UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-CV-3508-CMA-CBS

KATHRYN ROMSTAD and
MARGARETHE BENCH,

Plaintiffs

v.

THE CITY OF COLORADO SPRINGS, a municipal corporation, and in its capacity as a governmental enterprise doing business as Memorial Health System ,

Defendant

SECOND AMENDED COMPLAINT AND JURY DEMAND

COME NOW Plaintiffs Kathryn Romstad and Margarethe Bench, on behalf of themselves and all others similarly situated, by and through their undersigned attorneys, and allege upon personal knowledge as to themselves and their own acts, and upon information and belief as to all others matters, the following claims against Defendant City of Colorado Springs as follows:

I. NATURE OF THE CASE

1. This action involves the City of Colorado Springs' termination of Memorial Health System's affiliation with the Public Employees Retirement Association ("PERA") on October 1, 2012. At the time of its termination, Memorial Health System employed approximately 4,000 employees who were covered by PERA. These employees relied on the defined-benefit structure and formula to provide them with retirement security. Many of these employees had been employed by Memorial Health System and

contributed to PERA for decades, in anticipation of the promise that if they continued to work at the hospital until retirement, they would receive retirement benefits under PERA based on their years of service and age.

2. During their employment at the City-owned Memorial Hospital, they did not contribute to Social Security. Instead, they contributed to PERA.

3. The State of Colorado PERA statute, C.R.S. §§24-51-313 to -321, provides a process for an employer such as Memorial Health System to terminate its affiliation with PERA while protecting the rights of both PERA and the employees. These statutory procedural requirements include: 1) a vote of employees, with 65% vote required before an employer may terminate PERA affiliation; 2) an actuarial study to determine unfunded pension liability for current and future retirees, and payment of any unfunded liability; and 3) approval by the PERA Board.

4. The City terminated Memorial Health System's affiliation with PERA on October 1, 2012 without complying with the statutory procedure. In particular, the City did not hold a vote of employees before termination, and did not obtain approval of the termination by PERA.

5. The City recently concluded litigation with the Colorado Public Employees' Retirement Association in the District Court for the City and County of Denver, Colorado civil action 12 CV 5714 which resolved claims by PERA for unfunded pension liability. Although that litigation resolved claims by PERA against the City for unfunded pension liability, it did not protect employees such as Plaintiffs Kathryn Romstad and Margarethe Bench.

6. Plaintiffs Romstad and Bench bring this action against Defendant City of

Colorado Springs individually and on behalf of all others similarly situated, based upon breach of contract and a violation of the constitutions of the State of Colorado and the United States, including 42 U.S.C. § 1983, arising out of their status as employees of the Memorial Health System (hereafter "Memorial").

II. PARTIES, JURISDICTION AND VENUE

7. Plaintiff Kathryn Romstad (hereinafter "Romstad") is a natural person and is a resident of El Paso County, Colorado.

8. Plaintiff Margarethe Bench (hereinafter "Bench") is a natural person and is a resident of El Paso County, Colorado.

9. Defendant City of Colorado Springs (the "City") is a Colorado municipal corporation and home rule city located entirely within El Paso County, Colorado.

10. Memorial Health System is a system of hospitals and clinics that were owned and operated by the City of Colorado Springs as a separate government enterprise at all times up to and including September 30, 2012. Memorial Health System is, and was, a separate employer from the City for the purposes of PERA.

11. This class action is brought on behalf of all non-probationary employees of the Memorial Health System who were employed by the City on September 30, 2012 and who were members of PERA as of that date.

12. The events complained of herein took place in the State of Colorado, the Plaintiffs are residents of the State of Colorado, and the acts of which Plaintiffs complain on behalf of themselves and all putative class members are based upon their employment in El Paso County, Colorado.

13. This Court has subject matter jurisdiction over this action pursuant to 28

U.S.C. 1331 because a federal question is in dispute. *See* Notice of Removal [#001], ¶¶ 5, 6. .

14. This Court has personal jurisdiction over the City of Colorado Springs because the City is a municipality of the State of Colorado.

15. Venue is proper in this district as Plaintiffs' claim, or some part thereof, arose in El Paso County, Colorado, where the City is located and this is the "district court of the United States for the district … within which [this] action [was] pending" at the time the City removed the action. 28 U.S.C. §§ 1391 and 1446(b).

