

1988

# Glen J. Ellis v. Utah State Retirement Board : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc1](https://digitalcommons.law.byu.edu/byu_sc1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Glen J. Ellis; Attorney for Appellant.

Mark A. Madsen; Attorney for Respondent.

---

## Recommended Citation

Brief of Appellant, *Ellis v. Utah State Retirement Board*, No. 880333.00 (Utah Supreme Court, 1988).  
[https://digitalcommons.law.byu.edu/byu\\_sc1/2289](https://digitalcommons.law.byu.edu/byu_sc1/2289)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

UTAH  
DOCUMENT  
KFU  
45.9  
.S9  
DOCKET NO:

UTAH SUPREME COURT

BRIEF

BEFORE THE UTAH SUPREME COURT

880333

GLEN J. ELLIS,	)	
	)	APPELLANT'S BRIEF
Plaintiff & Appellant	)	
	)	Priority 14-a
vs.	)	
	)	
UTAH STATE RETIREMENT BOARD,	)	SUPREME COURT
	)	CASE NO. 880-0333
Defendant & Respondent.)	)	

APPELLANT'S BRIEF

-----

Appealing from an Opinion  
of the Court of Appeals  
Dated July 6, 1988

-----

GLEN J. ELLIS, #1514  
60 East 100 South, #102  
P.O. Box 1097, Provo,  
Utah, 84603. 377-1097  
Attorney for Appellant

MARK A. MADSEN, #2051  
540 E 200 S, Suite 430  
Salt Lake City, Utah  
84102. 355-3884  
Attorney for Respondent.

**FILED**  
NOV 18 1988

Clerk, Supreme Court, Utah

BEFORE THE UTAH SUPREME COURT

---

GLEN J. ELLIS,	)	
	)	APPELLANT'S BRIEF
Plaintiff & Appellant	)	
	)	Priority 14-a
vs.	)	
	)	
UTAH STATE RETIREMENT BOARD,	)	SUPREME COURT
	)	CASE NO. 880-0333
Defendant & Respondent.)	)	

---

APPELLANT'S BRIEF

-----

Appealing from an Opinion  
of the Court of Appeals  
Dated July 6, 1988

-----

GLEN J. ELLIS, #1514  
60 East 100 South, #102  
P.O. Box 1097, Provo,  
Utah, 84603. 377-1097  
Attorney for Appellant

MARK A. MADSEN, #2051  
540 E 200 S, Suite 430  
Salt Lake City, Utah  
84102. 355-3884  
Attorney for Respondent.

## TABLE OF CONTENTS

	<u>Page</u>
A. PROCEEDINGS BELOW. . . . .	1
B. JURISDICTIONAL GROUNDS . . . . .	1
C. STATEMENT OF THE ISSUES . . . . .	1
D. CONTROLLING PROVISION OF CONSTITUTION AND STATUTE . . .	2
Statutes to be construed . . . . .	2
E. STATEMENT OF THE CASE . . . . .	2
1. The Nature of the Case . . . . .	2
2. Course of Proceedings . . . . .	2
F. STATEMENT OF FACTS . . . . .	3
G. ARGUMENT . . . . .	4
1. Point I. . . . .	4
2. Point II . . . . .	9
H. SUMMARY . . . . .	11
I. SIGNATURE . . . . .	12
J. MAILING CERTIFICATE . . . . .	12

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>CONSTITUTIONAL PROVISIONS:</b>	
1. Article I, Section 7, Utah Constitution . . .	2,10
<b>STATUTES CITED:</b>	
2. 49-9 U.C.A. . . . .	9
3. 49-9a U.C.A. . . . .	4,5,6,8,9
4. 49-9a-2 U.C.A. . . . .	8
5. 49-9a-3(10) U.C.A. . . . .	6,10
6. 49-9a-4 U.C.A. . . . .	3
7. 49-9a-8 U.C.A. . . . .	1,2,3,4,5,6
8. 49-9-103(7) (1987) U.C.A. . . . .	9
9. 49-10 U.C.A. . . . .	9
10. 49-10-2 U.C.A. . . . .	7
11. 49-10-2.5 U.C.A. . . . .	7
12. 49-10-6(34) U.C.A. . . . .	6
13. 49-10-7 U.C.A. . . . .	7
14. 49-10-11 U.C.A. . . . .	7
15. 49-10-28 Utah Code . . . . .	1,2,3,4,5,6,7,8,10,11
16. 49-10-28.5 U.C.A. (1967) . . . . .	7,8
17. 78-2-2 U.C.A. . . . .	2
18. 78-2a-4 U.C.A. . . . .	2
<b>CASES DETERMINATIVE:</b>	
Cases are not cited herein when referenced in the decision of the Appeals Court.	

GLEN J. ELLIS, #1514  
Attorney Pro Se for the Plaintiff  
60 East 100 South, Suite 102  
P.O. Box 1097  
Provo, Utah 84603  
Telephone: (801) 377-1097

9050B

BEFORE THE UTAH SUPREME COURT

---

GLEN J. ELLIS,	)	
	)	APPELLANT'S BRIEF
Plaintiff & Appellant	)	
	)	
vs.	)	
	)	
UTAH STATE RETIREMENT BOARD,	)	SUPREME COURT
	)	CASE NO. 880-0333
Defendant & Respondent.)	)	

---

PROCEEDINGS BELOW

Plaintiff-Appellant appeals from a denial of Benefits by the Utah State Retirement Board, which was sustained by the Third District Court, Salt Lake County, and from an adverse ruling by the Utah Court of Appeals.:

JURISDICTIONAL GROUNDS

Jurisdiction for this writ is based on Rule 42 of the Rules of the Utah Supreme Court based on an erroneous decision of the Court of Appeals, and Sections 78-2-2 and 78-2a-4 U.C.A.

STATEMENT OF THE ISSUES

1. WHETHER THE PLAINTIFF'S DISABILITY QUALIFIED HIM FOR RETIREMENT BENEFITS UNDER SECTION 49-10-28 UCA, and THE EFFECT OF THE 1983 ENACTMENT OF 49-9a-8 UCA HAD ON HIS VESTED BENEFITS.
2. WHETHER THE PLAINTIFF HAS A CONSTITUTIONALLY VESTED CONTRACTUAL RIGHT TO AN EARNED DISABILITY PENSION?

CONTROLLING PROVISIONS OF CONSTITUTION AND STATUTE

1. Article I, Section 7, Utah Constitution, "No person shall be deprived of life, liberty or property, without due process of law."

Statutes to be construed,

2. 49-9a-8 U.C.A. See full text in the appendix.
3. 49-10-28 U.C.A. See full text in the appendix.

STATEMENT OF THE CASE

THE NATURE OF THE CASE

Plaintiff sued for disability retirement benefits under the 1967 Public Employees Disability Retirement provisions but was refused benefits by the Retirement Board based on their attorney's opinion, that passage of the 1983 Disability Retirement Act and particularly 49-9a-8 U.C.A. had "implicitly repealed" the previous Disability Retirement Statute.

