

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Merrimack, SS

Docket No. _____

Professional Fire Fighters of New Hampshire
43 Centre Street
Concord, NH 03301

New Hampshire Police Association
816 Elm Street, Box 128
Manchester, NH 03101

National Education Association-New Hampshire
9 South Spring Street
Concord, NH 03301

The State Employees Association of New Hampshire
SEIU Local 1984
207 North Main Street
Concord, NH 03301

Walter A. Madore, Jr.
23 Sanborn Road
Hampton, NH 03842

Laurie Aucoin
45 Schuyler Street, Unit 2
Manchester, NH 03102

Diana Richard
120 Fisherville Road, Unit 4
Concord, NH 03303

Diana Lacey
233 Union Road
Belmont, NH 03220

Megan Tuttle
37 Plymouth Drive
Concord, NH 03301

and

Richard D. Brabazon
260 McKinley Road
Portsmouth, NH 03801,
Plaintiffs

v.

The State of New Hampshire
33 Capitol Street
Concord, NH 03301

and

The New Hampshire Retirement System
54 Regional Drive
Concord, NH 03301,
Defendants

COMPLAINT

Now come the plaintiffs, by and through their counsel, Bernstein, Shur, Sawyer & Nelson, P.A. and Gottesman & Hollis, PA, and file this complaint against the New Hampshire Retirement System and the State of New Hampshire seeking equitable relief for the return of funds illegally and unconscionably possessed by the New Hampshire Retirement System as a result of the State's violation of the constitutional Contract Clause rights of the plaintiffs and the class of public workers they represent.

PARTIES

1. Plaintiff Professional Fire Fighters of New Hampshire (PFFNH) is a voluntary labor organization and the state affiliate of the International Association of Fire Fighters. PFFNH's members include firefighters and paramedics through New Hampshire, all or nearly all of whom are also members of the NHRS. The PFFNH is located at 43 Centre Street, Concord, NH. The PFFNH has paid and continues to pay the business enterprise tax, RSA 77-E, to the

state of New Hampshire. As a result, the PFFNH has an equitable right and interest in the preservation of an orderly and lawful government within the local jurisdiction and within the state and therefore, has standing to petition for declaratory relief without having to demonstrate that its personal rights were impaired or prejudiced. This plaintiff does not have a right to challenge the conduct at issue in this complaint pursuant to RSA chapter 541 or under any other statute.

2. Plaintiff New Hampshire Police Association (NHPA) is a non-profit organization. NHPA's members include full-time and retired certified law enforcement officers and non-sworn law enforcement employees, nearly all of whom are also members of the NHRS. NHPA's address is P.O. Box 526, Portsmouth, New Hampshire 03802.

3. Plaintiff National Education Association – New Hampshire (NEA-NH) is a voluntary labor association and the state affiliate of the National Education Association. NEA-NH's members include school teachers and certified professionals working in public schools throughout New Hampshire, all or nearly all of whom are also members of the NHRS. The NEA-NH is located at 9 South Spring Street, Concord, New Hampshire 03301. This plaintiff pays local property taxes to the city of Concord in which its headquarters are located because this plaintiff owns real estate that houses its headquarter offices. This taxpayer pays the statewide property tax for education. RSA 76. Additionally, this taxpayer has paid and continues to pay the business enterprise tax, RSA 77-E, to the state of New Hampshire. As a result, NEA-NH has an equitable right and interest in the preservation of an orderly and lawful government within the local jurisdiction and within the state and therefore, has standing to petition for declaratory relief without having to demonstrate that its personal rights were impaired or prejudiced. This plaintiff

does not have a right to challenge the conduct at issue in this complaint pursuant to RSA 541 or under any other statute.

4. Plaintiff State Employees Association of New Hampshire, SEIU Local 1984 (SEA) is a voluntary labor organization. SEA's members include thousands of employees of the State of New Hampshire, nearly all of whom are also members of the NHRS. SEA is located at 107 North Main Street, Concord, New Hampshire 03301. This plaintiff pays local property taxes through a holding company to the city of Concord in which its headquarters are located because this plaintiff's holding company owns real estate that houses its headquarter offices. This taxpayer similarly pays the statewide property tax for education. RSA 76. This taxpayer also has paid and continues to pay the business enterprise tax, RSA 77-E, to the state of New Hampshire. As a result, the SEA has an equitable right and interest in the preservation of an orderly and lawful government within the local jurisdiction and within the state and therefore has standing to petition for declaratory relief without having to demonstrate that its personal rights were impaired or prejudiced. This plaintiff does not have a right to challenge the conduct at issue in this complaint pursuant to RSA 541 or under any other statute.

