



**Montana Legislative Services Division**  
**Legal Services Office**

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TO: Senator Dave Lewis  
FROM: David S. Niss, Staff Attorney  
RE: Addendum to Memorandum of August 14, 2009, Regarding GABA Modification  
DATE: August 28, 2009

I  
INTRODUCTION

After rereading Gulbrandson v. Carey, 272 M 494, 901 P.2d 573 (1995), which was not cited in my Memorandum to you of August 14, 2009, and the provisions of section 19-2-502(2), MCA, which also was not cited in my previous Memorandum, I decided to prepare this addendum to that Memorandum to discuss the Montana Supreme Court's opinion in that case and that section of law because I thought that that decision and that statute might affect my answer to your question responded to in the previous Memorandum. However, after considering the Gulbrandson opinion and that statute, I've concluded that neither Gulbrandson nor section 19-2-502(2), MCA, alter my conclusions reached in that previous Memorandum. I've set forth my reasoning below.

II  
DISCUSSION

A. The Gulbrandson Opinion

In Gulbrandson, a retired Montana judge sued the presiding officer of the Montana Public Employees' Retirement Board (PERB) for a judicial determination on whether an enhancement to the retirement benefit paid under the Judges' Retirement System enacted by Ch. 664, L. 1989, applied to him. The Montana Supreme Court ruled that the enhanced benefit did not apply to Gulbrandson because he retired before the effective date of the enhancements.

In the course of its eight-page opinion, the Supreme Court analyzed Gulbrandson's claim that denying him the enhancement impaired a contractual obligation of the PERB to pay him that enhanced benefit. In that analysis, the Court included one sentence that read: "[u]nder the three-part test we apply to determine whether legislation violates the impairment of contracts clause, the initial inquiry is whether the law has operated as a substantial impairment of the contract", citing Matter of Yellowstone River, 253 M 167, 832 P.2d 1210 (1992). (The three-part test used by the Montana Supreme Court asks the questions: (1) Is the state law a substantial impairment of a contractual relationship? (2) Does the state have a significant and legitimate purpose for the law? (3) Does the law impose reasonable conditions reasonably related to achieving a legitimate and public purpose?)

By using the foregoing sentence and citation to its previous opinion in Matter of Yellowstone River, the Supreme Court seems to have applied a method of analysis for determining whether a statutory public retirement pension contract had been impaired in violation of Article II, section 31, of the Montana Constitution that the Court had never before applied to that type of contract (Matter of Yellowstone River concerned water rights). As explained in the August 14 Memorandum, the few decisions of the Montana Supreme Court

concerning impairment of statutory public retirement pension contracts have in the past only determined whether a contract existed and then treated the change to the contracts addressed in those decisions as impairments without discussing whether the impairment was "substantial" or whether the state's police power included the authority to constitutionally impair that type of contract. Thus, the method of analysis used in Gulbrandson is more akin to the "California Rule" than any of its prior decisions such as Clark v. Ireland, 122 M 191, 355 P.2d 965 (1948), Evans v. Fire Dept. Relief Ass'n, 138 M 172, 355 P.2d 670 (1960), or Bartels v. Miles City, 145 M 116, 399 P.2d 768 (1965). Yet, those previous opinions were not even mentioned Gulbrandson, let alone not overruled.

B. Section 19-2-502(2), MCA

Section 19-2-502(2), MCA, provides:

Benefits and refunds to eligible recipients are payable pursuant to a contract as contained in statute. The contract is entered into on the first day of a member's covered employment and may be enhanced by the legislature. Unless specifically provided for by statute, the contract does not contain revisions to statutes after the time of retirement or termination of membership.

Subsection (2) was enacted by section 19, Ch. 532, L. 1997 (HB 169), after all of the Montana Supreme Court's opinions mentioned in this Memorandum and in the Memorandum of August 14 had been decided, but that doesn't mean that the quoted subsection changed the law in any significant way. The first sentence of subsection (2) is consistent with the Supreme Court's previous opinions in such cases as Ireland, Evans, and Bartels. The first phrase of the second sentence is more or less consistent with the holding in Evans that the contract arises upon the employee's first payment into the retirement system. The second phrase of that sentence, providing that benefits may be enhanced, is not directly attributable to Montana Supreme Court opinions but does find direct support in opinions of the Montana Attorney General, specifically 35 A.G. Op. 4 (1973), wherein the Attorney General opined that the Public Employees' Retirement System had to maintain the level of benefits then established in statute and that any increase in contributions by employees must be accompanied by a corresponding increase in benefits. The third sentence is also consistent with Montana Supreme Court opinions, as in Gulbrandson, where the Court held that Gulbrandson wasn't entitled to the enhancement made to the Judges' Retirement System that became effective after Gulbrandson retired. However, in order to be entirely consistent with the second sentence, the third sentence should be read as applying to enhancements only.

The only court decision that has been located in which the issue of impairment of a statutory public pension retirement contract was at issue following the enactment of section 19-2-502(2), MCA, in 1997 is the First Judicial District Court's opinion in Baumgardner v. Public Employees' Retirement Board, first cited on page 3 of the August 14 Memorandum. In that case, which was lost and never appealed by Baumgardner, the District Court, as discussed on that same page, examined the language used in the Public Employees' Retirement Act (PERA), Title 19, chapter 2, MCA, and concluded "[t]here is no indication that the Act provides anything other than current policy with regard to calculation of retirement benefits." Curiously, the District Court arrived at this conclusion without analyzing or even mentioning the provisions of section 19-2-502(2), MCA, which is clearly part of the PERA. The meaning and effect of this critical section and

subsection has therefore never been determined by a Montana Court.

### III CONCLUSION

In the August 14 Memorandum, I stated, citing an earlier 1998 Memorandum, that there was no "clear" indication that the Montana Supreme Court has adopted the California Rule, which holds that statutory public pension retirement contracts may be invaded to some extent pursuant to the state's police power. Taking the Gulbrandson opinion into account does not change that conclusion because the effect and meaning of the above-quoted single sentence in Gulbrandson (applying something like the California Rule) upon previous Montana Supreme Court opinions is anything but clear. Nor does the language of section 19-2-502(2), MCA, change the conclusions reached in the August 14 Memorandum because those conclusions are consistent with the provisions of that section of law. However, IF we assume that opinions in such cases as Clarke v. Ireland are now overruled or at least changed by the Montana Supreme Court's opinion in Gulbrandson and if legislation were therefore to be written to modify the Montana GABA to make the amount of the GABA for existing employees and retirees dependent upon investment earnings, it's imperative that issues such as those addressed in part III E, (1) through (8), of the August 14 Memorandum be fully discussed and addressed in that legislation because it is a near certainty that that legislation, if enacted, will be judicially tested.<sup>1</sup>

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<sup>1</sup>If legislation tying the amount of the GABA for existing employees and retirees to the performance of the state's investments is written, there is a question of whether that legislation should also amend the second sentence of section 19-2-502(2), MCA. Because there is no explicit prohibition in that sentence against a reduction of a retirement benefit, that amendment would seem to be unnecessary. However, in Baumgardner, the District Court's opinion quotes the November 17, 2000, minutes of the Public Employees' Retirement Board, the agency administering the Public Employees' Retirement Act, as stating: "The terms of the retirement system are a contract with members effective on the first day of employment, As stated in the statute, the contract may be enhanced by the Legislature, but the contract cannot be impaired."