

Retired State Employees Association



Serving Texas ERS Retirees Since 1977

May 2018

Volume XLI - Number 1

President's Message

Here it is May and we've already had a very busy year at RSEA! There's lots to talk about and you'll see some of it in this edition of our newsletter. In fact, we've been a little busier than usual, so we're a little behind our usual publication schedule – so, let me give you a few things to think about and make up for some lost time with a bonus-sized, eight-page newsletter.

First, we're well into our "2018 Year of Renewal" as announced at our annual membership meeting last October. Many of you will recall my often telling the story of how RSEA was created in 1977 as the Texas organization whose **singular commitment is to retired state employees**. Since 2018 is our 41st year, we're taking a step back and looking for new ways of doing things while remaining true to our commitment to our fellow state retirees, and future ones as well.

To do this, the Board has organized itself around three task forces: (1) Membership; (2) Benefits; and, (3) Marketing. Our collective goals are to:

- increase our ability to recruit and retain members of our association;
- enhance our capacity to educate our members about the benefits of state retirement and the need to protect them, as well as the benefits of membership in RSEA; and,
- develop best-practice methods for how to communicate with RSEA members as well as potential new members.

As part of our communications strategies, we are working on a refresh of the RSEA website and expect to roll that out by the time of our 2018 annual membership meeting scheduled for next **October 4**. As part of that refresh, we plan to be able to include the online ability to join RSEA and pay membership dues.

Second, since one of our priorities is to educate RSEA members regarding the value of retiree benefits, future newsletters will periodically include feature articles

providing special perspectives on various aspects of retiree benefits. Sometimes, this will focus on retirement annuities, and other times it may highlight issues about health insurance, Medicare, or other forms of insurance coverage. Our purposes here will be two-fold.

Primarily, we want to provide factual information on current or emerging issues or factors directly affecting our members' health and well-being, including realistic financial impacts on retirees. Also, this kind of information is generally the most effective when telling legislators about the status and prospects for retirees seeking security in their retirement years. While doing this, we will be looking for more opportunities to get this message out – for our members, legislators, and the public -- via our new website.

Accordingly, you will see on pages 4-6 of this newsletter our first such feature, titled "***How Safe Are Your ERS Pension Benefits?***" This article is written by one of your new Board members, Tim Sims, who took office in January. He provides some history, perspectives, and analysis, with a legal flavor, of pension statutes and court opinions in Texas. Any opinions expressed in the paper are Tim's own, and I commend the article to you for your consideration. As we approach another legislative session in January 2019, it will be helpful for all of us to have an understanding and appreciation for this kind of background.

Third, finally, and perhaps most important, speaking of the legislative process, RSEA continues to look for and support constructive ideas and ways to **get our pension fund back on an actuarially sound path on a long-term basis**. While progress has been made over the several recent legislative sessions – with the help of legislative leaders, ERS, and contributions of active state employees – more work remains. While there have been

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plan design changes for incoming employees as well as increases in legislative funding -- all of which we appreciate -- the effects of many years of chronic legislative underfunding over the last two decades have not yet been overcome. Therefore, we must continue to encourage looking for new approaches.

As RSEA looks at various ideas, our priority will be methods of financing to get more money into the employees' trust fund in lieu of additional design changes which reduce retirement benefits.

One set of ideas has come from **State Comptroller Glen Hegar**, who was a keynote speaker at our 2016 annual meeting. He has proposed a "*Texas Legacy Fund*" which would set aside a portion of the state's "rainy day fund," officially known as the *Economic Stabilization Fund*, and invest it in higher-yield investments and use the proceeds to start paying off some of our built-up liabilities such as state employee and teacher pension funds, deferred infrastructure maintenance, and other uses not being sufficiently addressed by the regular appropriations process. Mr. Hegar brought this idea to the legislative committees in April 2017 and, more recently during this 2018 legislative interim, has appeared before the Senate Finance and House Appropriations committees to provide updates on his ideas. These have been public meetings, so you may have already read about it in the daily newspapers or online in *The Texas Tribune*, whose **Executive Editor Ross Ramsey** spoke at our 2017 annual meeting.