49-10-28 U.C.A. was later repealed by the legislature, effective July 1, 1987, one year after Plaintiff's July 1, 1986 retirement date.

COURSE OF PROCEEDINGS

After administrative denial of benefits, Plaintiff was granted a hearing before the Retirement Board which affirmed the administrative decision. The Third District Court, Salt Lake County affirmed. Plaintiff appealed to the Utah State Court of Appeals which held that the 1983 Act did not repeal the earlier statute and also held that retirement benefits under the 1963 Act vested in the constitutional sense but affirmed disallowance

of benefits because Plaintiff did not meet the qualification of total disability in the 1983 Act. Plaintiff filed a Motion for Rehearing which the Appeals Court denied.

#### STATEMENT OF FACTS

1. Plaintiff was the head of the Provo City Attorney's Office for twenty-one and one-half (21 1/2) years, (from January, 1965 to July, 1986), during twenty of those years the Plaintiff, and his employer, on his behalf contributed under the Utah State Retirement Act a percentage of his annual salary which included a contribution of .04% of his salary to the Disability Retirement Fund, pursuant to 49-10-28 U.C.A.

2. On April 28, 1986 the Plaintiff applied to the City for disability retirement based on his physicians' recommendation that he seek less stressful employment (See Exhibit "A" attached).

3. The city accepted the medical retirement request effective July 1, 1986 , and the City certified Plaintiff's qualifications for retirement under 49-10-28 U.C.A. to the State Retirement Office (See Exhibit "B" attached).

4. On June 13, 1986, Bert Hunsaker, Executive Director of the Retirement Board, denied benefits on the sole ground that the disability provisions of 49-10 had been superceded by the enactment in 1983 of Sections 49-9a-4 and 49-9a-8 (See Exhibit "C" attached).

5. Plaintiff requested and was granted a hearing before the Retirement Board, which Board acknowledged that he was qualified to retire under 49-10-28 U.C.A., but denied benefits under the same theory, that there had been an "implicit repeal" of that section, based on their legal counsel's interpretation of 49-9a-8 U.C.A. Plaintiff's appeal of the



administrative denial of his request for benefits was affirmed by the Retirement Board, (See Exhibit "D").

6. The matter was then appealed to the Third District Court in Salt Lake County where Judge Noel was of the opinion that the legislature did not intend that the two disability retirement programs described in 49-9a and 49-10-28 U.C.A. exist side by side and Judge Noel without a hearing or trial granted Defendant's Motion to Dismiss (See Exhibit "E").

7. The Plaintiff next appealed to the Utah Court of Appeals, which on July 6, 1988 entered an opinion which held directly contrary to the "implicit repeal" theory, but affirmed the District Court's judgment (See Exhibit "F" attached).

#### ARGUMENT

##### POINT I. WHETHER THE PLAINTIFF'S DISABILITY RETIREMENT QUALIFIED HIM FOR RETIREMENT BENEFITS UNDER SECTION 49-10-28 OF THE UTAH CODE AND THE EFFECT THAT THE 1983 AMENDMENT HAD ON VESTED RETIREMENT BENEFITS?

1. The sole basis for administrative denial of Plaintiff's request for retirement benefits under 49-10-28 U.C.A. was a claimed "implicit repeal" of the 1967 Public Employee's Retirement Act disability benefits, which Defendant claimed was affected by the passage of the new disability retirement provisions found in 49-9a U.C.A. The Court of Appeals did not agree with the trial court's premise and held "thus, in 1983 the legislature, by clear, express language provided that two disability retirement systems would co-exist in Utah." (See Appeals Court Opinion, center paragraph of page three.)

2. The Appeals Court continued on however, and erroneously interpreted 49-9a-8 U.C.A. as applying to all disabilities with the date of disability after July 1, 1983. The

court skipped over the key word, "covered", which differentiates between the two self-subsisting retirement disability systems, The key word, "covered", is the second word of 49-9a-8 which reads:

"All covered disabilities with an effective date of disability on or after the effective date of this act shall be administered under this act. Disabilities commencing before the effective date of this act shall be administered under the provisions of Chapter 10, Title 49. In no event, may a disability be covered under both Chapter 10, Title 49 and this act." (Emphasis added.)

The court then proceeds to rely entirely on the time relationship of the disability and the effective date of the 1983 disability act and ignores four important points.

(1) The first point is that they missed the key word in 49-9a-8 which makes it applicable only to "covered" disabilities. An employee whose employer opted not to subscribe for the optional coverage provided by 49-9a, (a decision which is made by the unit of government, with no input from the employee) is not "covered", and his disability is not a "covered disability" under the statute. Since his disability is not "covered" by 49-9a, the only real question is whether he is covered by 49-10-28 U.C.A.

(2) Second, there is a vast difference between the definition of a covered disability in the new disability act which requires "total disability to perform any remunerative employment" as compared with the much broader definition of disability under 49-10-6(34) where disability means "incapacity of a member to perform the usual duties of his employment with an employer." Plaintiff's condition is not, by definition, "covered" by

49-9a, but is by 49-10-28.

(3) The third point which the appeals court ignored is the fact that the legislature did later repeal 49-10-28 but that repealer was not effective until the 1st day of July, 1987, exactly one year after Plaintiff's benefits vested. The error made by the Retirement Board, its' attorney and its' administrator was assuming that there was an implicit repeal.

4. The Appeals Court decision, as did the preceeding decisions, ignores the essentially different nature of 49-9a-8 vis-a-vis 49-10-28. The older Disability Retirement is a self standing portion of the overall pension plan for public employees. As such it vested, if and when the employee qualfied. It was manditory, the cost thereof was assessed and collected by the Retirement office, and that office still holds millions of dollars, collected from public employees to provide disability benefits, if and when the employee needs them. The newer act is not manditory, is not part of the contributory pension plan, but is merely an optional salary protection insurance, similar to that described in the parent Act, in 49-10-28.5 UCA (repealed in 1986).

The Appeals Court rejected the "implicit repeal" position but still denied benefits on the contention that the Plaintiff did not meet the definition of "Disability" as defined in 49-9a-3 (10) (1983). This was plain error on the part of the Appeals Court, which ignored the fact that 49-10-28 was still applicable law on the date of retirement, and the conditions set in that pension plan are the only ones applicable.

Continued existence of 49-10-28 included the providing of benefits to anyone who met the conditions imposed by that section up until repealer of the act in

1987. The following sections of the 1967 act buttress that position; See:

A. 49-10-2 which provides a public retirement system for those employees and dependants who in case of old age disability or death or who have become incapacitated, may without hardship or prejudice be retired from active service by their employers. This part of the Retirement System, is not even remotely similar to the Disability Retirement insurance program in 49-9a-8 UCA.

