



April 27, 2019

Hon. Sharon Carson, Chair
Executive Departments and Administration Committee
Legislative Office Building, Room 101
Concord, New Hampshire

Re: HB 616, relative to a cost of living adjustment for retirees in the state retirement system

Dear Senator Carson and Committee Members:

I understand that at Wednesday's hearing on HB 616, testimony was offered indicating that increasing employer rates to pay for cost of living adjustments would not violate Part 1, Article 28-a of the New Hampshire Constitution, based on the supreme court's decision in *City of Concord v. State of New Hampshire*, 164 N.H. 130 (2012). For the following reasons, I disagree.

Article 28-a states:

The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or [approved by the local legislative body].

The *Concord* case was a challenge to the legislature's decision in 2009 to reduce the state's share of the NHRS employer contribution for teachers, police, and firefighters from 35 percent to 25 percent, and to shift that expense to municipalities, counties, and school districts. Although this seemed like a clear case of an "expanded responsibility" that "necessitates additional local expenditures," the court engaged in linguistic gymnastics to conclude that there was no violation of article 28-a. However, even applying the logic the court employed in that case, a legislative change requiring political subdivisions to pay for retiree COLAs is likely to be deemed a violation of article 28-a.

The court in the *Concord* case held that the term "responsibility" as used in article 28-a has to mean "something more than merely a financial obligation." Specifically, "to constitute a new, expanded or modified 'responsibility,' the state action must impose some substantive

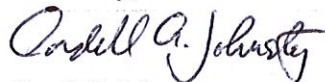
change to an underlying function, duty or activity.” The court stated that the 2009 legislation did not create an “expanded responsibility” because it made “no changes to the scope of retirement benefits local subdivisions are required to provide.”

The court continued, “[The new law] does not, for instance, require an additional category of local employees to be part of NHRS. Rather, it merely shifts part of the financial obligation for funding NHRS from the State to the local subdivisions without altering any underlying activities.”

The COLA provided in HB 616 is different. It does not “merely” shift an existing financial obligation from the state to municipalities. Rather, it is a “substantive change”—it creates a whole *new* obligation and then hands it to local government employers (municipalities, school districts and counties). Whereas the court in *Concord* concluded that the 2009 changes made “no change to the scope of retirement benefits local subdivisions are required to provide,” HB 616 does exactly that—it adds a new benefit *and makes it a permanent addition to the member’s base retirement allowance*.

The court in *Concord* strongly implied that expanding mandatory NHRS coverage to an additional group of employees would violate article 28-a. It did not expressly address the question of adding a new *benefit* for *existing* NHRS members, but there seems to be little difference for legal purposes. In either case, the legislature is “changing the scope of retirement benefits local subdivisions are required to provide,” and I believe this would be a violation of article 28-a.

Sincerely,



Cordell Johnston
Government Affairs Counsel

cc: Committee members