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January 16, 2004

Via Facsimile (503) 725-5709 and Certified Mail

Chancellor Richard Jarvis
Office of the Chancellor
Oregon University System
P. O. Box 751
Portland, OR, 97207-0751

Re: Optional Retirement Plan - Failure to Pay Wages
Our File No.: 10086-00

Dear Chancellor Jarvis:

I. Introduction

This office represents the Association of Oregon Faculties (“AOF”) in regard to recent changes by the Oregon University System (“OUS”) to retirement account contributions of Optional Retirement Plan (“ORP”) members. It appears that the OUS has reduced its employer contribution to ORP members by as much as 7.44 percent. Please be advised that this reduction in payments is in violation of ORS 243.800. Therefore, the OUS is currently failing to pay wages due to its employees under ORS 652.120 *et seq.* We demand on behalf of all ORP members that the OUS pay all amounts due to these members within fourteen days. Otherwise, we will pursue litigation over this matter. Following is our analysis.

I. Background

A. ORP Contributions

The legislature created the Optional Retirement Plan under ORS 243.800 for certain academic and administrative higher education employees.¹ Under that provision, the Board of Higher Education may create an Optional Retirement Plan as an alternative to membership in the Public Employees Retirement System (“PERS”). The statute allows PERS members to make an election to participate in the plan. ORS 243.800(9) requires the OUS to contribute monthly to the

¹This language has been left relatively unchanged since this provision was enacted in 1995 in HB 3395.

Optional Retirement Plan, “a percentage of salary of each employee participating in the plan equal to the percentage of salary that would otherwise have been contributed as an *employer contribution*, on behalf of the employee to the Public Employees Retirement System if the employee had not elected to participate in the Optional Retirement Plan.” (Emphasis added). Thus, contributions under the Optional Retirement Plan are dictated by the employer contribution that would have been made if the employee remained a member of PERS. The Optional Retirement Plan in effect functions as a defined contribution plan, whereby that contribution is dictated by the employer contribution required as if the employee were a member of PERS.

B. Lump Sum Unfunded Actuarial Liability (“UAL”) Payments

Under OAR 459-009-0084, PERS has established procedures to allow for employers to make lump sum payments to cover unfunded actuarial liabilities (“UALs”). A UAL is the excess of the actuarial liabilities for future retirees over the fair market actuarial value of employer contributed assets. Employers, including the State, are allowed to make payments on those liabilities before they are due through a “side account” mechanism. In effect, this allows an employer to refinance this debt obligation through its bonding powers. Under OAR 459-009-0084, any payment which is not regularly scheduled, that is not paid as a percentage of salary, and that is made for the express purpose of reducing the UAL, is considered a lump sum UAL payment. That side account is held by PERS for the benefit of the employer and enjoys a preferential status in that it receives earnings of the fund in general, but is only subjected to reductions for administrative expenses and for reserve account payments. Payments are then made out of this lump-sum account to the employer contribution account for that employer once a year. The amount of these payments is determined by the PERS actuary on an annual basis. Under these rules, these payments are treated as pre-funded contributions for the payment of obligations of the employer under ORS Chapter 238. Thus, in effect, these payments from the side account are treated as employer contributions. The only difference between these contributions and ordinary contributions is that the former is distributed from the employer’s lump sum side account, while the latter come from the employer’s general fund. The rule specifically provides that these payments are not to be treated as a reduction of the employer’s contribution obligations but rather as a contribution to satisfy that obligation.

C. Ballot Measure 29

In November 2003, the State of Oregon decided to take advantage of the lump-sum UAL payments option. The legislature referred and the voters passed Measure 29. That measure allowed the State of Oregon to borrow two billion dollars to fund the State’s unfunded actuarial liabilities. That two billion dollars was borrowed by the State of Oregon and placed into a side account as a lump-sum payment to prepay unfunded actuarial liabilities pursuant to OAR 459-009-0084. As a result of this lump-sum payment, the additional funds required from the State to satisfy its required contribution have been reduced. As a result, the employer contribution rate has been reduced in an amount corresponding to the amount that has been prepaid from this side account. According to the OUS, it was notified by PERS that its employer contribution, which had been 11.31 percent for Tier One members, will be dropped to 3.71 percent. Similarly, Tier Two members whose rate had been 11.71 percent of their salary would be 4.27 percent. According to OUS, because of this prepayment contribution, and because the rate has dropped as a result of this prepayment, it is only obligated to pay the rate required by PERS. In effect, OUS has taken the position that the pre-payment amount is not to be considered an “employer contribution” for purposes of ORS 243.800.

I. Violation of ORS 243.800 and ORS 652.120

OUS is under the impression that the two-billion dollar pre-payment by the State of Oregon to PERS is not considered an “employer contribution” under ORS 243.800. Therefore, according to OUS, it is only obligated to pay the employer contribution rate as set by PERS, regardless of any prepayments. However, this position is contrary to OAR 459-009-0084(10), which states that the UAL lump-sum payment “shall offset any pooled, unfunded actuarial liabilities and shall be treated as pre-funded contributions and additional assets for the payment of obligations of the employer under ORS Chapter 238, rather than as a reduction of those obligations.” Thus, under this regulation, the two-billion dollar contribution on behalf of state employees must be treated as a pre-funded “employer contribution.” The State of Oregon, in effect, has made a pre-payment on its obligations to its employees. In no way has that pre-payment changed the amount due for the benefits of its employees, as expressed as a total percentage of the employer’s payroll. The source of the monies which fund the employer contribution, ie. the side account versus the general fund, is irrelevant to the determination of the amount of the employer contribution.

Under ORS 243.800, the ORP plan requires that the Board contribute the percentage of salary of each employee participating in the plan, equal to the percent of salary that would otherwise have been contributed as an employer contribution on behalf of the employees to PERS. There can be no doubt that the OUS is required to make the same proportional “employer contribution” to ORP members as it has for PERS members. It has failed to do so.

Oregon wage statutes require that all wages be paid in a timely manner. Pension payments by an employer on behalf of an employee are considered wages for purposes of the Oregon wage statute (ORS 652.120 *et seq*). OUS’s failure to pay these wages by the designated monthly pay day constitutes a violation of this statute. We therefore demand that back wages be paid and any earnings that would have accrued on those wages also be credited to individuals’ accounts. Failure of the OUS to comply with this demand within 14 days will subject the state to penalty wages equal to full salary for all ORP members for 30 days from the date the payment is not made. If litigation is necessary, we will also seek an award of attorney fees.

I. Conclusion

In conclusion, based upon a reasonable interpretation of the applicable statutes and regulations, the OUS is violating Oregon statutes by failing to pay the full employer contribution rate for ORP members. If this office does not receive confirmation that the OUS will be paying the same proportional employer contribution to ORP members accounts as its has for PERS members, we will have no choice but to seek the assistance of the courts.

Sincerely,

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

Thomas K. Doyle

Chancellor Richard Jarvis

January 21, 2004

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