III. GENERAL ALLEGATIONS

16. All allegations contained in the previous paragraphs 1-14 are incorporated herein by reference.

17. Plaintiffs Kathryn Romstad and Margarethe Bench were at all relevant times up to and including September 30, 2012, employed by the City of Colorado Springs at Memorial, a city-owned hospital.

18. Romstad and Bench were full-time, permanent, non-probationary employees at Memorial as of September 30, 2012.

19. A copy of one of the Memorial Hospital Employee Handbooks is attached hereto as **Exhibit 1**.

20. The terms and conditions upon which the Plaintiffs accepted employment are contained in the City's policy and procedures manuals and related documents, and Employee Handbooks, which include the terms by which pension benefits would be paid to vested employees.

21. One of the terms and conditions of Plaintiffs' employment included the

right to participate in a defined-benefit pension plan through the Public Employees Retirement Association of Colorado, commonly known as PERA.

22. An Employee Handbook (**Exhibit 1**) explained:

> As an employee of a City-owned facility, you will participate in a retirement plan under the Public Employees '·Retirement Association (PERA). A percentage of your pay, before it is taxed, is contributed to PERA. The Hospital also contributes to this fund for you. Participation is mandatory for all employees. ·
>
> Should you leave the employ of Memorial Hospital before earning five (5) years of service credit, you may leave your member contribution account with PERA or withdraw it as a refund (the Hospital contribution is not refundable). With five (5) years of service or more, you become vested and may elect to leave your contributions in PERA for your retirement benefit. Please consult with the ·Human Resource Department concerning the specifics of eligibility for retirement under PERA and the options available for continuing your participation in PERA.
>
> Memorial Hospital does not participate in Social Security; however the contribution for the Medicare portion of Social Security is mandatory for all employees who were hired on or after April 1, 1986.

23. PERA is a statutory pension plan established pursuant to Article 51 of Title 24 of the Colorado Revised Statutes, C.R.S. §§24-51-101 to -1748 (the "PERA Statute.") PERA was created in 1931 to provide retirement and other benefits to state, school and local government employees of its members.

24. The PERA Statute governs the operation of the pension plan and provides the mandatory procedure for participation in the plan, termination of membership under the plan, payment of contributions into the plan, and retirement benefits under the plan.

25. The Plaintiffs have rights under the PERA pension plan that are contractual in nature and are also protected under the Colorado Constitution, Article II, the United States Constitution, Article 1, section 10, and 42 U.S.C. section 1983.

26. Pursuant to their employment at Memorial and the provisions of the PERA statute, Plaintiffs contributed a portion of their salary each pay period to acquire pension benefits under a specific formula or matrix. The formula or matrix provides that upon retirement, an employee who had five or more years of service credit could receive benefits based on a percentage of the average of the highest three years of income. Employees who began PERA membership on or before June 30, 2005, who had five years of service credit on January 1, 2011, and who were eligible to receive a benefit on January 1, 2011 were entitled to receive benefits based on Table 1, attached.

27. As Table 1 indicates, employees who had 20 or more years of service and retired after age 60 generally were entitled to receive an additional 2.5% of their average of their highest three years of income for each additional year of employment, up to a maximum of 87.5% of their average of their highest three years of income.

28. The PERA defined benefit scheme is weighted toward greater benefits for employees with more years of service, with employees who retire early or have less than 20-25 years of service receiving much lower benefits, if any. Accordingly, the PERA scheme encourages and rewards long-term employment.

29. In reliance on the terms of the PERA plan, Plaintiffs regularly contributed a portion of their salary to participate in the plan, and remained employed at Memorial.

30. Plaintiffs intended to continue to be employed at Memorial through their anticipated retirement age.

31. Plaintiffs were regular, non-probationary employees who were satisfactorily performing their duties at Memorial at all times through at least September 30, 2012.

32. Beginning in approximately 2010, the City of Colorado Springs began to explore alternatives to Memorial's continued participation in PERA.

33. In October 2010, the City informed PERA that it intended to terminate Memorial's affiliation with PERA.

34. Pursuant to the PERA statute, an employer who seeks to terminate PERA affiliation must satisfy the statutory provisions located at C.R.S. §§ 24-51-313 to 321.

35. An employer that seeks to terminate PERA affiliation must hold a vote of the active PERA members of the employer. At least 65% of these members must vote to approve termination of affiliation with PERA pursuant to C.R.S. § 24-51-313.

36. The legislative history of the 65% approval requirement in C.R.S. § 24-51-313 indicates the General Assembly's intent to preserve the rights of public employee PERA members by requiring the City to obtain this 65% approval.