B. 49-10-2.5 which was passed contemporaneously with the new Retirement Act in 1983, provides that the parent act, 49-10 shall govern any conflict, discrepancy or inconsistency which might occur between the parent act and any other statute relating to retirement, supplemental or deferred income programs.

C. 49-10-7 U.C.A. provides that it is to be the policy of the legislature that this act be liberally construed so that the benefits and protections as herein provided shall be extended as broadly as reasonably possible.

D. Under 49-10-11 membership was mandatory, as were the contributions required under the Retirement Act. The new Act, by contrast, is simply an optional insurance program, which replaced 49-10-28.5 U.C.A. (1967), but did not in any way effect 49-10-28 U.C.A. (1967), which remained active and on the books until a year after Plaintiff's retirement.

It is important to observe, that under 49-10-28 U.C.A., millions of dollars of public employee's money was paid into the Disability Retirement Fund, the exact amount of which is known only to the Retirement Board staff.

Plaintiff estimates that at least \$16,000,000.00 of contributions, plus interest accruing thereto, since 1967, is in the hands of the Board, and with the repeal of 49-10-28 is a windfall to the Board, which no longer has to pay out anything for disability retirement.

Under the new plan, they simply buy an insurance policy with newly contributed funds, and the insurance carrier pays any claims which may meet the new criteria.

E. 49-10-28 sets forth it's own requirements for eligibility which require: 1) that the member complete ten (10) or more years of service (plaintiff had 20 years); 2) that he submit to examination by the board to determine his physical condition (Plaintiff remains ready willing and able to comply with this requirement); and 3) that that examination show that the member is physically or mentally incapable of the performance of the "usual duties of his employment", (Plaintiff's medical history (which includes 3 operations for ulcers, 14 hospitalizations and recently diagnosed diabetes) meets this requirement according to his doctors).

F. 49-10-28.5 U.C.A. (1967) describes a paid salary protection program which was an insurance, almost identical to the provisions of the so-called new Disability Retirement Act found in 49-9a U.C.A. effective July 1, 1983. 49-10-28.5 likewise prohibited the employee from collecting both under Section 28 and Section 28.5.

G. Interestingly, 49-9a which went through the legislature as SB 305 went into effect July 1, 1983 (See laws of Utah 1983, Vol. 1, page 870), but in the 1986 legislature the language of 49-9a-2 was changed to give Chapter 9a a new effective date of March 17, 1986, (except for State employees for whom it became effective July 1, 1987). The compiler also notes that in 1986 the

legislature restricted the scope of 49-9a by limiting its application to Chapter 9a instead of having it apply to the whole act, an obvious legislative intent that the two acts, still then on the statute books, be treated as independent, equally existing retirement plans.

By the time our present code (1987-1988) came into being, Chapter 49-9a had disappeared entirely and the present Utah Public Employee's Disability Act now found in 49-9 U.C.A. (1987) which contains a third and again distinctly different definition of "total disability."

See 49-9-103(7) (1987) :

"Total Disability" means the complete inability due to injury or illness to engage in the employees regular occupation during the elimination period and the first twenty-four(24) months of disability benefits. Thereafter, 'total disability' means the complete inability to engage in any gainful occupation which is reasonable, considering the employees education, training and experience."

It appears to the Plaintiff, that the vacillations of the Retirement Board, as reflected in it's recommended changes, effectuated by the Legislature in 1987, are a direct result of this case, which pointed out the defective reasoning on which the 1983 definition of "Disability" was based.

POINT II. WHETHER THE PLAINTIFF HAS A CONSTITUTIONALLY VESTED CONTRACTUAL RIGHT TO AN EARNED DISABILITY PENSION?

The Appeals Court, in a well reasoned manner, held that the State of Utah, under the mandatory membership and contribution plan set forth in the 1967 Public Employees Retirement Act, 49-10 U.C.A. is committed to the "Contractual

View", ie., that the Constitution (Article I, Section 7: "No person shall be deprived of life, liberty or property, without due process of law.") prohibits the Retirement Board from cutting off vested rights. See Appeals Court Opinion, P. 6:

"...when a retired employee had made the requisite contributions and had satisfied all conditions precedent to his benefits, then the employee had a "vested right" in his retirement benefits as provided by the statute at the time of his retirement and a subsequent amendment could not reduce the amount of benefits to which the employee was entitled." (See cases cited.)

From that point on, the Appeals Court Opinion is totally inconsistent. It ignores the fact, established under the cited cases, that the conditions precedent are those set by the statute under which the contributions were collected, i.e., 49-10-28 U.C.A. (1967), and it commits error when it concluded that because Plaintiff did not fit the 49-9a-3 (10) (1983) definition, that his rights did not vest.

1. In the first place, the Appeals Court erred, once again, in passing over the crucial word "covered."

2. Secondly, the Appeals Court erred, in failing to note that 49-10-28 U.C.A. (1967) was still the law until July 1, 1987, when it was repealed.

3. Third, it ignored the fact that Plaintiff had met all requirements for vesting of his pension benefits under the parent act, a year before that act was repealed.

4. Fourth, that the arbitrary decision of Provo City to not subscribe to the new disability insurance program, can in no way justify depriving Plaintiff of his vested pension benefits. After all, the old act was a fully contributed, fully vested pension plan; its benefits are constitutionally guaranteed to Plaintiff, so long as he meets the conditions

precedent (which he does in every detail). The fact that he does not fit the definition in the new insurance program, which is not a pension plan, nor capable of vesting (because it is non-contributory), is totally immaterial and irrelevant. (See Appeals Court Opinion , p. 5, and cases quoted therein.)

#### SUMMARY

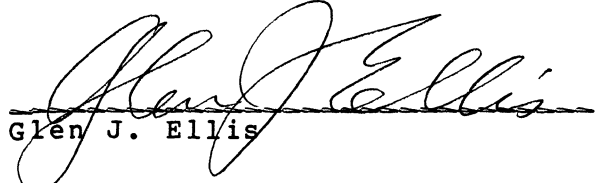
1. The Appeals Court decision, holding that there was no "implicit repeal" of the 1967 Public Employee Retirement Act, should have resulted in a reversal of the District Court decision, not an affirmation, since the only grounds for either the Retirement Board decision, or its' affirmation by Judge Noel, was the theory of "implied repeal." The Appeals Court was correct on that portion of its' Opinion. Only the later inconsistent conclusions were erroneous.

2. Plaintiff is not a "covered" employee under the 1983 disability insurance; his employer had not opted to be covered, and his particular medical condition did not qualify him for coverage, because he was not completely unable to engage in any remunerative work. Plaintiff was however, still covered by the pension plan described in 49-10-28 UCA (1967), he met all the prerequisites for benefits, and since that plan was still open until repealed on July 1, 1987, his right to benefits vested on his effective retirement date of July 1, 1986.

