ATTORNEY GENERAL OPINION NO. 96-1

To: Mr. Jody B. Olson, Acting Chairman
Public Employee Retirement System of Idaho
607 N. Eighth Street
P.O. Box 83720
Boise, ID 83720-5518

Per request for Attorney General's Opinion

QUESTIONS PRESENTED

1. In the circumstances where a political subdivision requests to withdraw from PERSI, but continues in the same form as a qualified employing entity with the same employees, may the board allow the employer to withdraw from PERSI voluntarily, under Idaho Code § 59-1326?

2. If a political subdivision is allowed to voluntarily withdraw from PERSI under existent law or under any future legislation, is there a right for these current employees to continue to accrue membership credit in PERSI, *i.e.*, a right to future benefit accruals?

3. What fiduciary responsibility, if any, does PERSI have to preserve any rights to future benefit accruals should they exist?

CONCLUSION

1. Idaho Code § 59-1326 as presently written does not allow voluntary withdrawal from PERSI. There are no other statutory or non-statutory grounds that would allow voluntary withdrawal from PERSI by political subdivisions of the State of Idaho.

2. It does not appear that Idaho would recognize a right to future benefit accruals.

3. Although PERSI may have a fiduciary duty to challenge an invalid statute that interferes with the members' benefits, the proposed changes would not create any such direct interference. However, through its fiduciary responsibility to its members, PERSI would have standing to challenge the statute if PERSI chose to do so.

Question No. 1

The only statute providing for employer withdrawal from PERSI under any circumstances is Idaho Code § 59-1326, which requires that certain conditions be met in order for an employer to be eligible to withdraw from the system. The conditions stated in the question exclude any possibility for withdrawal eligibility under Idaho Code § 59-1326. In addition, there are no non-statutory grounds for withdrawal from PERSI.

Idaho Code § 59-1326 provides for withdrawal only when an employer has incurred complete withdrawal or partial withdrawal as defined in that section. Complete withdrawal occurs, under Idaho Code § 59-1326(2), when the political subdivision incurring withdrawal ceases to employ active members. The conditions stated in the question presented establish that the employer continues in existence and continues to employ active qualified members. The conditions for complete withdrawal cannot be met under these circumstances.

Partial withdrawal, defined in Idaho Code § 59-1326(3), occurs when a political subdivision's average membership in PERSI declines by more than twenty-five members and twenty-five percent of the average membership over the course of one fiscal year. A political subdivision that has continued as a qualified employing entity could not meet either of these conditions. Remaining employees would continue as active members of PERSI, and all additional employees hired during the prior fiscal year would become members of PERSI. The conditions for partial withdrawal therefore cannot be met under the circumstances stated in the question.

Question No. 2

Your next question concerns the legal ramifications of allowing local governmental units to voluntarily withdraw from PERSI. It might be more accurate and helpful to divide your question into two separate questions. First, is there a right to future benefit accruals? Second, if there is a right to future benefit accruals, does this right require that current employees of contracting employers be allowed to continue membership in PERSI? Regarding the latter question, as explained below, even in jurisdictions which clearly have held that there is a right to future benefit accruals, such right is not necessarily tied to a particular pension plan. Rather, the right is to a pension in general, whether it be the present pension system or an equivalent plan. Thus, even if there is a right to future accrual of benefits, this right does not necessarily mandate that the employees be allowed to remain in PERSI. The withdrawing entity might provide a pension plan with benefits substantially equivalent to PERSI which would protect the right to future benefit accruals.

With regard to the right to future benefit accruals, after extensive research it is the opinion of this office that Idaho law does not currently recognize such a right. Whether Idaho courts would expand and adopt the analysis of other jurisdictions which appear to recognize such a right is not easy to predict. However, current case law suggests that Idaho courts would not.

Traditionally, benefits under pension plans were treated in two radically different ways. Some jurisdictions treated such benefits as mere gratuities which could be changed or revoked at any time. Other jurisdictions considered the offer of a pension, once accepted, as an irrevocable contract which could not be modified without the express consent of the members, *i.e.*, a strict contract approach. Cohn, Public Employee Retirement Plans - The Nature of the Employees' Rights, University of Illinois Law Forum 32 (1968); and note, Public Employee Pensions in Times of Fiscal Distress, 90 Harvard Law Review 992 (1977).

