in Appellant's Opening Brief, because electing to receive a refund did not render Metcalfe and the Class ineligible to eventually retire at their initial tier service level, the article XII, section 7 contractual relationship between the State and the Class continued. The State continued to owe a duty to allow reinstatement of credited service if that "former member" returned to eligible employment and repaid their refunded contributions.

C. Alaska's protection of the public retirement system benefits cannot be reduced to unilateral contract law.

The State relies heavily on a unilateral contract theory as the basis for article XII, section 7's protection in order to support its conclusions that 1) Metcalfe and the Class were not working towards retirement and therefore the State had no obligation to keep its offer of reinstatement open, 2) there was no consideration to support keeping its offer of reinstatement open, and 3) even if there was a contractual obligation to keep the offer open as an option, the Class failed to accept the offer within a reasonable time.

This Court has never analyzed article XII, section 7's protections through the lens of a unilateral contract theory. The State relies entirely on an Oregon case, *Moro v. State*, for its analysis under that theory, interchanging Oregon's Public Employee Retirement

System with Alaska's.[9] Given this reliance on another State's case law, it is should come as no surprise that it is a poor fit when applied to Alaska.

The State's analysis cannot meaningfully distinguish "inactive members" from "former members" for purposes of determining whether the individual is "attempting to complete the acceptance."[10] By definition, neither are employed by the State.[11] The sole distinction is that "inactive members" have not elected to receive a refund of their employee contributions whereas "former members" have.[12] But if "non-vested," that is, without five years of credited service in the system,[13] both would have to return to public employment in order to obtain "vested" status.[14] Yet under the State's argument, the "inactive member" could remain inactive for thirty years and vest at the same tier service level, while the former member could not, and the State argues that it would be per se unreasonable for them to do so. At the same time, under the State's argument, because the "inactive member" is a statutory "member," the State cannot diminish or impair their retirement benefits.

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9 *See* Appellee Br. at 13-15, fns. 41-50 (citing to 351 P.3d 1, 21, 35 (Or. 2015)).

10 *See* Appellee Br. at 16.

11 *See* AS 39.35.680(20), (21).

12 *See id.*

13 *See* AS 39.35.680(25).

14 *See* AS 39.35.680(43).

The difference in outcome cannot be answered by treating the contractual relationship protected by article XII, section 7 as a unilateral contract. If the inactive member receives unlimited time to complete performance, so should the former member who took a refund with the expectation that they would be able to complete performance after reinstatement in the future. But, as the State also argues, unilateral contract principles generally does not give parties an unlimited amount of time in which to complete performance.

What this tension demonstrates is that article XII, section 7 operates as set forth by this Court interpreting and applying Alaska law, not under an alternate unilateral contract theory of public retirement benefits. As this Court has consistently held since *Hammond*, the right to benefits vests at the time of enrollment, not at the time of eligibility to receive those benefits. And it is the practical effect of the whole complex of provisions related to those benefits that is protected. An "inactive member" is thus protected because the system at the time that inactive member enrolled provided that the inactive member would retain credited service. Similarly, the system at the time that Metcalfe and the Class enrolled provided that electing to receive a refund of their employee contributions would not permanently forfeit their credited service. For this reason, the State's arguments regarding unilateral contract theory should be rejected.

D. Article XII, section 7 protects vested interests in benefits *generated by membership* in a public retirement system; that the Class are statutory "former members" does not exclude them from protection if they retain a vested right.

The State erroneously asserts that plain language of article XII, section 7 limits its protection to "members" of public retirement systems as statutorily defined. As discussed in Appellant's Opening Brief at 15-18, the key determination for whether an individual has standing to claim article XII, section 7 protection is whether they have a vested right to a benefit *generated* by membership in the State's public retirement systems.[15] As this Court quoted with approval in *State v. Allen*: "A contract creating [vested] rights is legally effective according to its terms[.]"[16] A right in such a contract can vest even if the benefit to be received is conditional or uncertain.[17] If a benefit is generated by membership in a public retirement system and the benefit, by its terms, does not require continued statutory "member" status, then neither does article XII, section 7's protection.

