

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

THE RETIRED PUBLIC EMPLOYEES  
OF NEW MEXICO, Inc.,

Plaintiff,

v.

No. CIV \_\_\_\_\_

THE PUBLIC EMPLOYEES RETIREMENT  
ASSOCIATION OF NEW MEXICO BOARD;  
WAYNE PROPST, in his individual capacity,  
and SUSAN PITTARD, in her individual capacity.

Defendants.

**COMPLAINT FOR DAMAGES FROM VIOLATIONS OF THE  
UNITED STATES CONSTITUTION, 42 U.S.C. § 1983,  
THE NEW MEXICO CONSTITUTION, AND NEW MEXICO COMMON LAW**

**COMES NOW** The Retired Public Employees of New Mexico [hereinafter “RPENM”], by and through its counsel, Law Offices of Michael. E. Mozes, P.C., and hereby submits its Complaints for Damages from Violations of the United States Constitution, 42 U.S.C. § 1983, the New Mexico Constitution, and New Mexico common law. As grounds therefor, RPENM states as follows:

**I. INTRODUCTION**

1. This action arises under the United States Constitution, as implemented through 42 U.S.C. § 1983, the New Mexico Constitution, and New Mexico common law.
2. The RPENM is a duly incorporated New Mexico non-profit association, operating and acting under the statutes, laws, and regulations of the State of New Mexico, headquartered in Albuquerque, New Mexico and with members located throughout the State of New Mexico. RPENM’s members consist of former public employees entitled to PERA retirement benefits.

3. The Public Employees Retirement Association of New Mexico Board [hereinafter “PERA Board”] is a duly organized New Mexico public entity, created and endowed with powers under New Mexico Statutes, with the purpose of administering and implementing all matters pertaining to the operation of state retirement system acts for public employees, including the management of the association and making effective the provisions of those acts.

4. Wayne Propst [hereinafter “Propst”] is, based upon information and belief, and at all times relevant hereto has been, a resident of the County of Santa Fe, State of New Mexico.

5. Susan Pittard [hereinafter “Pittard”] is, based upon information and belief, and at all times relevant hereto has been, a resident of the County of Santa Fe, State of New Mexico.

6. This Court has personal jurisdiction over the parties and subject matter jurisdiction over the claims set forth herein.

7. Venue is proper in this Court.

8. The Court may exercise jurisdiction over this matter pursuant to 28 U.S.C. § 1331, federal question jurisdiction.

## II. FACTUAL ALLEGATIONS

9. RPENM hereby adopts and incorporates by reference paragraphs 1 through 8 as set forth above.

10. In March 2001, the PERA Board Policies and Procedures (BPP), written by PERA staff, noted that the Executive Director had authority to employ all PERA employees. The BPP limited particularly the “employment” of PERA staff by noting that the Executive Director had the specific authority to hire, fire, and evaluate PERA employees.

11. In 2002, the PERA Board met to determine whether the Executive Director of PERA had the authority to “employ” all PERA employees. At that time, the Board decided that

it would not become directly involved in “hiring, terminating, and evaluating PERA staff.”

12. The PERA Board 2002 determination did not, at any time, address matters related to the compensation of PERA staff. New Mexico statutes clearly state that the PERA Board has exclusive and complete authority over the compensation of PERA staff.

13. RPENM is not aware of any decision, determination, regulation, policy, or statute that has ever removed the PERA Board’s exclusive and complete authority to determine compensation matters related to PERA staff, including compensation matters related to the Executive Director.

14. Further, based upon information and belief, the Board Policies and Procedures of PERA (“BPP”) do not anywhere delegate to the Executive Director, any other individual, nor any other group of individuals the authority to recommend, consider, or determine the compensation of PERA staff.

15. The Board acts as trustee of all PERA monies and funds and is charged with a fiduciary duty to manage, invest, and disburse PERA monies and funds in the best interests of the retirees with rights and privileges to those monies and funds, as established through State benefit acts under the PERA’s administration.

16. § 10-11-130(A) NMSA 1978 allocates the responsibility to the PERA Board to manage and administrate any matter related to employee benefits, including compensation.

17. No New Mexico statute or regulation assigns or delegates to the Executive Director or anyone else on PERA staff the authority to determine employee compensation.