3. The constitutional prohibition against depriving a citizen of vested rights, makes it impossible for the legislature to change those benefits in any manner, after the fact, if it would result in his benefits being eliminated, after they had vested. There are undoubtedly other persons in a similar position too.



RESPECTFULLY SUBMITTED, THIS 16th Day of November ,  
1988.

  
Glen J. Ellis

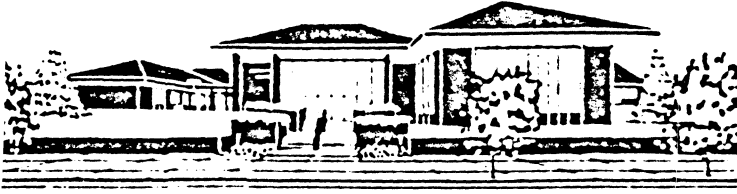
MAILING CERTIFICATE

On this 16th day of November, 1988, the undersigned mailed 10 copies of the foregoing Appellant's Brief to the Clerk of the Utah Supreme Court, 332 State Capitol, Salt Lake City, Utah 84114, and two copies to Mark A. Madsen, Attorney for the Respondent, Utah State Retirement Board, 540 East 200 South, Salt Lake City, Utah 84102, postage prepaid in the U.S. Mail.



## APPENDIX

## APPENDIX



G. J. ELLIS  
Attorney

# City of Provo

CITY ATTORNEY'S OFFICE

P.O. BOX 1849  
PROVO, UTAH 84603  
(801) 375-1822, Ext. 330

April 28, 1986

TO: Mayor Joseph A. Jenkins

FROM: Glen J. Ellis

RE: Resignation

Dear Mayor,

Pursuant to our discussions of last week, I have given some thought to stepping down as City Attorney. I have served the City since January 1, 1965. The first year I was Assistant City Attorney, a position under Civil Service, the last 20+ as a department head. Although I could opt to simply step down to the assistant status to fill the few remaining years I would need to put in to qualify for retirement, I have given some thought to put in for a medical retirement instead.

The last seven or eight months have been the most frustrating of my life. I have experienced a great deal of stress, resulting in a return of my chronic acidosis, a condition which has been with me for many years, and which resulted in my having ulcers. I was operated on three times as a direct result of this condition, and I feel that remaining in the position I am in will be further detrimental to my health. I have been in distress with diarrhea and stomach distress for most of this year, and am obliged to go in for a periodic dilation of my esophagus about every nine months. All of this is directly connected to my stressful employment. I feel that my long history of ulcer-related problems will probably be with me for the rest of my life, and if I take my retirement at this time, I can still be covered by City insurance.

Accordingly, will you please accept my resignation as City Attorney, effective as soon as my replacement can be selected and trained to take over my case load and other responsibilities. Please ask personnel to process my request for medical retirement effective at the same date as I finish my city service.

Very truly yours,

*Glen J. Ellis*

APR 28 1986

# the City of Provo

MAYOR  
Joseph A. Jenkins

OFFICE OF THE MAYOR

April 29, 1986

Mr. Glen Ellis  
City Attorney  
Post Office Box 1849  
Provo, Utah 84603

Dear Glen:

It is with the utmost respect and concern for you that I accept your resignation as the City Attorney for Provo City. I want to express my appreciation for the long years of service you have given to our City and for the way you handled matters over that period of time.

Although we have discussed on several occasions your health problems and the fact that some of them were related to your employment, I was not fully aware of the extent of your problems or to the degree your stressful employment contributed to them. We have instructed Mr. Mausser in Personnel to take the necessary steps to help you in any way he can in securing a medical retirement.

We will be advertising for an attorney for your replacement and anticipate that advertising and the selection process will take approximately six weeks. We will then look to you for guidance in the training and acclimation of the person we select. We will leave the final date of your retirement open pursuant to getting another attorney on board and trained to take your place.

If there are any other concerns that you have or help that I can give you please don't hesitate to call.

Sincerely,



Joseph A. Jenkins  
Mayor

cc Personnel

JAJ/nks

UTAH RETIREMENT SYSTEMS

**UTAH STATE RETIREMENT BOARD**

540 East 200 South  
Salt Lake City, UT 84102  
(801) 355-3884

BERT D. HUNSAKER  
EXECUTIVE DIRECTOR

June 13, 1986

Mr. Glen J. Ellis, City Attorney  
City of Provo  
P. O. Box 1849  
Provo, Utah 84603

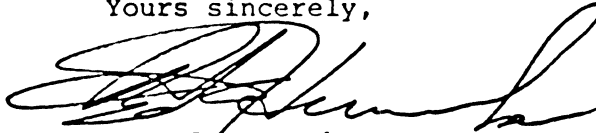
Dear Mr. Ellis:

The 1983 Legislature effectively repealed the disability provisions from section 49-10, U.C.A. 1953, as amended, which pertains to the Utah State Retirement System. At that time they enacted 49a of the Code, which was an optional program for local governments and other political subdivisions. In doing this, the legislature also reduced the contribution rate to the employers.

Provo City did not join the disability plan and elected to provide its own program. Therefore, disability coverage in the State Retirement System, as far as Provo City is concerned, terminated July 1, 1983.

I respectfully refer you to section 49-9a, with particular attention to 49-9a-4 and 49-9a-8. After you have had a chance to review these sections, if you have additional questions, please write or call me or, if you prefer, Mark Madsen, General Counsel for the Retirement Board, may be reached at the same address and telephone number.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Bert D. Hunsaker', written over a horizontal line.

Bert D. Hunsaker  
Executive Director

BDH:whm

UTAH RETIREMENT SYSTEMS

**UTAH STATE RETIREMENT BOARD**

540 East 200 South  
Salt Lake City, UT 84102  
(801) 355-3884

BERT D. HUNSAKER  
EXECUTIVE DIRECTOR

February 16, 1987

Mr. Glen J. Ellis  
P. O. Box 1097  
Provo, Utah 84603

REGISTERED MAIL

Dear Mr. Ellis:

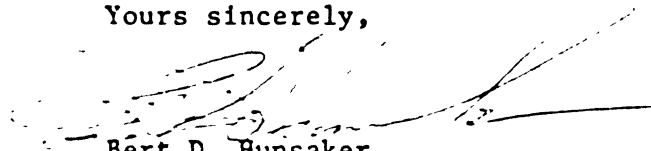
This letter is written confirmation of the action taken by the Utah State Retirement Board regarding your appeal of the administrative denial of your disability retirement application.

The Board voted to deny your request, based on advice of legal counsel and the interpretation of section 49-9a-a, enacted in 1983 by the Utah Legislature, which it feels specifically negates the disability provisions of section 49-10, U.C.A., as amended.