RSEA is actively studying Mr. Hegar's proposal(s) and we'll provide more information in future newsletters, so please "stay tuned" for more about this "outside-the-box" idea.

In conclusion, thank you for reading this longer-than-usual President's Message. I hope it's been informative about what your RSEA Board of Directors has been doing and plans to do during our "Year of Renewal."

Also, thank you for your membership in RSEA and for supporting our efforts. As always, let us know your ideas, suggestions, or concerns --- now's a good time to hear from you as we plan for another 40 years. ■

--William C. (Bill) Hamilton, RSEA President

Two New Directors Join the RSEA Board

Directors elected to serve two-year terms beginning January 1, 2018 are: William C. (Bill) Hamilton, President; Don Raschke, 2nd Vice President; William C. (Bill) Dally, Director; Ed Dolzel, Director; Tim Sims, Director (new); and Vic Holubec, Director (new).

Vic Holubec retired from the Texas Department of Transportation. His career was centered in Legislative Analysis & Strategic Planning. He achieved the rank of Captain in the US Air Force. Vic is active with his church in Georgetown and energetically volunteers with Austin Disaster Relief Network.

Tim Sims retired from the Employees Retirement System of Texas where he served as First Assistant General Counsel. He analyzed and advised ERS management regarding civil litigation, contractual, regulatory, and other legal matters. Tim also worked at the Office of Attorney General where he represented state agencies in state and federal court litigation. In 2014, Tim made a presentation to the ERS Board of Trustees regarding state employees' rights to pension benefits. ■

Appreciation to RSEA Board Retirees

Justine Martone began her tenure as a Director on January 1, 2007. Justine has cheerfully and effectively chaired RSEA's membership outreach efforts. She served as Second Vice President from January 2012 to December 2017.

Lillie Gilligan began working as a Director on January 1, 2012. Lillie assisted RSEA's legislative committee with her extensive institutional knowledge around the Capitol.

On behalf of our members, we gratefully acknowledge the service of these two board members and wish them well. ■

Officers and Directors - 2018

President - William C. (Bill) Hamilton - *Office of Court Administration*

1st Vice President - Marie Moore - *Texas Bond Review Board*

2nd Vice President - Don Raschke - *Texas State Securities Board*

Treasurer - Tom Griebel - *Texas Dept. of Transportation*

Directors:

William C. (Bill) Dally - *Texas Dept. of Housing and Community Affairs*

Ed Dolzel - *Texas Dept. of Criminal Justice*

Victor (Vic) Holubec - *Texas Dept. of Transportation*

Dona Medlock - *Comptroller of Public Accounts*

William M. Piña - *Dept. of Human Services*

Tim N. Sims - *Employees Retirement System of Texas*

Diane Thomas - *Comptroller of Public Accounts*

Annual Meeting Highlights

The Williamson Conference Center at the Wingate in Round Rock received very high marks from those who attended the Annual Meeting on October 5, 2017.

The first speaker was Porter Wilson, Executive Director of the Employees Retirement System (ERS). Mr. Wilson explained the 85th Legislature was not able to provide funding to get the retirement fund to an actuarially sound level. Thus, it is not known when the fund will be able to sustain a cost-of-living adjustment or 13th check. Members always appreciate his interactive response to questions.

Attendees gave rapt attention to Ross Ramsey, Executive Editor and Co-Founder of *The Texas Tribune*. *The Texas Tribune* is a nonprofit, nonpartisan digital news organization of national renown. Ross provided a concise outline of multiple actions and outcomes from the 85th Regular and Special Legislative Sessions. He also previewed issues for the upcoming 2019 session of the 86th Legislature.