More recently, courts have attempted to balance the interests of the state in having the ability to modify the pension plans to conform to changing conditions while protecting the reasonable expectations of the pension plan members. In order to accomplish this goal, several courts have adopted a sort of modified contract approach. *See* Allen v. City of Long Beach, 287 P.2d 765 (Cal. 1955); Dullea v. Massachusetts Bay Transportation Authority, 421 N.E.2d 1228 (Mass. App. Ct. 1981).

Modifications to public employee pensions in jurisdictions which have adopted some form of contract approach raise issues of breach of contract, and impairment of contract under clauses contained in art. I, § 10 of the U.S. Constitution, and Idaho Constitution art. 1, § 16. However, other jurisdictions have disregarded the contract approach, and instead examine public employee pension benefits under a property rights approach or the doctrine of promissory estoppel. Spiller v. Main, 627 A.2d 513 (Maine 1993); Pineman v. Oechslin, 488 A.2d 803 (Conn. 1985); and Christensen v. Minneapolis Municipal Employees Retirement Board, 331 N.W.2d 740 (Minn. 1983).

In Idaho, the courts have adopted, to some extent, the modified contract approach first enunciated in California. In Hanson v. City of Idaho Falls, 92 Idaho 512, 514, 446 P.2d 634 (1968), the Idaho Supreme Court rejected both the gratuity and strict contract approach:

> The better reasoned rule in most American jurisdictions today is that the rights of the employees in pension plans such as Idaho's Retirement Fund Act are vested, subject only to reasonable modification for the purpose of keeping the pension system flexible and maintaining its integrity. Since the employee's rights are vested, the pension plan cannot be deemed to provide gratuities. Instead, it must be considered compensatory in nature.

(Citations omitted.)

In Nash v. Boise City Fire Department, 104 Idaho 803, 663 P.2d 1105 (1983), the Idaho Supreme Court further clarified public employee pension rights in Idaho. In Nash, the plaintiff was a full-time paid fire fighter from 1953 to October 17, 1978. In 1978 the pension statute was amended to place a three percent cap on the amount of the increase or decrease of the cost of living adjustment. The question facing the court was whether the three percent cap applied to fire fighters retiring after the July 1, 1978, effective date of the amendment, "who earned benefits by virtue of service prior to that date." 104 Idaho at 803, 663 P.2d at 1105 (emphasis added).

The court stated that the "issue presented requires a determination of whether the level of a public employee's rights in a pension plan which has vested may be unilaterally altered by a subsequent legislative act." 104 Idaho at 804, 663 P.2d at 1106. The court in Nash quoted extensively from Dullea v. Massachusetts Bay Transportation Authority, *supra.* The court, quoting from Dullea, emphasized the problems underlying both the gratuity and strict contract theories:

> It is true that a few cases that adopt the label of "contract" have approached the terms of a retirement plan as they would a bond indenture, but closer to the realities is a view that "contract" protects the member of a retirement plan in the core of his reasonable expectations, but not against subtractions which, although possibly exceeding the trivial, can claim certain practical justifications. Attention should then center on the nature of these justifications in light of the problems of financing and administering these massive plans under changing conditions.

104 Idaho at 805, 663 P.2d at 1107.

Next, the Idaho Supreme Court, quoting Abbott v. City of San Diego, 332 P.2d 324 (Cal. Ct. App. 1958), stated, "it is an advantage or disadvantage to the particular employees whose own contractual pension rights, already earned, are involved which are the criteria by which modifications to pension plans must be measured." 104 Idaho at 806 (emphasis added). The Idaho Supreme Court, further quoting from a California decision in Betts v. Board of Admin. of Public Employees' Retirement System, 582 P.2d 614 (Cal. 1978), summarized the principles which must be considered by the courts in determining whether a modification is reasonable:

> An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. Such modifications must be

> reasonable, and it is for the court to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employee's pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.