As was explained to you at the hearing, Provo City elected not to participate in the disability program provided in 49-9a, and chose to provide its own program. Disability coverage of Provo City under any programs by the State terminated when Provo chose to exclude the benefits of 49-9a from its employees and provide another disability program. It would appear from these facts that the real issue here is one with Provo City and not the Utah State Retirement Board.

If I may provide any further information I shall be happy to do so.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Bert D. Hunsaker", is written over a horizontal line.

Bert D. Hunsaker  
Executive Director

BDH:whm

**THIRD JUDICIAL DISTRICT**  
**County of Salt Lake - State of Utah**

FILE NO. C86-8672

(✓ PARTIES PRESENT)

COUNSEL:

(✓ COUNSEL PRESENT)

Helen J. Ellis: James Brady, Helen EllisvsUtah State Retirement Board: Mark MadsonJones

CLERK

HON. Frank H. Noel

JUDGE

REPORTER

DATE: May 1, 1987

BAILIFF

The court having taken D's motion to dismiss and pltf's motion for Summary Judgment under advisement, and being fully advised rules follows: The affidavit of Bert Hunsaker is not yet filed and will not be considered by the court. The court is of the opinion that the legislature did not intend, with the passage of 49-9a to establish 2 separate, but simultaneous systems disability benefits. Disabilities occurring after the passage of 49-9a (1983) must qualify under 49-9a. It is established that pltf's disability occurred after the effective date of 9-9a but pltf. concedes it does not qualify under that act, therefore D's motion to dismiss is granted and pltf's motion for Summary Judgment is denied. D to prepare the order

5-1-87



IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Glen J. Ellis, )  
 )  
Plaintiff and Appellant, )  
 ) OPINION  
v. ) (For Publication)  
 )  
Utah State Retirement Board, ) Case No. 870252-CA  
 )  
Defendant and Respondent. )

Before Judges Billings, Greenwood, and Davidson.

FILED

BILLINGS, Judge:

-----  
JUN 6 1988  
Timothy M. Shea  
Clerk of the Court  
Utah Court of Appeals

Plaintiff Ellis appeals from the district court's decision affirming an administrative denial of his application for disability retirement benefits. Ellis' main contention is that the lower court erred in upholding the administrative ruling that the 1983 Utah Disability Act rather than the 1967 Utah State Retirement Act governed his claim for disability benefits. We affirm the district court's judgment.

Ellis was the head of the Provo City Attorney's Office for over 20 years. According to Ellis' attending physician, Ellis suffered numerous medical conditions stemming from the stressful nature of his employment. Consequently, on April 28, 1986, Ellis applied for disability retirement benefits. He was not totally disabled but, rather, sought less stressful legal employment.

The Utah State Retirement Board denied Ellis' application for disability retirement benefits finding the Legislature replaced the disability plan under which Ellis sought benefits, see Utah Code Ann. §§ 49-10-1 to -61 (1981), with an optional plan in 1983, see Utah Code Ann. §§ 49-9a-1 to -15 (1984), in which Provo elected not to participate and under which, in any event, Ellis would not have qualified because he was not totally disabled.

Ellis objected to the administrative denial of benefits and sought a formal hearing before the Board. In a hearing

held in February 1987, the Board listened to Ellis and then requested Ellis to leave the room so the Board could consider his application. The Board denied Ellis' application for benefits. In response, Ellis filed a complaint in district court seeking a review of the Board's decision. He claimed that if the Board was correct in finding the Legislature repealed the retirement plan under which he sought benefits, then this repeal was unconstitutional. Ellis also challenged the procedure of the Retirement Board claiming the Board failed to comply with the Utah Administrative Rulemaking Act and the Open and Public Meetings Act.

The Board moved to dismiss Ellis' complaint asserting it failed to state a claim upon which relief could be granted. Ellis moved for summary judgment arguing that, as a matter of law, the 1983 enactment of the long-term disability act did not repeal the retirement plan under which he sought benefits. The court granted the Board's motion to dismiss and denied Ellis' motion for summary judgment. This appeal ensued.

#### I.

At the outset, we must determine whether the Legislature replaced the 1967 retirement program under which Ellis sought and qualified for disability benefits. Since this issue raises a question of special law, see Utah Dep't of Admin. Servs. v. Public Serv. Comm'n, 658 P.2d 601, 610 (Utah 1983), we must determine whether the Board's decision falls within the limits of reasonableness or rationality. Id.

Our analysis of whether the Legislature replaced the earlier retirement program is best understood against the background of the relevant statutory history. Between July 1, 1967, and June 30, 1983, state retirement benefits were governed by the Utah State Retirement Act. Utah Code Ann. §§ 49-10-1 to -61 (1981). Section 49-10-28 of the Retirement Act provided that a state employee was entitled to disability benefits provided the employee had worked at least 10 years for the state and a medical examination determined that the employee was "physically or mentally incapable of performance of the usual duties of his employment and should be retired and the administrator so recommends to the board."

On March 10, 1983, the Legislature enacted the Utah Public Employees' Disability Act. 1983 Utah Laws ch. 223, § 1 (codified at Utah Code Ann. §§ 49-9a-1 to -15 (1984)). The Legislature did not expressly repeal the Utah State Retirement Act when it enacted the Disability Act; however, the Legislature clearly provided that the Disability Act would

cover all disabilities with a date of disability on or after the effective date of the Act, namely July 1, 1983. 1983 Utah Laws ch. 223, § 2; Utah Code Ann. § 49-9a-8 (1984). Provisions of the Disability Act relevant to the instant case, with our emphasis added, provide:

section 49-9a-4: All employers participating in the Utah state retirement system may cover their employees under this act. Nothing in this act shall require any political subdivision or educational institution to be covered by this act.

section 49-9a-8: All covered disabilities with a date of disability on or after the effective date of this act shall be administered under this act. Disabilities commencing before the effective date of this act shall be administered under the provisions of Chapter 10, Title 49. In no event, may a disability be covered under both Chapter 10, Title 49 and this act.

Thus, in 1983 the Legislature, by clear, express language provided that two disability retirement systems would co-exist in Utah. The earlier 1967 Retirement Act would continue to cover disabilities commencing before the effective date of the 1983 Disability Act. However, all those whose disabilities commenced after the 1983 Disability Act became effective would be governed by the later Disability Act.

In order to receive disability benefits under the Disability Act, the employee must be totally disabled. "Totally disabled" is defined by the Disability Act to mean "complete inability to engage in any gainful occupation which is reasonable, considering the employee's education, training and experience." Utah Code Ann. § 49-9a-3(10) (1984).<sup>1</sup> The effective date of the Disability Act was July 1, 1983. 1983 Utah Laws ch. 223, § 2. After July 1, 1983, the Retirement Board refused to accept contributions for the Chapter 10, Title 49 fund.

---

1. Ellis concedes he is not "totally disabled" as defined by the Disability Act and, therefore, does not qualify for disability benefits under this statutory scheme.