RSEA provided three one-year memberships to *The Texas Tribune* (including an online subscription). Winners in the drawing were excited to have the news opportunity.

Representative Dan Flynn was honored as the recipient of the Senator A.M. Aikin, Jr., Memorial RSEA Public Service Award. The award was created to recognize Senator Aikin, who served 46 years in both chambers. Senator Aikin inspired the creation of the Retired State Employees Association in 1977 when he realized that state retirees were not well-represented by any groups at that time.

Representative Flynn served as Chair of the Pensions Committee where he labored to safeguard the retired employees' pension fund and benefits, as well as other public pension funds across the state. Mr. Flynn has represented District 2 (Hopkins, Hunt, and Van Zandt Counties) since 2003; his residence is in Van.

Flynn holds the rank of General in the Texas National Guard. Prior to his election to the legislature in 2002, Mr. Flynn served as county judge of Van Zandt County.

In addition to Representative Flynn's service related to accountability and transparency of public funds; he has been extensively involved in border and homeland security

issues. He also serves on Defense and Veteran's Affairs Committee.

Representative Flynn expressed his appreciation for the many years of service to Texas from retirees. RSEA is proud and honored for the opportunity to recognize Representative Flynn on behalf of our members.

This is the fourth awarding of the Aikin award. Previous awards have been given to House Speaker Joe Straus, former State Senator Robert Duncan, and former State Representative Bill Callegari.

RSEA President Bill Hamilton presented *2018: Forty Years Later – A Year of Renewal for RSEA*. Highlights are outlined in his message on page 1.

Several legislators and/or their staff were present, along with others. These attendees included: Representative Donna Howard, with Lauren Hadley; Representative Celia Israel; Doug Greco for Representative Gina Hinojosa; Gary Kafer for Representative J.D. Sheffield; Lawrence Trevino for Representative Roberto Alonzo; Catherine Melvin, ERS Board Trustee; Owen Whitworth, former ERS Board Trustee; and Ann Bishop, former Executive Director of ERS. ■

--Marie Moore, RSEA First Vice President



Representative Dan Flynn (left) accepted the Senator A.M. Aikin, Jr., Memorial RSEA Public Service Award from RSEA President Bill Hamilton.

HOW SAFE ARE YOUR ERS PENSION BENEFITS?

BY TIM N. SIMS¹

Over the last decade, the Texas Legislature made changes to laws affecting the service pension benefit rights of some ERS members and retirees. So far, those changes have been prospective and generally reduce pension benefits for new ERS members hired after the effective dates of the statutes.

In 2015, the Texas Legislature made substantial funding changes intended to make up for nearly 20 years of underfunding the ERS pension trust fund for state employees. Unfortunately, in 2017 ERS reduced its expected rate of return on investments from 8 to 7.5 percent per year. ERS took the action due to actuarial constraints. Consequently, the fund is again in an underfunded status.

Also in 2015, the Texas State Supreme Court issued an important decision in *Klumb v. Houston Municipal Employees Pension System*, 458 S.W.3d 1 (Tex. 2015). The decision reaffirmed a 1937 case, *City of Dallas v. Trammell*, 101 S.W.2d 1009 (Tex. 1937) stating that Texas public employee pension benefits may be reduced or eliminated at the discretion of the Texas Legislature. ERS was not a party to the *Klumb* litigation and the Court did not address some key statutes and legal issues in the decision affirming *Trammell*. This article briefly outlines why *Klumb* should not apply to your ERS retirement benefits.

1. Your ERS pension benefits are protected by federal tax law.

Under the federal Internal Revenue Code (IRC) the ERS retirement system is considered a “Qualified Plan.” A Qualified Plan under the IRC receives beneficial tax treatment. For example, retirement fund contributions from ERS members and the State are not taxed until the contributions are withdrawn. The tax advantages to the State of Texas, ERS members and retirees are worth

billions of dollars. However, there are certain Internal Revenue regulatory requirements that the ERS plans must meet to remain qualified. For purposes of this discussion, there are three key requirements:

- The plan must follow its written plan requirements;
- The benefits payable by the plan must be “definitely determinable” (the Definitely Determinable Benefit Doctrine); and,
- The plan must vest its participants by no later than normal retirement age.