(Citations omitted.)

The Idaho Supreme Court further noted that Dullea had concluded that California has developed more realistic guidelines for analyzing the rights of the public employees in their pensions. The court, again quoting from Dullea, stated, "an employee's rights to a pension will not vest until he has worked for a legally significant period of time in reliance on the belief that he will be protected by a pension." 104 Idaho at 807, 663 P.2d at 1109.

After setting forth these principles, the Idaho Supreme Court held that the rights of Nash were unquestionably vested, his having worked twenty-five years, the last fifteen of which included the period when the pension plan provided for a fluctuated formula free of the three percent cap. 104 Idaho at 808, 663 P.2d at 1110. Under these facts, the court held that the three percent cap should not be applied to Nash.

With Nash's approval of the approach adopted by California courts, there is an argument that Idaho would similarly adopt the California approach to the rights of future accrual of benefits in a like situation. This question has never been specifically addressed by Idaho courts. Subsequent to Nash, the California Supreme Court, in State of California v. Eu, 816 P.2d 1309 (Cal. 1991), clearly held that a public employee has a right to future accrual of benefits in a pension the same as or equivalent to the existing plan for as long as they are employed by the particular governmental entity. The decision in Eu was predictable, given earlier California decisions.

In Kern v. City of Long Beach, 179 P.2d 799 (Cal. 1947), which was cited with general approval by Nash, the court stated that "the right to a pension vests upon acceptance of employment." *Id*. at 801. The court in Kern further stated:

> An employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested

> right to a pension but that the amount, terms and conditions of the benefits may be altered.

Id. at 803. Thus, the court held that the plaintiff had a vested pension right and that the defendant city, by completely repealing all pension provisions, had attempted to impair its contractual obligations.

In Pasadena Police Officers Association v. City of Pasadena, 195 Cal. Rptr. 339 (Cal. Ct. App. 1983), the court further clarified the holding of Kern in respect to changes in plans which were prospective only. In Pasadena, the defendants contended that the amendments in question did not impair the vested contractual rights of the employees because the amendments purported to be prospective. The court rejected this argument, stating:

> Also inconsistent with defendants' theory is the Supreme Court's recent summary of the pension cases stating, "by entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer." This statement indicates the employee has a vested right not merely to preservation of benefits already earned pro rata, but also, by continuing to work until retirement eligibility, to earn the benefits, or their substantial equivalent, promised during his prior service.

Id. at 343 (citations omitted; emphasis added). In United Firefighters of Los Angeles City v. City of Los Angeles, 259 Cal. Rptr. 65 (Cal. Ct. App. 1989), the California Court of Appeals further stated, "upon acceptance of public employment one acquires a vested right to a pension based on the system then in effect."

Clearly, these cases at the very least suggested that California recognized a right to a pension once employment begins, which right includes the right to future accrual of benefits on substantially the same level as long as the employee works for the government entity. As stated above, any doubt as to the opinion of the California Supreme Court on the right to future accrual of benefits was erased in State of California v. Eu, *supra*. In *Eu*, the court was faced with a challenge to Proposition 140 which, in relevant part, stated that no other pension or retirement benefits shall accrue as a result of service in the legislature, such service not being intended as a career occupation. This same provision provided that it should not be construed to advocate or diminish a vested pension or retirement benefits which may have accrued under an existing law, but upon adoption of the act no further entitlement to nor vesting in any existing program shall accrue to any such legislator. Incumbent legislators challenged that section of the proposition, claiming that it was an impairment of their contractual rights.

The legislators argued that they were impliedly promised pension benefits substantially equivalent to those offered by the then-existing provisions of the pension system, and that these benefits included both the primary right to receive any vested pension benefits upon retirement, as well as the collateral right to earn future pension benefits through continued service on terms substantially equivalent to those then offered. *Id*. at 1331. The court, after citing to previous California cases (including some of those quoted above), concluded that incumbent legislators had a vested right to earn additional pension benefits through continued service. *Id.* at 1332. The court further held that "as we have previously discussed, the pension provisions of Proposition 140, which abruptly terminate an incumbent legislator's right to earn future pension benefits through continued service, must be deemed an impairment, not a mere 'modification' or 'adjustment' of the vested pension rights of incumbent legislators, whether or not they will enter a new term on or after November 6, 1990." *Id.* at 1333.