The State's proposed limitation would also improperly exclude from protection third-party beneficiaries whose rights to a benefit have vested.[18] Accordingly, the Court should reject the State's proposed statutory "member" limitation. As previously

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15 *Cf. Hammond*, 627 P.2d at 1059 ("Appellants argue that death benefits are in the nature of bequests and that, therefore, survivors' interests, like the interests of heirs and legatees, do not vest until the death of the party whose membership in PERS *generated* the benefits.").

16 *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)).

17 *See id.*

18 *See id. 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).

discussed, whether the Class have a vested interest generated by their membership in PERS or TRS determines whether article XII, section 7 applies. Their statutory status as "members" or "former members" is not dispositive.

E. Article XII, section 7 protects the accrued benefits generated through membership in public retirement *systems*, not just the "retirement" benefits of those systems.

The State also argues that reinstatement is excluded from article XII, section 7 protection because it is an "employment benefit" rather than a "retirement benefit."[19] In the State's view, it is irrelevant whether reinstatement is provided for as part of the PERS statutes because it is not a benefit offered to retirees "during their retirement."[20] But the State subsequently discusses *Hammond v. Hoffbeck*'s holding that occupational disability and death benefits, and the eligibility requirements for those benefits, are protected by article XII, section 7.[21] Neither can be considered a benefit offered to retirees "during their retirement." To the contrary, they are more accurately characterized as employment benefits because they are essentially a form of insurance that is only relevant if there is a catastrophic event while the individual is actively employed, not when they have retired.[22]

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19 *See* Appellee Br. at 10-11.

20 *See* Appellee Br. at 10-11, 11 fn. 28.

21 *See* Appellee Br. at 16. *See Hammond*, 627 P.2d 1052.

22 *See Hammond* at 1059.

As this inconsistency in the State's position helps illustrate, benefits of retirement *systems* are protected by article XII, section 7, not just the "retirement" benefits of those systems, or the benefits received by "retirees." This is reflected in both the text of article XII, section 7, which protects the accrued benefits "of these systems," and the cases, such as *Hammond*, applying it: "We therefore hold that *benefits* under PERS are in the nature of deferred compensation and that the right to such benefits vests immediately upon an employee's enrollment in that system." [23]

Alaska law does not carve up PERS into benefits related to retirement and benefits otherwise created by PERS but not related to retirement. They are all benefits of the system. For this reason, the State's discussion of *Livingston v. Metropolitan Utilities District*, a Nebraska case applying Nebraska law regarding the United States Constitution's Contracts Clause is particularly inapplicable to Alaska: the long term disability insurance at issue there was not offered through a retirement *system*.[24] Occupational disability and death benefits are protected because they are benefits under PERS. So too should the option for reinstatement of credited service.

F. That an offsetting benefit be "comparable" in order to be reasonable under article XII, section 7 is a requirement, not a suggestion.

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[23] *See id.* at 1057.

[24] *See Livingston*, 692 N.W.2d 475 (Neb. 2005)).

The State's final, fallback argument is that even if the repeal of AS 39.35.350 repealed or diminished an accrued benefit protected by article XII, section 7, there is no requirement that the State provide a *comparable* offsetting benefit. This is contrary to settled law in Alaska. There is no question that an offsetting benefit must be "comparable" in order to be reasonable.[25] The State's argument that a "comparable" offsetting benefit is unnecessary when a benefit protected by article XII, section 7 is diminished should be rejected.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Appellant's Opening Brief, Peter Metcalfe on behalf of himself and the Class of individuals similarly situated, respectfully requests that the decision of the superior be reversed.

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[25] *See, e.g. Hammond*, 627 P.2d at 1058 ("the fact that rights in PERS vest on employment does not preclude modifications of the system; that fact does, however, require that any changes in the system that operate to a given employee's disadvantage must be offset by *comparable* new advantages to that employee." (emphasis added)); *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882, 886 (Alaska 2003) ("[B]enefits can be modified so long as the modifications are reasonable, and one condition of reasonableness is that disadvantageous changes must be offset by *comparable* new beneficial changes." (emphasis added)).