18. Under the regulations written to the enabling PERA statutes, the Executive Director “is authorized to perform any acts required of the board pursuant to a proper delegation of authority by the board.” NMAC 2.80.1800.8( C).

19. There is no evidence the PERA Board ever delegated, in any sense, the authority to the Executive Director or any other individual or group the authority to set employee compensation.

20. In March 2001, the Rules and Administration Committee (RAC) of the PERA Board decided that the BPP would merely serve as guidelines, and not rules, for the administration and operation of PERA. At no point did the BPP serve as anything other than a guideline—without the force and effect of law and obligation.

21. In September 2002, Defendant Pittard stated to the RAC that the credentials of all PERA exempt employees had to be formally presented to the Board prior to any offers of employment. Nothing was presented at that time that could be considered a modification or amendment of the PERA Board's authority to set compensation for PERA staff.

22. During the period 2003 through 2013 and despite significant amendments to the BPP in 2011, there were no modifications or alterations in the exclusive and complete authority of the PERA Board to set compensation for PERA staff.

23. In March 2014, the BPP stated, in Section II, that the PERA Board had delegated execution of the BPP to the Executive Director and permitted a re-delegation from the Executive Director to PERA staff. At this point, no section of the BPP set forth, explained, or established a delegation of the Board's exclusive and complete authority to set PERA staff compensation to the Executive Director, any other individual, or any group of individuals.

24. The New Mexico Attorney General issued Opinion No. 55-6070 dealing with the authority of the PERA Board to set the compensation of the PERA Executive Director. The Opinion stated that the PERA Board was the exclusive and appropriate entity for fixing the compensation to be given the Executive Director.

25. On several occasions spanning the 2005 through 2014 time period, PERA Executive Directors, Terry Slattery and current Executive Wayne Propst, received significant pay raises without the authorization of the PERA Board.

26. Moreover, during this same period, exempt PERA employees have received significant increases in salary and benefits without the authorization of the PERA Board. These raises in salary and benefits have involved a significant, but undetermined, amount of PERA funds.

27. Since Propst has been the Executive Director of PERA, Propst has unilaterally, without consultation with or the approval of the PERA Board, has approved and allocated raises in compensation to himself and exempt employees.

28. The raises in compensation and benefits noted in the preceding paragraphs have been funded out of monies allocated to PERA for retiree benefits.

29. Therefore, any monies spent in funding salary increases and benefit increases to the Executive Director represent a loss of monies available to retirees for the payment of benefits.

30. RPENM has learned that on at least one occasion, Propst persuaded the PERA Board Chair to approve compensation requests for himself and others. The PERA statutes, regulations, and rules nowhere allow for nor countenance a derogation of the full PERA Board's duty and obligation to consider and approve compensation and benefit matters for exempt staff.

31. Throughout the period of time relevant hereto, Defendant Pittard, who serves as PERA's General Counsel and Chief of Staff, has counseled, promoted, and supported the unlawful violations of New Mexico statutes depositing exclusive and complete authority in the PERA Board on matters pertaining to compensation and benefits of exempt authorities.

32. Based upon information and belief, RPENM asserts that Pittard has at times

collaborated in, at times suggested, and at other times advised that PERA staff employees openly violate the unambiguous statutes governing the administration and distribution of PERA monies. Indeed, it is the contention of RPENM that Propst and Pittard engaged in an unlawful conspiracy in violation of their statutory duties, their fiduciary duties, and their administrative duties.

33. At all times relevant hereto, Pittard was a willing, ready, and knowing participant in the devolution of the PERA Board's authority and discretion to the Executive Director, herself, and other PERA exempt staff.

34. Propst and Pittard, along with other exempt employee, also engaged in reclassifications of PERA staff duties and obligations that induced an additional disbursement of PERA funds to employee salaries and benefits.

35. According to Pittard's job description, Pittard was to provide the PERA Board advice and counsel on "fiduciary responsibility and governance, policy and regulatory matters," as well as a number of other duties.

36. The State Auditor has issued an opinion stating that the PERA Board has authority to rescind pay raises the Board did not support.

37. The RPENM maintains that Propst and other PERA exempt employees have received unauthorized additional raises over the period of the past 10 years that have eroded monies available for retirement payments to retirees.