5. Plaintiff Walter A. Madore, Jr. has been employed as a Group II firefighter with the Town of Hampton since April 24, 2007. Mr. Madore's contributions to NHRS were raised by 2.5% as a result of HB 2. Mr. Madore was an individual plaintiff in Merrimack County Superior Court Case Number 217-2011-CV-00385 and the appeal of said matter to the New Hampshire Supreme Court in Case Number 2013-0669. The appeal was successful and this plaintiff is entitled to relief in the form of the return of monies illegally

collected from his wages and conveyed to the New Hampshire Retirement System (“NHRS”) and currently possessed by the NHRS.¹

6. Plaintiff, Laurie Aucoin, has been employed with the State of New Hampshire since February 1, 2002. Ms. Aucoin’s Group I contributions to NHRS were raised by 2.0% as a result of HB2. Ms. Aucoin was an individual plaintiff in Merrimack County Superior Court Case Number 217-2011-CV-00385 and the appeal of said matter to the New Hampshire Supreme Court in Case Number 2013-0669. The appeal was successful and this plaintiff is entitled to relief in the form of the return of monies illegally collected from her wages and conveyed to the NHRS and currently possessed by the NHRS.

7. Plaintiff, Diana Richard has been employed with the State of New Hampshire since October 3, 2003. Ms. Richard’s Group I contributions to NHRS were raised by 2.0% as a result of HB2. Ms. Richard was an individual plaintiff in Merrimack County Superior Court Case Number 217-2011-CV-00385 and the appeal of said matter to the New Hampshire Supreme Court in Case Number 2013-0669. The appeal was successful and this plaintiff is entitled to relief in the form of the return of monies illegally collected from her wages and conveyed to the NHRS and currently possessed by the NHRS.

8. Plaintiff, Diana Lacey has been employed with the State of New Hampshire since April 15, 1994. Ms. Lacey’s Group I contributions to NHRS were raised by 2.0% as a result of HB2. Ms. Lacey was an individual plaintiff in Merrimack County Superior Court Case Number 217-2011-CV-00385 and the appeal of said matter to the New Hampshire Supreme Court in Case Number 2013-0669. The appeal was successful and this plaintiff is

¹ The appeal in case no. 2013-0669 is pending at the time of this filing. If the appeal is unsuccessful, this complaint will likely be withdrawn. Thus, Plaintiffs characterize the appeal as successful.

entitled to relief in the form of the return of monies illegally collected from her wages and conveyed to the NHRS and currently possessed by the NHRS.

9. Plaintiff, Megan Tuttle, was employed with the city of Keene from September 1, 1999 until July 1, 2008 when she became employed by the Pembroke School District. Ms. Tuttle has remained employed by the Pembroke School District through the present. Ms. Tuttle's Group I contributions to NHRS were raised by 2.0% as a result of HB2. Ms. Tuttle was an individual plaintiff in Merrimack County Superior Court Case Number 217-2011-CV-00385 and the appeal of said matter to the New Hampshire Supreme Court in Case Number 2013-0669. The appeal was successful and this plaintiff is entitled to relief in the form of the return of monies illegally collected from her wages and conveyed to the NHRS and currently possessed by the NHRS.

10. Plaintiff, Richard D. Brabazon, has been employed with the city of Portsmouth since November 8, 1986. Mr. Brabazon's Group II contributions to NHRS were raised by 2.5% as a result of HB2. Mr. Brabazon was an individual plaintiff in Merrimack County Superior Court Case Number 217-2011-CV-00385 and the appeal of said matter to the New Hampshire Supreme Court in Case Number 2013-0669. The appeal was successful and this plaintiff is entitled to relief in the form of the return of monies illegally collected from his wages and conveyed to the NHRS and currently possessed by the NHRS.