On appeal, Ellis contends the Legislature did not impliedly repeal the Utah State Retirement Act when it subsequently enacted the Disability Act. We agree that the Legislature did not impliedly repeal the Retirement Act but, rather, by clear language, it expressly replaced the Retirement Act with the Disability Act for disability retirements commencing after the Disability Act's effective date.

We acknowledge the authority governing implied repeals of legislation. As a general proposition, implied repeals are not favored and are found only if there is a manifest inconsistency or conflict between the earlier and later statutes. State v. Sorensen, 617 P.2d 333, 336 (Utah 1980). Subsequently enacted statutes relating to the same subject matter as previous statutes are, if possible, to be construed so as to make the later enactments harmonious with the former provisions. Stahl v. Utah Transit Authority, 618 P.2d 480, 481 (Utah 1980). Nonetheless,

[W]here a consistent body of laws cannot be maintained without the abrogation of a previous law, a repeal by implication of previous legislation . . . is readily found in the terms of the later enactment. It is the necessary effect of the later enactment construed in the light of the existing law that ultimately determines an implied repeal. . . . [W]here a conflict is readily seen by an application of the later enactment in accord with [the legislative] intent, it is clear that the later enactment is intended to supersede the existing law.

1A C. Sands, Sutherland Statutory Construction § 23.09, at 332 (4th ed. 1985). This is so because when there is an irreconcilable conflict between the new provision and the prior statutes relating to the same subject matter, the new provision is deemed controlling as it is the later expression of the Legislature. Murray City v. Hall, 663 P.2d 1314, 1318 (Utah 1983).

The foregoing authority, however, is inapplicable as we are persuaded the Legislature clearly and expressly provided that the Utah State Retirement Act would continue to govern disabilities arising before July 1, 1983, the effective date of the Disability Act, but all those disability retirements occurring thereafter would be governed by the Disability Act. Therefore, there is no irreconcilable conflict between the Retirement Act and the Disability Act as the two acts are

mutually exclusive. A disability is governed by one statutory act or the other, but not both. A consistent body of law is maintained and the Disability Act does not abrogate the Retirement Act.

The date of Ellis' disability is April 26, 1986, i.e., after July 1, 1983, which is the effective date of the Disability Act. Consequently, the Disability Act governs Ellis' disability retirement benefits. However, as previously mentioned, supra Note 1, Ellis is not "totally disabled" as required by the Disability Act. Therefore, Ellis is not entitled to disability benefits under the governing statutory scheme.

## II.

Notwithstanding our holding that Ellis does not qualify for benefits under either retirement scheme, we must now determine whether the Legislature's replacement of the Retirement Act with the Disability Act unconstitutionally deprived Ellis of vested contractual rights. Ellis contends that if the Disability Act governs his eligibility for disability retirement benefits, then he was unconstitutionally denied his vested contractual rights to an earned disability pension. Under Utah law, Ellis' argument is without merit.

There are two lines of authority addressing the rights of retired employees. One line of authority holds that a retirement plan is a gratuity in which the recipient has no vested rights and, consequently, is freely terminable at the employer's option. See, e.g., Keegan v. Board of Trustees, 412 Ill. 430, 107 N.E.2d 702 (1952) (retirement plans which mandate compulsory participation confer no vested rights upon recipients because statutes affording such benefits rest upon the sovereign power of the state and are not in the nature of contracts between the participant and the state); Roach v. State Bd. of Retirement, 331 Mass. 41, 116 N.E.2d 850 (1954) (holding that an employee had no vested rights to pension which were infringed by the repeal of the pension statute despite employee's eligibility for retirement prior to repeal); Dallas v. Trammell, 129 Tex. 150, 101 S.W.2d 1009 (1937) (public employee has no vested rights in a statutory pension).

The other line of authority adheres to the contractual view which reasons that once a public employee has fulfilled all the conditions precedent to receiving retirement benefits, the employee has certain vested rights which cannot be impaired by subsequent administrative or legislative enactments. See, e.g., Yeazell v. Copins, 98 Ariz. 109, 402 P.2d 541 (1965)

(right to public pension vests upon acceptance of public employment and laws of state are part of every contract); Betts v. Board of Admin. of the Pub. Employees' Retirement Sys., 21 Cal.3d 859, 148 Cal. Rptr. 158, 582 P.2d 614 (1978) (public employee's pension constitutes an element of compensation, and a vested contractual right to pension accrues upon acceptance of employment); In re State Employees' Pension Plan, 364 A.2d 1228 (Del. 1976) (vested contractual rights exist under state pension law for those public employees who have fulfilled eligibility requirements); Miles v. Tennessee Consolidated Retirement Sys., 548 S.W.2d 299 (Tenn. 1977) (public employee has contractual right to pension benefits). Under the contractual view, state legislatures may reasonably alter the terms or modify the retirement system to improve it or keep it on a sound basis prior to retirement for purposes of maintaining the integrity of the system. See, e.g., Betts, 582 P.2d at 617. Once the retirement benefits have vested, however, the Legislature can modify the plan only upon a showing that a vital state interest will be protected, Miles, 548 S.W.2d at 305, and only where a substantial substitute is provided for in lieu of the loss of benefits sustained. Newcombe v. Ogden City Public School Teacher's Retirement Comm'n, 121 Utah 503, 243 P.2d 941, 948 (1952).

Utah adheres to the contractual line of authority. In Driggs v. Utah State Teachers Retirement Bd., 105 Utah 417, 142 P.2d 657 (1943), the Utah Supreme Court recognized that an employee who receives a mere gratuitous allowance awarded for appreciation of past services has no vested rights in the allowance and it is terminable at will. Id. at 659. On the other hand, when a retired employee had made the requisite contributions and had satisfied all conditions precedent to his benefits, then the employee had a "vested right" in his retirement benefits as provided by the statute at the time of his retirement and a subsequent amendment could not reduce the amount of benefits to which the employee was entitled. Id. at 663-64.

Since Driggs, our supreme court has consistently held that the employee has this vested contractual right only when he has satisfied all conditions precedent to receiving the benefit, i.e., he has attained retirement age, or has been medically disabled. See Hansen v. Public Employees Retirement Sys. Bd. of Admin., 122 Utah 44, 246 P.2d 591, 597 (1952); Newcombe v. Ogden City Public School Teachers' Retirement

Comm'n, 121 Utah 503, 243 P.2d 941, 947 (1952).<sup>2</sup>

Based upon the foregoing authority, we are persuaded Ellis was not deprived of vested contractual benefits because he failed to satisfy the conditions precedent to his disability retirement benefits, namely Ellis had not become disabled and retired before the Legislature enacted the Disability Act. Consequently, he was not entitled to benefits under the governing Disability Act.