The court went on to hold that the federal constitutional contract clause would also likely protect the incumbent legislators in this situation, stating that "although the issue is not entirely free of doubt, we conclude that the foregoing federal cases would not withhold federal contract clause protection from incumbent state legislators who have acquired vested pension rights under state law." *Id.*

Therefore, in California, an employee's rights to a pension vest at the time of his or her employment. Thereafter, no modifications can be made to the plan which either affect earned or accrued rights or impair the ability of the employee to earn future benefits during continued service. The question then becomes whether Idaho courts, which have in the past looked favorably on the California approach, would continue to adopt the approach set forth in California.

The court in Nash was not faced with the question at hand. Rather, they were faced with an effect of legislation on earned and accrued benefits. Obviously, if Idaho courts continue to follow the California approach, the employees of withdrawing governmental entities would have a right to future accrual of benefits. Who might be liable for violating such a right, if recognized, is the subject of your final question, discussed below. However, McNichols v. Public Employee Retirement System of Idaho, 114 Idaho 247, 755 P.2d 1285 (1988), strongly suggests that Idaho does not recognize a right to future accrual of benefits at the current time.

In McNichols, the plaintiffs had been classified by their respective employers as police officers. This classification entitled the plaintiffs to participate in the portion of PERSI which applies to police officer members. This section requires a police officer member to contribute more of his or her salary to the pension fund than a general member; however, police officer members are eligible for earlier retirement.

In 1985 the legislature enacted a new section, effective July 1, 1985, which specifically delineated various employee positions to be included within police officer status. Neither of the plaintiffs' positions were included in the statutory definition of police officer. The court in McNichols framed the issue as "whether the legislature can prospectively reduce the rate at which public employees earn retirement benefits." 114 Idaho at 248. The district court had held that the decision in Nash v. Boise City Fire Department, *supra*, prohibited such a modification. The Idaho Supreme Court reversed this decision and held that the legislature does have the ability to prospectively limit the rate at which members of PERSI earn retirement benefits.

The McNichols decision is important for several different reasons, including the court's characterization of the Nash decision. The court stated that the "3% cap could not be applied to Nash because the legislature cannot limit previously earned benefits." 114 Idaho at 249, 755 P.2d at 1287 (emphasis added). The court went on to state that the issue of "whether the state can reduce the rate at which the employees *earn* retirement benefits" was not addressed in Nash. 114 Idaho at 250, 755 P.2d at 1288. It is also important to note that Justice Huntley, who authored the Nash opinion, dissented in McNichols, stating that the holding of the court conflicted with the Nash v. Boise City Fire Department decision.

The McNichols opinion refuses to extend the Nash decision to the future rights of employees in PERSI. The Nash decision requires an analysis of whether the modifications to the plan are reasonable and necessary to protect its integrity if such modifications impair the vested rights of the plan members. However, the McNichols court did not engage in any such analysis, but summarily stated that the legislature has the right to limit the rate at which employees earn future benefits. This strongly suggests that the court did not view a public employee's right to future pension benefits as vested. Rather, the legislature is free to diminish those future benefits as it deems appropriate. Otherwise, the court would have engaged in the analysis enunciated in Nash, because the modification in McNichols, at the very least, diminished the future benefits necessitating such an analysis.

The holding in McNichols puts Idaho in direct conflict with Pasadena Police Officers Association, *supra*, and United Fire Fighters of Los Angeles City, *supra,* which clearly held that the impairment must pass the reasonableness test regardless of whether it is purported to be prospective only. Such a distinction is a good indicator that Idaho is unwilling to extend the contract approach adopted in Nash as far as California did. Instead, the McNichols decision appears to be more in line with a federal district court decision in Maryland State Teachers Association v. Hughes, 594 F. Supp. 1353 (D. Md. 1984), wherein the court stated:

> A very important prerequisite to the applicability of the contract clause at all to an asserted impairment of a contract by state legislative action is that the challenged law operate with retrospective, not prospective, effect. No Supreme Court decision has been found in this court's research which has invalidated a non-retroactive state statute on the basis of the contract clause.