37. At all relevant times, the City knew of the requirement in C.R.S. § 24-51-313.

38. The employer seeking termination must set up an alternative pension plan for its employees pursuant to C.R.S. § 24-51-319.

39. The statutory termination provisions of C.R.S. §§ 24-51-313 to -321 are intended to protect participants in PERA, such as Plaintiffs, who have regularly invested in their defined-benefit pension plan for their retirement for many years under a well-defined statutory benefit formula.

40. Despite the statutory procedure for termination, the City decided to terminate Memorial's affiliation with PERA as of October 1, 2012 without following the statutory procedure for termination.

41. The Employee Handbook promised employees Memorial Hospital's administration would

> "strive to provide appropriate channels of communication to provide you with necessary information from administration throughout the organization. Communication shall include information on policies, procedures, personnel changes, information regarding special events and other appropriate information. The mechanisms for transmission of this information shall include personnel policies manuals, policies and procedures manuals, departmental meetings, employee publications, letters and information mailed to employees' homes, paycheck inserts, bulletin boards and employee information meetings." (See Employee Handbook (**Exhibit 1**), p. 10.)

42. The City failed to inform Memorial employees of the statutory PERA termination procedures, including their right to hold a vote prior to termination and the requirement of a 65% affirmative vote before termination.

43. Prior to termination of the City's affiliation with Memorial, Memorial employees were repeatedly told that when PERA affiliation was terminated, their pension plan would be replaced by another plan that would be at least as good as the PERA benefit plan.

44. The City proceeded with terminating Memorial's affiliation with PERA effective October 1, 2012, without holding an employee vote, without obtaining a 65% affirmative vote of employees to terminate, and without obtaining PERA Board approval of the termination.

45. Upon information and belief, the *Integration and Affiliation Agreement by and among The City of Colorado Springs, Colorado, and University of Colorado Health, and [New Memorial Health System], and Poudre Valley Health Care, Inc., D/B/A Poudre Valley Health System* (hereafter "*Integration and Affiliation Agreement*", and attached hereto as **Exhibit 2**) was the agreement between those entities listed therein that

governed the Lease (attached hereto as **Exhibit 3**) of Memorial to UC Health.

46. The City also did not protect Plaintiffs' future benefits in a manner that would ensure the Lessees under the Lease and Affiliation and Integration Agreement must maintain the Plaintiffs' pension benefits at or above the same level or similar in any respect to the PERA benefits they had up to September 30, 2012.

47. Instead, the City agreed that the Lessees (called the UC Health Party or Parties in the Affiliation and Integration Agreement, attached hereto as **Exhibit 2**), merely must "provide such employees with employee retirement and health and welfare plans and programs that, in general, are no less favorable to the employees as an aggregate group than those offered to newly hired employees working the UC Health Party. [And t]o the extent that the UC Health Party hiring the MHS Employees provides qualified retirement programs for such MHS Employees, such hiring entity shall recognize all of such MHS Employees' service with MHS for purposes of determining eligibility and vesting." But the City only agreed to require the UC Health Parties to use "commercially reasonable efforts" to comply with these promises. See Affiliation and Integration Agreement, ¶ 5.6.1.

48. Upon information and belief, a UC Health official told the City's attorney by email that it would not be appropriate for Memorial employees coming into UC Health party employment to have a richer, more expensive system than UC Health's other 10,000 employees—so the employees could not remain on the City's payroll with PERA benefits.

49. On October 1, 2012, Plaintiffs' continued participation in PERA was terminated. Accordingly, Plaintiffs' retirement benefits were "frozen" at levels based on

their years of service as of September 30, 2012, without any ability to achieve credit for continued employment at Memorial after September 30, 2012.

50. Upon information and belief, under the *Integration and Affiliation Agreement*, or some other agreement or agreements, including the Lease (attached as **Exhibit 3**), the employees of Memorial Health remained employed at Memorial when administration of the hospital switched to UC Health immediately upon the stroke of midnight on the night of September 30 – October 1, 2012.

51. Upon information and belief, at or about that exact same time, the pediatric division employees of Memorial Health continued to work at Memorial Hospital, but administratively were transferred to The Children's Hospital of Colorado under the so-called "Children's Hospital Sublease," or some other as yet undiscovered agreement or agreements.

52. Upon information and belief, after September 30, 2012, employment of the Children's Hospital Sublease employees remained the same in all material respects relevant here, except with regard to retirement pension benefits—which changed dramatically.