### III.

Ellis further contends the Retirement Board violated the Administrative Rulemaking Act<sup>3</sup> by failing to comply with rule making procedures when it determined the Retirement Act had been replaced by the Disability Act in deciding Ellis' eligibility for disability benefits. Ellis contends that such a determination was, in effect, a policy determination subject to adequate advance notice to all affected parties, an

---

2. We note, however, that Driggs was slightly modified in Newcombe. In Newcombe, the court held a statute which dissolved a statutory pension system invalid as to retired employees. Newcombe, 243 P.2d at 948. In dictum, however, the court acknowledged that had the Legislature "attempted to make changes in local retirement systems for the purpose of strengthening them, there would be no difficulty in finding authority to support such action." Id. at 946. To support this dictum, the court relied on several cases holding that vested rights of retired employees are not impaired by a reduction in the amount of the pension payments pursuant to statutes enacted subsequent to retirement, provided the purpose of such statutes is to render the retirement pension system actuarially sound.

3. The Administrative Rulemaking Act, Utah Code Ann. §§ 63-46a-1 to -15 (1986), was significantly revised and amended in 1987, after the commencement of this action. Accordingly, our analysis focuses on the administrative provisions in effect at the time of Ellis' hearing before the Retirement Board.

opportunity to participate, and an opportunity to comment.<sup>4</sup>

Any agency subject to the Administrative Rulemaking Act promulgating a rule must follow the procedures specified. See Williams v. Public Serv. Comm'n, 720 P.2d 773, 775 (Utah 1986) (interpreting the Utah Rule Making Act, the predecessor to the Administrative Rulemaking Act). The Administrative Rulemaking Act requires rule making whenever "agency actions affect a class of persons" and defines a rule as "a statement made by an agency that applies to a general class of persons, rather than specific persons . . . [which] implements or interprets policy made by statute . . . ." Utah Code Ann. §§ 63-46a-(3)(a), -2(8) (1986).<sup>5</sup>

The critical question, therefore, is whether the Retirement Board's decision to deny Ellis disability retirement benefits based upon its interpretation of the language of the Disability Act amounted to a rule within the meaning of the Administrative Rulemaking Act. "We acknowledge that there is a variance of opinion on when an agency is engaged in rule making and must follow formal rule making procedures, and when an agency may legitimately proceed by way of adjudication." Williams, 720 P.2d at 776. See generally 2 K. Davis, Administrative Law Treatise § 7.2 (2d ed. 1979). "Many rules are the product of rulemaking, and rulemaking is the part of the administrative process that resembles a legislature's enactment of a statute. An order is the product of adjudication, and adjudication is the part of the

---

4. The Retirement Board contends that Ellis did not raise the applicability of the Administrative Rulemaking Act below and, therefore, is precluded from raising this issue for the first time on appeal. We disagree. The record indicates that Ellis raised this issue not only in his amended complaint but also in his motion for summary judgment.

5. The Retirement Board argues that it is exempt from the Administrative Rulemaking Act because it is a "political subdivision." Since the commencement of this action, the Utah State Retirement Act was amended and the Legislature decreed that the Board "shall voluntarily comply" with the provisions of the Administrative Rulemaking Act. Utah Code Ann. § 49-1-201(4) (1987). This new language implies that during the period of time at issue here the Board may indeed have been exempt from the Act's coverage. But see Utah Attorney General Informal Opinion 86-16 (June 4, 1986), wherein Utah's Attorney General concludes that the Retirement Board was required to comply with the requirements of the Administrative Rulemaking Act. Inasmuch as we conclude that the Board, in any event, complied with the Act, we need not decide whether it was required to do so.



administrative process that resembles a court's decision of a case." 2 K. Davis, Administrative Law Treatise § 7.2, at 4 (2d ed. 1979).

In Williams v. Public Serv. Comm'n, 720 P.2d 773 (Utah 1986), the Utah Supreme Court interpreted the definition of "rule" contained in the Utah Rule Making Act, the predecessor to the Administrative Rulemaking Act.<sup>6</sup> In Williams, the petitioners charged the Public Service Commission with failure to follow proper administrative procedures in concluding that it did not have jurisdiction to regulate one-way mobile telephone paging services. The supreme court held that the Commission's letter stating that no certificate of public convenience and necessity was required constituted a "rule" and, consequently, the Commission, when reaching this determination, should have followed the rule making procedures. Id. at 776. The court relied on three factors in reaching this conclusion. First, the Commission's decision was generally applicable. Second, the letter interpreted the scope of the Commission's statutory regulatory powers, thus interpreting the law within the meaning of the Act. Finally, in so acting, the Commission made a "change in clear law" by reversing its long-settled position regarding the scope of its jurisdiction and announcing a fundamental policy change. Id.

Based upon the foregoing, we conclude the Retirement Board was not engaged in rule making and, therefore, did not have to adhere to rule making procedural requirements. Rather, the Board was merely applying the explicit statutory language of the Disability Act to the facts of Ellis' case. The explicit language of the Disability Act provides that that Act, not the Retirement Act, governs all disabilities with a date of disability after July 1, 1983. Ellis' date of disability is April 26, 1986. This administrative process does not resemble the Legislature's enactment of a statute. On the contrary, the administrative process examined here resembles a court's decision applying explicit statutory language. The only policy decision which was generally applicable was made by the Legislature in its enactment of the Disability Act. The change in clear law in this instance was promulgated by the Legislature, not the Retirement Board. Therefore, the Retirement Board was not compelled to follow the rule making procedures of the Administrative Rulemaking Act.

---

6. The court stated that its conclusion would not be any different had the court been called upon to interpret the definition of "rule" within the meaning of the subsequently enacted Administrative Rulemaking Act. Williams, 720 P.2d at 775 n.7.

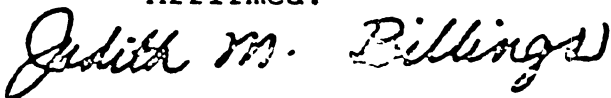
IV.

The final issue we address is whether the Retirement Board violated the Open and Public Meetings Act, Utah Code Ann. §§ 52-4-1 to -9 (1981), when it requested Ellis to leave the room while it deliberated his appeal from the administrative denial of benefits.

The Open and Public Meetings Act requires that every "meeting" of a "public body" be open to the public. As used in this Act, "public body" means "any administrative, advisory, executive or legislative body of the state or its political subdivisions which consists of two or more persons that expends, disburses or is supported in whole or in part by tax revenue and which is vested with the authority to make decisions regarding the public's business." Utah Code Ann. § 52-4-2(2) (1981).

We are persuaded that the Open and Public Meetings Act is not applicable to the Retirement Board. First, the Utah State Retirement Fund is administered as a common trust fund and not supported by tax revenue. Second, the Retirement Board is not vested with authority to make decisions regarding the public's business. The Board administers funds for the benefit of the beneficiaries and not for the public at large. Hansen v. Utah State Retirement Bd., 652 P.2d 1332, 1338 (Utah 1982). When Hansen was decided, "[s]ome 80 percent of the beneficiaries [were] not state employees, but employees of municipalities or counties." Id. "No state funds [were] appropriated to meet any administrative costs." Id. Ellis' argument that the Board acted contrary to the Open and Public Meetings Act is without merit.