Id. at 1360-61.

Examining the challenged modification under the federal contracts clause, the court in Maryland State Teachers Association stated that the challenged legislation did not operate to deny vested (which they relate to retirees) or merely earned pension rights retroactively. *Id.* at 1363. The court, after quoting a Maryland statute (similar to Idaho's) which stated that a member of their retirement system who has rendered five or more years of creditable service has a vested right to pension benefits upon retirement, held:

> That is not to say that the entitlement to a specific dollar amount of pension benefits vests in the employee, but rather that the right to some benefits vest as they are proratedly earned. As demonstrated in *C. Frederick v. Quinn*, 35 Md. App. 626, 371 A.2d 724 (1977), the State has no "right to withdraw retroactively the pro rata pension benefits that have accrued" but the State may modify prospectively the amount of benefits.

Id. at 1363, n.6 (emphasis added).

The Maryland State Teachers Association case, which appears to reflect the holding in McNichols, was distinguished from the California approach in United Fire Fighters of Los Angeles City, s*upra.* In United Fire Fighters*,* the defendant relied heavily on Maryland State Teachers Association in arguing that the vested rights of the plaintiffs were not impaired. The court stated, "under Maryland law, future pension benefits vest as they are proratedly earned. This is contrary to California law." *Id*. at 76 (emphasis added).

The court in United Fire Fighters also quoted the Maryland State Teachers Association holding that "the challenged legislation does not operate to deny vested or merely earned pension rights retroactively." In reply, the court held, "[a]gain, this is contrary to California law." *Id.* at 76. This characterization by the California courts of Maryland State Teachers Association is instructive on Idaho law because of the similar holding of McNichols.

Also significant is the decision in Public Employees Retirement Board v. Washoe County, 615 P.2d 972 (Nev. 1980), which is factually similar to McNichols. The Nevada

legislature had removed certain positions from the definition of police officer, eliminating plaintiffs from the class allowed to participate in the police officer member portion of their public employee retirement system. The Nevada court reiterated its adoption of the "California approach." The court then held that such a modification was an unconstitutional impairment of the contract with those employees, contrary to the holding in McNichols.

Underlying both the McNichols and Maryland State Teachers Association decisions is the rationale that future pension benefits vest as they are proratedly earned. Otherwise, the McNichols court, under the requirements of Nash, would not have been able to arrive at its conclusion. Such a holding is a significant departure from the "California approach" that a public employee has a vested right in a pension the same as or equivalent to the one in effect as soon as he or she commences employment. Based on McNichols, it would appear that Idaho does not recognize a right of a public employee of a withdrawing governmental entity to future accrual of benefits.

However, we recognize that there is a difference between the ability to prospectively reduce the rate at which an employee earns retirement benefits and the elimination of any right to earn future retirement benefits. The Idaho courts may distinguish the legislature's ability to limit future benefits from the ability to eliminate future benefits. We also recognize that the employees in McNichols were improperly categorized as police officers in the first instance, as opposed to the employees in Washoe County. Although this fact is not relevant to the court's analysis of whether employees have a constitutional right to future benefit accruals, it could nonetheless have bolstered the apparent reasonableness of the changes to the plan. Similarly, although not determinative from a purely legal perspective, withdrawal legislation that is substantially equitable to participating employees may make the amended statutes less likely to be voided by the courts.

Certainly, under McNichols, it appears that if the local governmental entity is allowed to withdraw, that entity could prospectively limit the rate at which employees earn pension benefits, *i.e.,* provide a pension plan with less generous benefits, while protecting those benefits which have been earned and accrued under the PERSI system. We would, however, caution local governmental entities who may withdraw under future legislation that refusing to have a pension system in place upon withdrawal is risky, both because Idaho courts have not definitively addressed this issue and for the reason stated above.