38. The RPENM is aware of the efforts of various current PERA Board members to correct, clarify, and challenge the acts of Propst and Pittard with respect to the manner in which compensation has been given to PERA exempt employees over the past 10 years.

**COUNT I**

**42 U.S.C. § 1983**

**UNITED STATES CONSTITUTION—FOURTEENTH AMENDMENT**

**VIOLATIONS OF PROCEDURAL DUE PROCESS**

39. RPENM hereby adopts and incorporates by reference paragraphs 1 through 38 as set forth above.

40. The Defendants, including both individually-named Defendants, acted without good faith to deprive the beneficiaries of the PERA trust fund monies in a manner contrary to law and statute.

41. In so acting, all Defendants knowingly and intentionally violated the dictates of the beneficiaries clearly established constitutional rights. Any defendant in these Defendants' position would have understood that their acts and failures to act were violations of objective reasonableness and deprived beneficiaries of their full retirement benefits without due process of law. The individually-named Defendants acted under the color of State law at all times relevant hereto.

42. The beneficiaries represented by RPENM have vested property interests, according to New Mexico law, in their retirement benefits.

43. Procedural due process requires fairness and a notice and opportunity to be heard at a meaningful time and in a meaningful manner prior to the deprivation of a property interest.

44. During the period of time that these Defendants, including both individually-named Defendants, were deciding to unilaterally and arbitrarily provide salary and benefit increases for PERA exempt employees in contravention of law, these Defendants did not provide RPENM or any beneficiary of PERA funds notice and an opportunity to be heard prior to the

deprivation of their property interests through the allocation of significant salary and benefit increases—which were allocated from PERA monies that could have been used to increase retirement benefits.

45. RPENM and the beneficiaries it represents have been and continue to be significantly harmed by the Defendants', including the individually-named Defendants, failures to provide constitutionally adequate due process prior to the deprivation of their constitutionally protected interests.

46. RPENM is entitled to all remedies and relief available to it under 42 U.S.C. § 1983, including, but not limited to, punitive damages against Defendants Propst and Pittard for their intentional, willful, wanton, and grossly reckless violations of the Fourteenth Amendment of the United States Constitution.

## **COUNT II**

### **42 U.S.C. § 1983**

#### **UNITED STATES CONSTITUTION—FOURTEENTH AMENDMENT**

#### **VIOLATIONS OF SUBSTANTIVE DUE PROCESS**

47. RPENM hereby adopts and incorporates by reference paragraphs 1 through 46 as set forth above.

48. The contours of the property rights enjoyed by the retirement beneficiaries represented by RPENM were clearly established at the time of their deprivation, such that the PERA Board and the individually-named Defendants would have understood that their actions and failures to act violated those property rights.

49. The Fourteenth Amendment has recognized that RPENM and the retirement beneficiaries they represent had the right to be free from unreasonable actions by government



officials which interfered with RPENM's and retirement beneficiaries' property interests.

50. The property interests involved with the earning of and entitlement to retirement benefits are among the most well-protected property interests under the Constitution.

51. At all times relevant hereto, all Defendants, including the individually-named Defendants, acted under the color of State law.

52. These Defendants could not deprive retirement beneficiaries represented by RPENM of these property interests without due process of law.

53. The property interests at stake in this action are created, established, and protected by State law and statute.

54. The retirement beneficiaries represented by RPENM, in accordance with State law, have a legitimate claim of entitlement to retirement monies.

55. The acts and failures to act of the Defendants, including the individually-named Defendants, unconstitutionally deprived the retirement beneficiaries of their property interests by unlawfully directing monies which could have supported increases in retirement benefits to salary and benefit increases to exempt employees, which included Defendants Propst and Pittard.

56. Propst and Pittard colluded to divert PERA monies and funds, which should have been used to the benefit of the beneficiaries, for their own personal benefit.

57. RPENM's members have suffered losses pursuant to 42 U.S.C. § 1983 because of the unlawful deprivation of their property interests by all Defendants. RPENM also requests this court grant them punitive damages against both individually-named Defendants for their intentional, willful, wanton, and grossly reckless conduct in effecting the deprivation of the property interests devolving from these retirement monies.