53. Upon information and belief, those Children's Hospital Sublease employees suffered the same or similar damages to those employees who transferred to UC Health; and those damages were caused by the City in the same or a substantially similar manner.

54. The new employee pension benefit plan for Memorial employees (including Children's Hospital Sublease employees) after October 1, 2012 is inferior to the benefits they would have accrued under PERA.

55. For example, for Memorial employees (except the Children's Hospital Sublease employees) the retirement benefits accrue at the rate of only approximately 1% of the average of the highest five years of service per additional year of service instead of 2.5% of the average of the highest three years of service under PERA. The maximum retirement benefits as a percentage of average income is now substantially less than under PERA. Veteran employees under the new plan would not have sufficient years of work left to accumulate significant benefits to offset the reduced PERA benefits. These differences amount to tens of thousands, or even hundreds of thousands of dollars per employee, in lost retirement benefits.

56. Upon information and belief, Memorial employees working under the Children's Hospital Sublease do not have a defined benefit plan like PERA. Instead, those employees now may participate in a 403(b) defined contribution plan, rather than a defined benefit plan. Thus, they do not benefit from their years of service. And their optional plan is funded with money the employees defer from their own pay, which is employer-matched up to 6% of the employee's total annual compensation. Unlike other Memorial employees, these Children's Hospital Sublease employees no longer have a fully-funded pension—not even the described in the previous paragraph. Their maximum retirement benefits as a percentage of average income is now substantially less than under PERA. Veteran employees under the new plan have lost the significant benefits they had under PERA. As newly minted private sector employees, these employees now must contribute to and qualify for Social Security. Yet they have not accrued substantial Social Security credits. These differences amount to tens of thousands, or even hundreds of thousands of dollars per employee, in lost retirement

benefits.

57. The Lessees paid the City a sum of money as consideration for the City's promise in § 3.4 of the Lease (attached as **Exhibit 3**), in which the City expressly acknowledged and agreed that it was responsible for all direct, indirect, residual or other PERA-related liability to Memorial employees, regardless whether that liability was less than or more than the amount the Lessee paid to the City for that purpose.

58. The Plaintiffs have complied with the conditions imposed upon them by the City and thus have a vested right in the PERA pension plan.

IV. FIRST CAUSE OF ACTION (BREACH OF CONTRACT)

59. All allegations contained in the previous paragraphs 1-41 are incorporated herein by reference.

60. Plaintiffs and the City entered into a contract for employment, including benefits under PERA.

61. The terms of this contract included the City providing PERA benefits and complying with the statutory requirements of PERA, in exchange for Plaintiffs' continued employment and contributions to PERA.

62. Plaintiffs complied with all conditions required by their employment contracts.

63. By unlawfully terminating its affiliation with PERA for Memorial Hospital employees without complying with the statutory requirement, the City has breached its obligation to the Plaintiffs to pay retirement benefits in accordance with their ongoing participation in PERA so long as the City's affiliation with PERA was not otherwise legally terminated.

64. Because the City did not comply with the statutory requirements for ending Memorial's affiliation with PERA, the Plaintiffs have suffered damages in the form of underpaid or owed PERA benefits.

V. SECOND CAUSE OF ACTION (DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, 42 U.S.C. § 1983)

65. All allegations contained in the previous paragraphs 1-47 are incorporated herein by reference.

66. Plaintiffs' right to continued participation in PERA and PERA benefits under the terms of the PERA plan are property rights protected by the U.S. and Colorado Constitution.

67. The PERA statute provides the process that Plaintiffs and other PERA members are entitled to receive when an employer seeks termination of affiliation with PERA.

68. The City failed to provide Plaintiffs and other Memorial employees with due process by terminating Memorial's affiliation with PERA without following the statutory procedure.

69. The City's failure to adhere to its statutory obligations regarding the termination of PERA constitutes a wrongful taking and denial of due process, and therefore a substantial impairment of the Plaintiffs' rights in violation of both the U.S. and state constitutions.

70. The City is a person within the meaning of 42 U.S.C. § 1983.

71. Because the City did not comply with the statutory requirements for ending Memorial's affiliation with PERA, the Plaintiffs have suffered damages in the form of

unpaid or owed PERA benefits.

72. Plaintiffs are entitled to recover damages pursuant to 42 U.S.C. §1983 for their deprivation of a property right by the City under color of state law.