In conclusion, it is the opinion of this office that Idaho courts do not currently recognize a public employee's right to future accrual of benefits. Given the Idaho Supreme Court's unwillingness to extend Nash in the McNichols decision, it would

appear that the court would not adopt the approach by the California court in regard to future accrual of benefits.[1]

Question No. 3

As discussed below, it is the opinion of this office that PERSI does not have a fiduciary duty to challenge the proposed statute. However, because PERSI would be charged with the responsibility of allowing political subdivisions to withdraw from the system, PERSI would nonetheless have standing to challenge the validity of any statute requiring that it allow such withdrawal. PERSI would therefore have standing to bring a declaratory judgment action seeking a judicial declaration of the validity of the statute before allowing any political subdivisions to withdraw from the system. Because the validity of the type of statute proposed has never been directly addressed by the Idaho courts, such an action may be the most prudent way to insure that such a withdrawal would be permitted by the Idaho courts prior to actually allowing employers to withdraw. It is also possible that PERSI could bring an original action in the Idaho Supreme Court seeking such a declaration.

The PERSI board has been vested with the "powers and privileges of a corporation, including the right to sue and be sued in its own name as such board." Idaho Code § 59-1305(1). Those powers and privileges are granted to the board as fiduciaries of the retirement fund with the obligation to "discharge their duties with respect to the fund solely in the interest of members and their beneficiaries." Idaho Code § 59-1301(2). Specifically, the board is to exercise its powers for the exclusive purposes of providing benefits to members and their beneficiaries and defraying reasonable expenses of administering the retirement system. Idaho Code § 59-1301(2)(a)(i)-(ii).

The scope and extent of any fiduciary responsibility on the part of PERSI to its members depends, in part, on the provisions of the retirement system, as provided by the legislature, then in place. *See* McNichols, 114 Idaho at 247, 775 P.2d at 1289. Idaho Code § 59-1302(d) specifically includes among PERSI's fiduciary duties "the responsibility to administer the retirement system in accordance with the provisions of the Idaho Code governing the system."

Although the Idaho courts have not addressed this issue, there is some authority for the proposition that PERSI's fiduciary responsibility to the system's beneficiaries includes the responsibility to challenge invalid statutes enacted by the legislature. In Wisconsin Retired Teachers Ass'n, Inc. v. Employee Trust Funds Board, 537 N.W.2d 400 (Wis. Ct. App. 1995), the Wisconsin Court of Appeals recognized that the trustees of a public retirement plan may have a fiduciary duty to the members of the plan to challenge an invalid statute that interferes with the members' benefits. *Id.* at 414-15. The court reasoned that, although the board has the duty to administer the trust account

according to the terms of the statutes governing the plan, enactment of invalid legislation places this duty in conflict with the trustees' responsibility to administer the plan for the benefit of its members.

However, the proposed changes to title 59, chapter 13, are distinguishable from all of the legislation that has been held invalid as an impairment of contract, discussed above, or otherwise unconstitutional or invalid as a breach of contract or governmental taking. In all of those cases, the statute enacted had a direct effect on the benefits of the plan members. The legislation at issue here would not, itself, directly affect any existing or future rights. The proposed changes would provide a mechanism for political subdivisions to elect to withdraw from the system in the future. No existing or future benefits are affected by the passage of such legislation. Even if the Idaho courts were to recognize a right to future benefit accruals, the enactment of the proposed legislation would not substantially impair that right. Such a right to future benefit accruals could not be substantially impaired until: (1) an employer actually withdraws from the system, and (2) that employer fails to provide a comparable pension system to its employees.[2]

In order to state an actionable cause of action for breach of a fiduciary duty against PERSI, an employee must establish not only that a right to accrue future benefits exists and that PERSI is obligated to safeguard that right, but also that PERSI breached that obligation and the employee has suffered actual damages as a result of PERSI's failure to discharge its duty. Jordan v. Hunter, 124 Idaho 899, 907, 865 P.2d 998, 1006 (Ct. App. 1993) (holding that damages are an essential element of action for breach of fiduciary duty). Similarly, under contracts clause analysis, the employee would be required to prove that an existing right of that employee has been substantially impaired by the passage of the legislation. *See* National Education Ass'n—Rhode Island v. Retirement Board of the Rhode Island Employees' Retirement System, 890 F. Supp. 1143, 1150 (D. R.I. 1995) ("If the contractual right has been impaired, the court must next determine whether that impairment has been substantial. If the impairment is not significant, the court's inquiry ends.").

