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Mr. Sean E. O'Day
General Counsel
League of Oregon Cities
1201 Court Street, N.E., Suite 200
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Dear Mr. O'Day:

You have asked me to examine two documents: A letter to Representative Tina Kotek from Deputy Legislative Counsel Marisa N. James, dated February 4, 2013, and a memorandum to Curtis Robinhold, Chief of Staff, Office of the Governor, from Assistant Attorney General Keith L. Kutler, Attorney-in-Charge, Tax & Finance Section, Oregon Department of Justice, dated February 5, 2013, copies of which you were kind enough to forward to me, and to offer brief comments respecting each. I have reviewed those documents. Both are concerned with the constitutional permissibility of limiting or eliminating the cost of living allowances - "COLAs" - - presently received annually by retired members of PERS. The documents draw different conclusions, both of which are understandable within the analytical task that each set for itself. My comments follow.

Legislative Counsel's Letter

Legislative Counsel (hereafter "LC") was asked specifically about the permissibility, in light of certain Supreme Court precedents, of limiting COLAs to the first $24,000 of annual retirement benefits. LC opines that limitations on COLAs, whether those due for presently retired members in PERS or for those members still presently working but who will be eligible to receive a PERS pension on retirement, probably are not permissible under a combined reading of *Hughes v. State of Oregon*, 314 Or 1 (1992), and *Strunk v. PERB*, 338 Or 145 (2005). I have had occasion recently to review each of those cases in detail for you, and I shall not repeat my analyses here. Suffice it to say that it is permissible to read those cases, and particularly *Strunk*, broadly and, from that broad reading, conclude that limiting COLAs to, for example, the first $24,000 of yearly benefits is impermissible. That is the conclusion reach by LC, and it can point to wording in both decisions that appears to support its reading of them. But LC's reading is not the only permissible reading.

Department of Justice Memorandum

Another (and, to me, somewhat more persuasive) reading of the cases, particularly *Strunk*, is found in DOJ's memorandum. There, DOJ points out (correctly) that *Strunk* was concerned with the provision for awarding COLAs in ORS 238.360(1) (bold and emphasis added), which is the generic authorization for COLAs. However, the *calculation* (and, therefore, the *amount*) of COLAs is governed by ORS 238.360(2) (bold and emphasis added) -- a subsection of the statute that the *Strunk* court did not directly purport to construe. It follows, DOJ reasons, that, while *Strunk* may stand for the proposition that *some level* of COLA must be awarded to all eligible retirees, there is no authoritative decision from the Supreme Court holding that the calculation can only be performed for all eligible retirees under a single formula. DOJ also argues, among other things, that legislative history of the statute and related provisions of the PERS act suggests the COLA authorization was not, in fact, intended to be a permanent part of the PERS contract at all (*i.e.*, that *Strunk* is wrongly decided in this respect), that "economic necessity" may justify alteration of the PERS contract, and that reform might be accomplished by changes to ORS 238.360(3), the "banking" provision (as DOJ calls it) of the COLA statute.

DOJ's most sweeping argument is that, in spite of the Supreme Court's contrary statement in *Strunk*, COLAs in fact are not a part of the PERS contract. That is a difficult argument, but it may be an intellectually justifiable one: DOJ's recitation of the history of COLAs and similar legislative additions to benefits does appear to bear the argument out.

Moreover, other, less sweeping DOJ arguments are attractive and could carry the day. As to reductions in COLAs, for instance, the best argument is that the legislature has amended the statutes in substantive ways in the past, proceeding as if the details of the COLAs (amount, timing, eligibility in the event of a drop or of only a minimal rise in the Consumer Price Index, and the like) are completely within the control of the legislature and can be changed from time to time. That is, legislative history indicates that those aspects of COLAs are not set in stone. (You will note that this argument is, in its essentials, an argument for a more limited consequence to the history of COLAs than the argument previously discussed.) Thus, "scaling back" COLAs for pensioners with larger pensions may be entirely permissible, because the *amount* of a COLA is a flexible detail of that part of the PERS system, not an immutable characteristic of it. (Further comfort on this front comes from the concurring opinion of Justice (as he then was) Thomas Balmer in *Strunk*, in which he criticized an all-or-nothing holding in an earlier opinion, *OSPOA*, and suggested that many parts of the PERS statutes were administrative details, not parts of the PERS contractual promise. That concurring opinion seems to me to indicate a certain receptiveness to arguments that would limit the scope of any holding that COLAs are a part of the PERS contract.)

A somewhat more narrow focus on the foregoing is the suggestion by DOJ that, whatever other parts of ORS 238.360 may be a part of the PERS contract, subsection (3) of that statute (the "banking" provision) is not such a part. That idea would have the statute eliminate "banking" entirely, and make the award of COLAs contingent on there being a positive rise in the cost of living index for each year in which a COLA is awarded. (A negative index would not lower the

basic retirement benefit, which already is fully earned.) This argument deserves fuller development.

In conclusion, I find both the documents that I reviewed to be thoughtful, well-written, and responsive to the questions that prompted them. I am more persuaded by the DOJ memorandum, because it appears to address the PERS system and its COLA aspect in a more comprehensive way. I hope these observations are of some assistance to you.

With best regards,

W. Michael Gillette

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WMG:bak