**COUNT III**

**42 U.S.C. § 1983**

**UNITED STATES CONSTITUTION—FIFTH AMENDMENT**

**UNLAWFUL TAKING**

58. RPENM hereby adopts and incorporates by reference paragraphs 1 through 57 as set forth above.

59. The property interests of RPENM's members in their retirement benefits constitute "private property" within the meaning of the Fifth Amendment.

60. The Fifth Amendment applies to government action through the Fourteenth Amendment.

61. At all times relevant hereto, the Defendants, including the individually-named Defendants, acted under the color of State law.

62. RPENM and its members have a cognizable property interest for purposes of the Just Compensation Clause.

63. The Defendants, including the individually-named Defendants, did take PERA monies for their own benefit and in furtherance of their own interests without justly compensating the retirement benefits lost by RPENM's members.

64. As a result of this unconstitutional taking, RPENM and its members have suffered constitutional harms enforceable under 42 U.S.C. § 1983, including, but not limited to, punitive damages for the intentional, willful, wanton, and grossly reckless conduct of the individually-named Defendants.

**COUNT IV**

**NEW MEXICO CONSTITUTION—ARTICLE II, SECTION 18**

**VIOLATION OF PROCEDURAL DUE PROCESS**

65. RPENM hereby adopts and incorporates by reference paragraphs 1 through 64 as set forth above.

66. Article II, Section 18 of the New Mexico Constitution provides that no New Mexico citizen shall be deprived of property in the absence of due process of law.

67. The PERA Board is responsible, pursuant to Article 20, Section 22 of the New Mexico Constitution, for ensuring that all PERA funds and monies are administered and invested for the sole and exclusive benefit of RPENM's members.

68. Article 20, Section 22 prohibits the use or diversion of PERA monies and funds for any reason other than the sole and exclusive benefit of PERA beneficiaries.

69. These constitutional provisions establish clear and obvious property interests in the retirement benefits administered through PERA.

70. At all times relevant hereto, the property interests of RPENM's members were vested and could not be unlawfully diminished, diverted, affected, or modified by acts or failures to act of these Defendants, including the individually-named Defendants.

71. However, these Defendants did act to diminish, divert, affect, and modify the retirement benefits available to the members of RPENM by unlawfully and intentionally using PERA funds to unilaterally, and contrary to statute, increase salaries and benefits payable to PERA exempt employees—including themselves.

72. At the times of Defendants' acts and failures to act, Defendants, including the individually-named Defendants, acted under the color of law.

73. Under State statute, Defendants had no authority to determine salary and benefit increases for PERA exempt employees—that authority resided exclusively with the PERA Board.

74. At not time did the PERA Board properly delegate to Defendants Propst and Pittard decision-making authority to determine salary and benefits for PERA exempt employees.

75. In making these determination, all the monies diverted by Defendants, including the individually-named Defendants, were PERA funds requiring the exercise of fiduciary duties that extended to compliance with law and statute.

76. These PERA funds were diverted and used for salary and benefit increases for PERA exempt employees without providing RPENM and its members notice and an opportunity to be heard—in open violation of Article II, Section 18 and Article 20, Section 22 of the New Mexico Constitution.

77. RPENM is entitled to all remedies and relief available to them under the New Mexico Constitution for the failure to provide procedural due process prior to adversely affecting the property interests of RPENM's members.

## **COUNT V**

### **NEW MEXICO CONSTITUTION—ARTICLE II, SECTION 18**

#### **SUBSTANTIVE DUE PROCESS**

78. RPENM hereby adopts and incorporates by reference paragraphs 1 through 77 as set forth above.

79. RPENM's members have a constitutionally-protected property interest in their vested rights to PERA retirement benefits.

80. New Mexico courts have consistently held that vested retirement benefits are property interests meriting substantive constitutional protections. New Mexico statute provides

substantive rights to RPENM's members who receive benefits after meeting certain statutory and regulatory requirements.

81. The actions and failure to act of the Defendants, including the individually-named Defendants, to deprive RPENM's members of their property rights in retirement benefits by unlawfully diminishing and altering the PERA monies available for those benefits must be compensated for by an equal or greater benefit.