The plan qualification requirements did not exist at the time of the 1937 *Trammell* decision. Further, the Court did not address plan qualification requirements in *Klumb* in 2015. Because of the federal Definitely Determinable Benefit Doctrine and vesting requirements, the Court’s decision appears inconsistent with the requirements for plan qualification. **If in the future, the Texas Legislature relied on *Trammell* and *Klumb* to reduce or eliminate accrued pension benefits in the ERS plans, such action could result in disqualification of the plans. ERS members, retirees and the State of Texas would suffer billions of dollars in immediate tax liabilities if IRS took such action.**

Long after the Texas Supreme Court decided *Trammell*, the Texas Legislature determined that state laws regarding ERS plans should be construed in a manner that is consistent with plan qualification requirements. Tex. Gov’t Code § 815.507(a) states:

It is intended that the provisions of this subtitle be construed and administered in a manner that the retirement system’s benefit plan will be considered a qualified plan under § 401(a) of the Internal Revenue Code of 1986 (26 U.S.C. § 401).

The ERS plans could not be properly considered qualified if the State of Texas can reduce or eliminate ERS retirees’ pension benefits. In other words, the retirees’ benefits could not be considered “definitely determined” nor “vested” if the state can change or eliminate them at will. Because these issues were not analyzed or discussed in the *Klumb* decision, that case should not be considered as binding precedent on ERS, its members and retirees.

¹ Tim Sims is a Texas lawyer who served as an attorney for the Employees Retirement System of Texas (ERS) for over sixteen years. At the time he retired in January 2017, Mr. Sims was ERS’ First Assistant General Counsel. Mr. Sims currently serves on the Board of the Texas Retired State Employees Association. This article reflects Mr. Sims’ views and analysis as of May 2018.

2. Your benefits are earned and not a “gratuity” from the State of Texas.

In 1937 when the Court issued its decision in *Trammell*, public pension benefits were generally considered to be gifts from the state that were subject to the government’s discretion regarding continuation and amount. Consequently, Officer Trammell found that after he retired, the state could reduce his pension annuity by more than half to address catastrophic underfunding of his retirement plan. In analyzing the issue, the Court cited court decisions from five states: California, Minnesota, Illinois, Kentucky and Florida. Since 1937, each of those states has reversed the decisions that the Texas Supreme Court relied upon in *Trammell*. Indeed, legal analysts surveying state public pension laws in the United States have concluded that only two states, Texas and Indiana, have continued to follow the gratuity model for public pension benefits. All of the other 48 states have recognized that by no later than retirement, a public pension annuitant has vested rights in his or her benefits that are not subject to reduction or elimination.

To forestall any questions on the issue, the Texas Legislative Council (TLC) addressed the nature of Texas public pensions in its analysis of a 1968 amendment to the Texas Constitution. The TLC stated:

In the modern concept of employment, pensions are an absolutely indispensable complement of wages. As they are earned and contractual by nature, not free gifts, it is important that public employees have confidence in the perpetuity of the retirement system.

(Analysis regarding Article XVI, § 62 of the Texas Constitution, 1968)

In 1975, the TLC analyzed the current provision of the Texas Constitution, Article XVI, § 67 regarding ERS and the proper (actuarially sound) funding of its pension plans stating:

The sound actuarial requirement is intended to place a high level of fiscal and fiduciary responsibility on the legislature and administrative bodies concerned with the creation, funding, and management of the public retirement systems of Texas and is an entirely new provision.