Assuming that employees have a prospective right to continue earning retirement benefits that are comparable to those the employee received through PERSI, and further assuming that PERSI is obligated to protect that right, there could be no actionable breach of PERSI's duty until an employer actually withdrew from PERSI and the employee's prospective retirement rights were substantially damaged by the retirement system established by that employer. If the employer's ability to withdraw were conditioned on having a comparable retirement system in place or if employees were allowed to elect to remain members of PERSI, no such violation could take place. It would also be within the power of the legislature to place the burden of providing an adequate pension plan on the withdrawing employer.

Although PERSI would not be the breaching party in an action challenging the withdrawal of an employer, PERSI nonetheless would be the party charged by statute with allowing the employer to withdraw. As discussed above, although it is the opinion of this office that the proposed legislation would be upheld by the Idaho courts, this is a question of first impression, and there is a chance that the Idaho courts could hold that the proposed legislation is invalid. It may therefore be advisable for PERSI to seek, through a declaratory judgment action, a ruling that the statute is valid, and PERSI is therefore required to allow qualified employers to withdraw. By obtaining such a declaration prior to actually allowing employers to withdraw, PERSI could avoid the logistical problems that could be created if the statute were declared invalid after a number of employers had already withdrawn from the system.

The Uniform Declaratory Judgment Act provides that the courts of this state have the authority to issue declarations of rights, status or other legal relationships, and further provides that declarations may be either affirmative or negative in form and effect. Idaho Code § 10-1201. Because several parties' rights would be determined by the ruling in the underlying declaratory proceeding, and the affect on those rights and obligations under the pension plan would be identical, this would be a proper case in which to seek a declaratory judgment. Idaho Mutual Ben. Ass'n v. Robison, 65 Idaho 793, 154 P.2d 156 (1945) (holding that district court had authority to pass on the constitutionality of the unemployment compensation statute under Uniform Declaratory Judgment Act).

Because of the nature of the declaration sought by PERSI, it is also possible that the action could be brought as an original proceeding in the Idaho Supreme Court under Idaho Appellate Rules 5 and 43. Under IAR 5, "[a]ny person may apply to the Idaho Supreme Court for the issuance of any extraordinary writ of other proceeding over which the Supreme Court has original jurisdiction . . . ." IAR 43 provides that the Supreme Court has original jurisdiction to issue "extraordinary writs." Under the Idaho Supreme Court's interpretation of IAR 43, the declaratory relief that PERSI would seek in an action brought under the amended statute would likely constitute an "extraordinary writ."

In Mead v. Arnell, 117 Idaho 660, 791 P.2d 410 (1990), the Idaho Supreme Court held that it had original jurisdiction, under art. 5, § 9 of the Idaho Constitution, to exercise original jurisdiction in a declaratory proceeding regarding the validity of a legislative repeal of certain rules issued under the Idaho Administrative Procedure Act. The court held that the nature of the relief sought by the plaintiffs established jurisdiction under the Idaho Constitution and the Idaho Appellate Rules, stating:

> In the instant case, the Board is requesting that the writ of prohibition be issued to nullify the legislative action taken pursuant to I.C. § 67-5218, and that the writ of mandate be issued to District VII. Our

> disposition of the constitutionality of I.C. § 67-5218 will be limited to a simple declaration of its constitutionality or lack thereof.

Id. at 664, 791 P.2d at 414. It is therefore possible that this action could be brought as an original proceeding before the Idaho Supreme Court, seeking a writ of prohibition enjoining implementation of the proposed withdrawal legislation and challenging its validity on the grounds discussed above. Although it is the opinion of this office that such legislation would not be declared invalid, this is clearly an unsettled issue under Idaho law.