82. In this matter, RPENM received no greater or equal benefit related to the monies unlawfully expended on salary and benefit for PERA exempt employees, including the individually-named Defendants. Indeed, the Defendants' actions and failures to act served to substantially diminish and alter the value of retirement benefits for RPENM's members in the past, present, and future because these salary and benefit increases were implemented unlawfully.

83. The PERA Board has never properly delegated any authority to the individually-named Defendants to implement and enforce salary and benefit increases without the approval of the full Board.

84. At all times relevant hereto, the Defendants, including the individually-named Defendants, were fully aware and cognizant of the fact that only the PERA Board had statutory authority to fix compensation for these exempt PERA employees.

85. As a result of the Defendants' unlawful and unconstitutional acts and failures to act, RPENM's members have been harmed and suffered damages in an amount to be determined at trial.

## **COUNT VI**

### **BREACH OF FIDUCIARY DUTY**

86. RPENM hereby adopts and incorporates by reference paragraphs 1 through 85 as

set forth above.

87. The New Mexico Constitution and the PERA enabling statutes provide that the PERA Board has all the powers necessary or convenient to administer and effectuate the purposes and provisions of the retirement system.

88. NMSA 1978 §§10-11-130 and 10-11-131 provide the PERA Board with full powers to effectuate the constitutional and statutory mandates imposed upon the administration and operation of PERA.

89. All decisions and determinations of the PERA Board and the individually-named Defendants were required to be taken in the sole and exclusive interests of RPENM's members.

90. All decisions and determinations of the Defendants, including the individually-named Defendants, were ruled by the requirements and provisions of the Prudent Investor Rule found in NMSA 1978 45-7-602 and 603, which require that each member of the PERA Board manage trust assets as a prudent investor. These statutory provisions further require the PERA Board exercise reasonable care, skill, and caution in managing PERA assets.

91. Additionally, New Mexico statutes require the PERA Board to make a reasonable effort to verify facts relevant to management of PERA's assets.

92. With respect to the fiduciary duties of the PERA Board, Propst, and Pittard, the following breaches of fiduciary duty are applicable, among others, under the undisputed facts: (1) fiduciaries are required to fully disclose material facts and information relating to their duties, regardless of whether the information is requested; (2) fiduciaries have a greater duty imposed upon them to simply act in good faith; (3) fiduciaries must act in conformity with the Prudent Investor Rule and the New Mexico Constitution; and (4) fiduciaries are subject to personal liability for any losses resulting from a breach of fiduciary duty.

93. All Defendants, including the individually-named Defendants, are liable for the losses and harms suffered by RPENM's members due to the constitutional and statutory violations noted above, the failure to disclose material facts related to their PERA duties as fiduciaries, the lack of good faith and lawful conduct associated with the management of PERA's assets, the failures to comply with the Prudent Investor Rule and the constitutional duty to act in the sole and exclusive benefit of RPENM's members, and the failures to act in accordance with the statutory requirement of care, skill, and caution in managing and distributing PERA assets.

94. RPENM and its members have suffered harms due to the breaches of fiduciary duty by these Defendants, including the individually-named Defendants, and are entitled to all remedies and relief available to them under law, including, but not limited to, punitive damages for the intentional, willful, wanton, and grossly reckless conduct of the individually-named Defendants.

#### **DAMAGES**

95. RPENM hereby adopts and incorporates by reference paragraphs 1 through 94 as set forth above.

96. RPENM seeks damages in the form of lost retirement benefits for its members in an amount to be determined at trial.

97. RPENM seeks the statutory remedy of the return to the PERA beneficiaries the value of lost retirement benefits or a greater value in relation to the unlawful salary and benefit raises accrued over the past five (5) years.

98. RPENM seeks punitive damages against the individually-named Defendants for their intentional, willful, wanton, and grossly reckless conduct.

99. RPENM seeks pre- and post-judgment interest on its claims.

100. RPENM seeks payment of its attorney's fees and costs accrued to date and to be accrued as this matter proceeds to resolution.

**WHEREFORE** RPENM respectfully requests that the Court order judgment in its favor on the claims set forth herein and such further relief as the Court deems just and appropriate under the circumstances.

Respectfully submitted,

LAW OFFICES OF MICHAEL E. MOZES, PC

/s/ Michael E. Mozes

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