(Analysis regarding Article XVI, § 67 of the Texas Constitution, 1975)

The TLC’s analysis of the constitutional provisions underlying creation of Texas public pension plans appears inconsistent with outdated notions that a public pension annuity is an unprotected gratuity from the State of Texas. The TLC’s analysis of the constitutional provisions came decades after *Trammell* and were not discussed in *Klumb*.

3. *Trammell*, and by extension *Klumb*, have internal inconsistencies that are contrary to Texas law.

The Court’s analysis in *Trammell* begins with the premise that a Texas public pension annuitant’s pension benefits are contractual in nature. However, the court goes on to state that the annuitant’s rights are always conditioned upon and subject to the Legislature’s power to modify or even repeal the underlying pension statute. Legal examination of these two premises reveals a serious inconsistency.

The Texas Supreme Court has recognized that pension agreements are a form of “unilateral contract.” In the pension context, the employer (in this discussion the State of Texas) promises to pay defined benefits to its employees once all the conditions for the benefits are met. Until the right to the benefits becomes vested, the employer may change or eliminate its offer of pension benefits. Texas courts have noted that until an employer becomes bound to pay benefits, or provides that the right to future benefits is vested, the contract is “illusory.” Describing an agreement as illusory means that there is no legally enforceable contract. In Texas, and elsewhere in the United States, there must eventually be binding obligations by both parties to an agreement for the law to recognize the transaction as a legally binding contract. Accordingly, once the employer becomes obligated to pay an annuity or the employee’s pension rights become vested, a contract is formed. Both the employer and employee have incurred or performed obligations necessary to form a binding contract.

Under the analysis in *Trammell* no contract could ever be formed between the State of Texas (the employer) and state employees. The State would always have the discretion going forward to not perform its part of the bargain. Under *Trammell* it does not matter that the retiree fully and faithfully performed all of his or her obligations for pension benefits, the State retains discretion to reduce or eliminate the benefits. Consequently, at least when applied to the State as the employer, there could never be a contract binding on both the retiree and the State of Texas.

Therefore, the right of the Legislature to change or end benefits as stated in *Trammell* would have to fall when applied in the state employment context: if there is a contract between a state retiree and the State of Texas then the State is not at liberty to repudiate the agreement once the retiree becomes eligible for benefits. Likewise, a vested ERS member would have legally protected rights in the benefits he or she has accrued. Ultimately, the Texas courts may have to choose whether ERS pension benefits are a “gift” from the State of Texas or a vested contractual right subject to legal protection. The benefits cannot be both. Moreover, the constitutional and statutory authorities and analysis discussed above reflect that state pension benefits are contractual and not subject to reduction or elimination.

4. The Impairment of Contracts Clause of the federal constitution also protects ERS benefits from reduction or elimination.

Although the U.S. Supreme Court has not reviewed the *Trammell* line of cases, its decisions applying the Contracts Clause of the federal constitution are important. Article I, section 10 of the Constitution state, “No State shall...pass any...law impairing the obligation of contracts...” In applying the Contracts Clause, the Court stated in *Energy Reserves Group, Inc. v. Kansas Power and Light Company*, 459 U.S. 400 (1983):

When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets.

(*Id.* at n. 14)

The courts in many states, including, but not limited to Alaska, Arkansas, California, Georgia, Hawaii, Illinois and Kansas have found that a government’s efforts to limit its financial burdens in a public retirement system violates the Contracts Clause. As applied to ERS retirement benefits, it appears reasonable to conclude that a reduction or elimination of vested benefits would likely violate the Contracts Clause. In *Klumb*, the Court did not address the Contracts Clause because it never found a contractual right on the part of municipal employees in their pension benefits. The Court concluded that under *Trammell* they only had an “expectancy” in the continuation of laws underlying the benefits. For the reasons discussed above, this analysis appears flawed and incomplete.