11. The State of New Hampshire is a governmental entity located at 33 Capitol Street, Concord, New Hampshire. The State adopted RSA 100-A:16, which was found to have illegally raised the retirement contribution rates for public workers.²

12. Defendant NHRS, a financially self-sustaining governmental entity of the State is a defined benefit pension plan qualified under § 401(a) of the Internal Revenue Code. The NHRS

² See footnote 1.

also pays medical subsidies to qualified retirees. NHRS provides benefits to its eligible members and their beneficiaries upon retirement, disability or death. NHRS has approximately 53,000 active members including firefighters, police officers, teachers, and state and local government employees. Approximately 22,000 individuals currently receive a monthly benefit from NHRS. NHRS is located at 45 Regional Drive, Concord, New Hampshire 03301.

JURISDICTION AND VENUE

13. This court has personal jurisdiction over the parties and subject matter jurisdiction pursuant to RSA 491:22 and 498:1.

14. Venue is proper because one or more plaintiffs reside in Merrimack County. See RSA 507:9

FACTS CONCERNING A CLASS ACTION

15. Each of the named plaintiffs seeks permission, through the filing of a separate motion and by these assertions in this Complaint, to represent a class of similarly situated class members. In seeking class certification, each of the named plaintiffs asserts that the members of the class are so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; that there are questions of law or fact common to the class which predominate over any questions affecting only individual members; that the claims of the representative parties are typical of the claims or defenses of the class; that these proposed representative parties will fairly and adequately protect the interests of the class; that a class action is superior to other available methods for the fair and efficient adjudication of the controversy; and, the named plaintiffs assert that the attorney for the representative parties will adequately represent the interests of the class.

FACTS

16. Some or all of the foregoing plaintiffs filed suit in the Merrimack County Superior Court challenging the constitutionality of changes made to RSA 100-A:16 regarding the rate at which public workers in New Hampshire are required to contribute to the NHRS. The suit was assigned docket number 217-2011-CV-00385. *Inter alia*, the plaintiffs in case number 217-2011-CV-00385 challenged certain increases in their mandatory rates of contribution as violative of the Contract Clause of the New Hampshire Constitution.

17. The Merrimack County Superior Court (McNamara, J.) partially ruled for the plaintiffs in case number 217-2011-CV-00385 finding that certain cognizable rights vested when the plaintiffs completed a minimum of ten years of creditable employment service. The plaintiffs and the State both appealed the court's ruling. The NHRS was not a party in the prior action, but participated as an *amicus* party before the New Hampshire Supreme Court.

18. The New Hampshire Supreme Court considered the matter on appeal and ruled in favor of the plaintiffs finding that their rights vested upon their becoming non-probationary employees.³

19. In the alternative, the New Hampshire Supreme Court considered the matter on appeal and ruled partially in favor of the plaintiffs finding that their rights vested upon the completion of ten years of creditable employment service.⁴

20. In either circumstance, the rulings of the New Supreme Court establish that the contribution rate increases imposed upon all or some of the plaintiffs in 2011 were illegal and unconstitutional.

³ See footnote 1.

⁴ See footnote 1.

21. The NHRS received the benefit of the illegal and unconstitutional rate increases each time a public worker had his or her wages reduced by the amount of the illegal and unconstitutional contribution rate increment which amount was then conveyed by the public employer to the NHRS. The amounts deducted from the wages of public workers to comply with the law that required the illegal and unconstitutional contribution rate increases is referred to herein as the "illegal increment" or "illegal increments."

22. The NHRS fully commingled the illegal increments with other funds it held and invested and benefitted greatly from those investments. For example, the NHRS investments for FY 2011 earned a 23 percent rate of return. FY 2011 Annual Report at 6. For FY 2012, the rate of return on NHRS invested assets was 0.9 percent. FY 2012 Annual Report at 6.⁵

23. The plaintiffs on their own behalf and as class representatives, where appropriate, have sought the return of the illegal increments plus reasonable interest and/or the analogous benefit of investment from the NHRS, but the NHRS has declined to return the illegal increments to the plaintiffs and members of their classes.

24. The decision of the NHRS to maintain the illegal increments and to refuse to return the illegal increments with interest or the benefit of investment is unconscionable.

25. The conduct of the NHRS has forced the plaintiffs to seek judicial assistance to secure a clearly defined and established right and is in bad faith. The conduct of the NHRS has unnecessarily prolonged this litigation through its oppressive, vexatious, arbitrary, capricious, or bad faith conduct.