73. Plaintiffs are also entitled to recover costs and attorney fees pursuant to 42 U.S.C. §1988.

VI. THIRD CAUSE OF ACTION (MANDATORY INJUNCTIVE RELIEF)

74. All allegations contained in the previous paragraphs 1-56 are incorporated herein by reference.

75. Because the City has unlawfully terminated Memorial's participation in the PERA pension plan, the Plaintiffs have been denied the retirement benefits that they would have received through the City's ongoing participation in PERA.

76. The Plaintiffs seek mandatory injunctive relief from this Court, ordering the City to provide the Plaintiffs with the benefits as if Memorial had continued its participation in the PERA plan from October 1, 2012, to the employees' normal retirement age.

VII. CLASS ACTION ALLEGATIONS

77. All allegations contained in the previous paragraphs 1-59 are incorporated herein by reference.

78. The Plaintiffs bring this action individually, and pursuant to Fed.R.Civ.P. 23(a) and (b)(3) on behalf of a class of Memorial Hospital employees, and this action may properly be maintained as a class action, as it satisfies the numerosity, typicality, adequacy, predominance, and superiority requirements of Fed.R.Civ.P. 23.

79. The proposed class consists of all non-probationary employees of Memorial Hospital employed on September 30, 2012 who were participants in PERA.

80. **Numerosity:** The class described above is so numerous that joinder of all individual members in one action would be impracticable, as the City has acknowledged that approximately 4,000 or more such employees of Memorial Hospital existed as of October 1, 2012.

81. **Commonality:** There are questions of law common to the class, including the following:

a. Whether the City violated C.R.S. § 24-51-101 et. seq., including sections 313 - 321, by terminating Memorial's participation in PERA without obtaining the required approval of 65% vote of the employees.

b. Whether the City breached its contract with its employees by failing to follow the statute regarding the termination of PERA.

c. Whether the City violated provisions of the state of Colorado and United States Constitution by an unlawful talking and denial of due process.

82. **Typicality:** Plaintiffs' claims or defenses are typical of the claims or defenses of the Class, alleged herein. Plaintiffs, the same as every class member, were employed at Memorial on September 30, 2012, and were then still employed at Memorial Hospital, in the same jobs, when administration of the hospital changed to UC Health and The Children's Hospital of Colorado through the "Children's Hospital Sublease." Each suffered damages arising from the City's course of conduct as outlined herein.

83. **Adequacy:** Plaintiffs have the same interests in this matter as all other members of the class. The Plaintiffs' claims are coincident with and not antagonistic to those of the other class members they seek to represent, as they and all class members have sustained damages arising out of the City's common course of conduct as outlined herein, and the damages of each class member were caused by the City's wrongful conduct.

84. The Plaintiffs will fairly, adequately, and vigorously represent and protect the interests of the members of the class and their interests do not conflict with the interests of the members of the class.

85. The Plaintiffs have retained competent counsel with experience in the prosecution of class action litigation.

86. The questions of fact and law common to the class predominate over questions which may affect individual members.

87. A class action is superior to other available means for the fair and efficient adjudication of the claims of the class.

88. Individualized litigation by members of the Class would risk for variant, inconsistent, or contradictory judgments. And separate litigation would increase the delay and expense to all parties and the court system resulting from multiple trials of the same factual issues. In contrast, the conduct of this matter as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and would protect the rights of each class member.

89. The Plaintiffs know of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

90. Fed.R.Civ.P. 23(b)(3) Requirements: This case satisfies the prerequisites of Fed.R.Civ.P. 23(b)(3). The common questions of law and fact enumerated above predominate over questions affecting only individual Class members, and a class action is the superior method for fair and efficient adjudication of the controversy.

VIII. PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs pray for the following relief:

A. An Order

a. certifying this case as a class action,

b. certifying the class and any appropriate sub-class,

c. appointing Romstad and Bench as the class representatives, and

d. appointing the undersigned attorneys as counsel to represent the class;

B. Judgment in favor of the Plaintiffs and the class,

C. An award to the Plaintiffs and the class members of compensatory damages in the form of benefits wrongfully denied to them;

D. A mandatory injunction against the City, requiring it to make payments to the Plaintiffs dating from October 1, 2012, in accordance with the PERA benefits owed to the Plaintiffs as if the City had remained in the PERA plan predating October 1, 2012; and

E. Payment of costs of suit, pre-judgment, and post-judgment interest, and reasonable attorneys' fees, including those awardable pursuant to 42 U.S.C. §1988.

IX. JURY DEMAND

Plaintiffs hereby demand a trial to a jury on all issues so triable.

Respectfully submitted this 17th day of February, 2015.

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