5. Conclusion.

This article does not address all of the arguments supporting the rights of ERS members and retirees in their retirement benefits. It is intended only as an overview of important issues that have not yet been addressed by the Texas Legislature or by Texas and federal courts. It is important for all stakeholders, including state employees, retirees, affected agencies and state leadership to understand that state employment retirement rights do become vested and are protected by state and federal law. Understanding these points may help avoid confusion, fear and potential financial catastrophe down the road. ■



President Bill Hamilton welcomed State Representatives Donna Howard and Celia Israel. RSEA continues to be grateful for their support in matters of importance to state retirees and active employees. We always appreciate their attendance at our meetings.

SAVE THE DATE for 2018 ANNUAL MEETING

Preparations are underway for another great agenda!

Thursday, October 4, 2018
Wingate Williamson Conference Center
1209 North Interstate 35
Round Rock, Texas 78664

(on east frontage road just north of Hwy 79)
Watch the RSEA website and your mailbox for details.



Keynote Speaker for the RSEA Annual Meeting was Ross Ramsey, Executive Editor and Co-Founder of *The Texas Tribune*, who summarized actions and outcomes from the 85th Legislative Session.

Exhibitors and Sponsors Give RSEA A Lift

Some new exhibitors were present at the 2017 event, along with longtime supporters. Exhibitors included: Associated Member Benefits Advisors (AMBA); Blue Cross and BlueShield of Texas; Costco; Texas DPS Credit Union; Employees Retirement System; Frost Bank; Greater Texas Credit Union; Humana; Public Employees Credit Union; The Salvation Army; Superior Vision Services; and United HealthCare HealthSelect Medicare RX.

Conference sponsors were: BlueCross and BlueShield of Texas, UnitedHealthcare, and Associated Member Benefits Advisors (AMBA). We thank all of the exhibitors and sponsors for their support! ■

Door Prizes Add Fun to the Day

RSEA is very grateful for the support of each of the following who generously donated door prizes.

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Barbeque Lunch Is Always A Hit

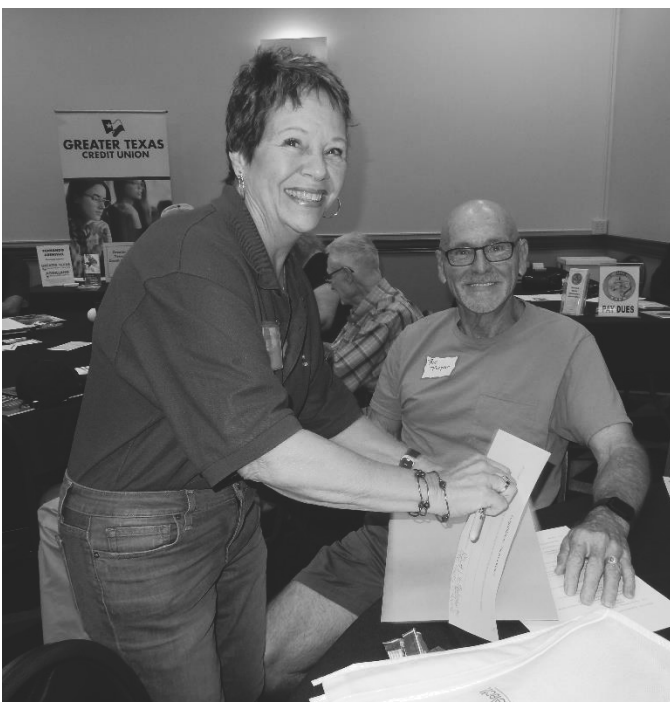
Members continue to say: "Who makes that outstanding barbeque?" "Can we go there?" "When all you need is a fork to eat brisket, you know you've got good BBQ!"

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Justine Martone is pictured with her husband, Bill Puryear, the winner of one of RSEA's 1-year membership subscriptions to *The Texas Tribune*. Happy reading and happy trails to Justine and Bill!

Please visit our website to see more photos from the 2017 Annual Meeting and to view other information about RSEA's initiatives and activities.

www.rseaoftx.org

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