⁵ The plaintiffs reserve the right to challenge whether the illegal increments were prudently invested and are not necessarily bound by the rates actually achieved by the NHRS on its investments.

26. The NHRS acquired the illegal increments at issue through the conduct of the State which considered and adopted laws that unconstitutionally increased the contribution rates at issue. Although it is an independently funded agency, the NHRS remains a state agency and is answerable to the State.

27. The State has not ordered the NHRS to return the illegal increments to the plaintiffs or the classes of public workers the plaintiffs represent or taken other actions that would result in the return of the appropriate funds that were illegally withheld from workers' wages and conveyed to the NHRS, such as, re-paying the illegal increments from general state funds.

28. The conduct of the State, or refusal by the State to act, has forced the plaintiffs to seek judicial assistance to secure a clearly defined and established right and is in bad faith. The conduct of the State has unnecessarily prolonged this litigation through its oppressive, vexatious, arbitrary, capricious, or bad faith conduct.

29. The plaintiffs here incorporate by reference and restate here all of the allegations contained in the final version of the amended complaints filed in Merrimack County Superior Court docket number 217-2011-CV-00385.

CAUSES OF ACTION

A. Unjust enrichment

30. The plaintiffs incorporate by reference all of the preceding paragraphs in this complaint.

31. The NHRS and/or the State, through the conduct alleged herein, have been unjustly enriched because it or they acquired the illegal increments as a result of the imposition of an unconstitutional contribution rate increase.

32. The NHRS and the State have had the benefit of the illegal increments and have unjustly benefitted thereby.

33. The conduct of the NHRS and the State has been unconscionable, in bad faith, vexatious, arbitrary, and/or capricious.

B. General Equitable Powers and Breach of Fiduciary Duties

34. The plaintiffs incorporate by reference all of the preceding paragraphs in this complaint.

35. This Court enjoys general equitable powers to do justice. The NHRS and its trustees are fiduciaries with respect to funds held by the NHRS for the benefit of current and future members.

36. Even though the NHRS, and through it, the State, are holding funds that were wrongly received by the NHRS due to unconstitutional acts of the State and its political subdivisions, the NHRS and the State refuse to return those funds to the plaintiffs and the classes of individuals they represent.

37. Further, the NHRS and the State have benefitted from their illegal receipt of the aforesaid funds.

38. In the interests of justice, this Court should order the NHRS and the State to restore to the plaintiffs and the classes of individuals they represent the illegally obtained funds and the benefits derived therefrom.

C. Requests for Relief

WHEREFORE, for the foregoing reasons the plaintiffs request the Court:

A. Certify this matter as a class action;

B. Order the NHRS and/or the State to disgorge, forfeit and return the illegal increments of contribution rates;

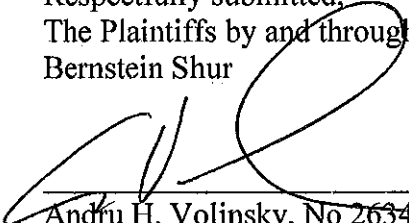
C. Order the NHRS and/or the State to disgorge, forfeit and return the benefits it or they received or should have reasonably received as a result of the possession of the illegal increments of contribution rates by the NHRS;

D. Order the NHRS and/or the State to pay the full and complete costs and attorney fees incurred by the Plaintiffs in this matter;

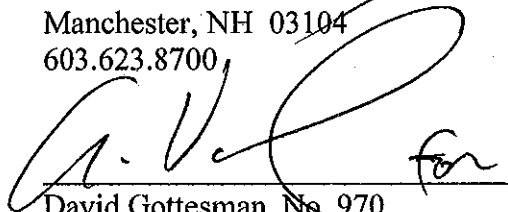
E. Order the NHRS and/or the State to pay pre-judgment and post-judgment interest; and

F. Order such other relief as is just and proper.

Respectfully submitted,
The Plaintiffs by and through their counsel,
Bernstein Shur



Andre H. Volinsky, No 2634
PO Box 1120
Manchester, NH 03104
603.623.8700



David Gottesman, No. 970
Gottesman and Hollis, PA
39 Pearl Street
Nashua, NH 03060
603.889.5959