If the Idaho Supreme Court were to decline to hear the declaratory action as an original proceeding, the complications inherent in waiting for an employee to challenge the validity of the amended statute would nonetheless be avoided by bringing a declaratory judgment action in district court prior to allowing any political subdivisions to withdraw under the proposed legislation.

AUTHORITIES CONSIDERED

1. United States Constitution:

Art. I, § 10.

2. Idaho Constitution:

Art. 1, § 16.
Art. 5, § 9.

3. Idaho Code:

§ 10-1201.
§ 59-1301(2).
§ 59-1301(2)(a)(i)-(ii).
§ 59-1302(d).
§ 59-1305(1).
§ 59-1326.

4. Idaho Court Rules:

Idaho Appellate Rule 5.
Idaho Appellate Rule 43.

5. Idaho Cases:

Hanson v. City of Idaho Falls, 92 Idaho 512, 446 P.2d 684 (1968).

Idaho Mutual Ben. Ass'n v. Robison, 65 Idaho 793, 154 P.2d 156 (1945).

Jordan v. Hunter, 124 Idaho 899, 865 P.2d 998 (Ct. App. 1993).

Mead v. Arnell, 117 Idaho 660, 791 P.2d 410 (1990).

McNichols v. Public Employee Retirement System of Idaho, 114 Idaho 247, 755 P.2d 1285 (1988).

Nash v. Boise City Fire Department, 104 Idaho 803, 663 P.2d 1105 (1983).

6. Other Cases:

Abbott v. City of San Diego, 332 P.2d 324 (Cal. Ct. App. 1958).

Allen v. City of Long Beach, 287 P.2d 765 (Cal. 1955).

Betts v. Board of Admin. of Public Employee Retirement System, 582 P.2d 614 (Cal. 1978).

Christensen v. Minneapolis Municipal Employees Retirement Board, 331 N.W.2d 740 (Minn. 1983).

Dullea v. Massachusetts Bay Transportation Authority, 421 N.E.2d 1228 (Mass. Ct. App. 1981).

Kern v. City of Long Beach, 179 P.2d 799 (Cal. 1947).

Maryland State Teachers Association v. Hughes, 594 F. Supp. 1353 (D. Md. 1984).

National Education Ass'n—Rhode Island v. Retirement Board of the Rhode Island Employees' Retirement System, 890 F. Supp. 1143 (D.R.I. 1995).

Pasadena Police Officers Association v. City of Pasadena, 195 Cal. Rptr. 339 (Cal. Ct. App. 1983).

Pineman v. Oechslin, 488 A.2d 803 (Conn. 1985).

Public Employees Retirement Board v. Washoe County, 615 P.2d 972 (Nev. 1980).

Spiller v. Main, 627 A.2d 513 (Maine 1993).

State of California v. Eu, 816 P.2d 1309 (Cal. 1991).

United Firefighters of Los Angeles City v. City of Los Angeles, 259 Cal. Rptr. 65 (Cal. Ct. App. 1989).

Wisconsin Retired Teachers Ass'n, Inc. v. Employee Trust Funds Board, 537 N.W.2d 400 (Wis. App. 1995).

7. Other Authorities:

Cohn, Public Employee Retirement Plans - The Nature of the Employees' Rights, University of Illinois Law Forum 32 (1968).

Note, Public Employee Pensions in Times of Fiscal Distress, 90 Harvard Law Review 992 (1977).

DATED this 26th day of January, 1996.

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[1] As stated above, other courts have adopted theories outside of the contractual approach to describe the public employee's rights to pension benefits, *i.e.,* the property and promissory estoppel approaches. Although one or both of these approaches may be superior to the contracts approach, there is no sign that the Idaho courts will adopt one of these approaches.

[2] Even if the Idaho courts were to hold that there is a right to future benefit accruals and that the proposed legislation would substantially impair that right, it is not clear the PERSI's fiduciary responsibilities would require PERSI to intervene on behalf of employees to protect that right. Such an implied right is not part of the trust that PERSI is charged with administering under statute, and insuring future benefit accruals is not an element of PERSI's fiduciary responsibility under the statute.