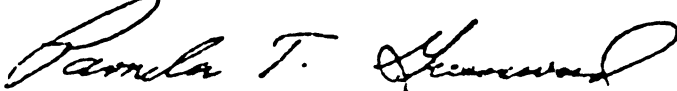
Affirmed.



Judith M. Billings, Judge

-----

WE CONCUR:



Pamela T. Greenwood, Judge



Richard C. Davidson, Judge

event shall the amount of the death benefit provided by this section be less than \$600 and the accumulated contributions of the deceased member, except for:

(1) A person who entered covered employment at age 65 or later. This deceased member's benefit shall be a refund of his accumulated contributions or \$600, whichever is larger.

(2) A deceased member who has no dependent beneficiary. This deceased member's death benefit shall be a refund of his accumulated contributions or \$600, whichever is larger.

(c) The foregoing part of the death benefit as provided in (b), based upon the member's past compensation, shall not be paid to the beneficiary of an inactive member unless the member has credit for ten or more years of service or unless the death of the member occurs either: (1) Within a period of 120 calendar days after the last day of service for which said person received compensation; (2) while said person is still physically or mentally incapacitated from performance of his duties, provided that such incapacity has been continuous since the last day of service for which he received compensation, or (3) said person is on military leave and has elected to remain in active contributing membership status as provided in section 49-10-19; providing that in no case shall such part of the death benefit as cited in this paragraph be paid to any person except a dependent beneficiary.

(d) The death benefit for an inactive member, except as otherwise provided in (c) above, shall be a return of the deceased member's accumulated contributions only.

(e) A member, or his beneficiary after death of the member, may elect, by a written document filed with the retirement office, to have the death benefit paid in monthly installments, fixed in number or amount, but not involving life contingencies, subject to such rules as the board may adopt. Regular interest shall be credited on the unpaid balance of such benefit.

Payment of the foregoing death benefits by the retirement office shall be deemed to be a full acquittance of a beneficiary's claim against the system, and the said system shall not be liable for any further or additional claims or assessments on behalf of the deceased member.

Unless specified otherwise in a written document filed in the retirement office on or after July 1, 1971, death benefits payable to dependent beneficiaries shall be made in the following order of precedence:

- (1) Surviving spouse,
- (2) Surviving children under 21 years of age, and mentally or physically handicapped children regardless of age, share and share alike,
- (3) All other dependent beneficiaries.

If the deceased member has no dependent beneficiary and section 49-10-42 is not applicable, the last written beneficiary designation on file with the retirement office shall be used in determining the beneficiary or beneficiaries to whom death benefit payments should be made. In the event there are no dependent beneficiaries and no beneficiary designation on file with the retirement office, the death payments shall be distributed in accordance with the provisions of section 49-10-43.

In the implementation of this section and for administrative purposes only, the Utah tax commission is authorized and directed to provide pertinent information to the retirement administrator. upon

his request, concerning dependents claimed by a deceased member on his income tax return covering the year previous to his death.

1973

**49-10-28. Disability benefits - Requirements for eligibility - Payment for medical services and advice rendered to board.**

A member shall be entitled to receive disability benefits upon approval of the retirement board after medical examination if the following requirements have been met:

(a) Said member has completed and has standing to his credit ten or more years of service on the date of disability retirement.

(b) Said member, within two years after last rendering covered service, and whose covered employment was terminated due to a physical or mental condition existing at the time of termination, has been examined by one or more physicians or surgeons selected by the board pursuant to the request of his employer, said member or person acting on his behalf or of the board.

(c) Said medical examination and such other evidence as may be available shows to the satisfaction of the administrator that said member is physically or mentally incapable of the performance of the usual duties of his employment and should be retired and the administrator so recommends to the board.

The board shall obtain and pay from the interest earnings of the fund for such medical services and advice as may be necessary to carry out the provisions of this section.

1967

**49-10-28.5. Disabled member - Continuation of eligibility for retirement benefits - "Benefit protection contract."**

Any department or political subdivision, covered by any system administered by the retirement office which has established a paid salary protection program under which its officers or employees, during periods of disability arising out of sickness or accident, shall be paid by it or by an insurance underwriter of the disabled member's rate of compensation in effect at the time disability occurred, may with the approval of the retirement board enter into a "benefit protection contract" with the retirement office.

The benefit protection contract shall among other things provide a means whereby:

(1) The disabled person shall be deemed to be an active participating member of his respective retirement system and as such shall continue to accrue full-time service and salary credits during the time member and employer contributions, based upon his full rate of pay in effect at the time disability began, are paid to the retirement office.

(2) The disabled person or his beneficiary shall remain eligible during the contract period for any retirement system benefits provided by the retirement system act under which he is a member.

The retirement board shall establish the manner and times when member and employer contributions are to be paid. A failure to make the required payments shall be cause for the board to cancel the contracts as to all individuals or any individual covered by the contract. Service and salary credits granted and accrued up to the time of cancellation, however, shall not be forfeited.

During the term of the contract the disabled person shall not be entitled to receive disability retirement benefits under the provisions of the retirement

for benefits and all matters relating to the administration of the fund. If the executive officer of board is unable to determine factors such as length of service, compensation, or the age of any employee covered by this act, the executive officer may estimate these factors for purposes of any necessary determination. An employee may challenge any decision of the board and appeal that decision to a proper district court of the State of Utah.

2) Nothing in this act shall require the observance of formal rules of pleading or evidence in any proceeding before the board. 1983

#### 9a-7. Employer contribution rate.

During each legislative session, the retirement board shall certify to the legislature the percentage of employer contributions required to fund the public employees' disability fund. Upon the board's recommendation, the legislature shall adjust retirement contribution rates to maintain adequate funding for the disability fund. 1983

#### 9a-8. Disabilities covered by this chapter or retirement act.

All covered disabilities with a date of disability on or after the effective date of this act shall be administered under this act. Disabilities commencing before the effective date of this act shall be administered under the provisions of Chapter 10, Title 49. In no event, may a disability be covered under both chapter 10, Title 49 and this act. 1983

#### 9a-9. Periods for which benefits are payable.

(1) Upon receipt of proof that an employee has become totally disabled as a result of (a) accidental bodily injury which is the sole cause of disability and is sustained while this act is in force (hereinafter referred to as the injury) or (b) disease or illness causing total disability commencing while this act is in force (hereinafter referred to as the illness), the fund will pay to the employee a monthly disability benefit for each month the total disability continues beyond the elimination period, not to exceed the maximum benefit period.

(2) Successive periods of disability which: (a) result from the same or related causes, (b) are separated by less than six months of continuous full-time work at the individual's usual place of employment, and (c) commence while the individual is an employee covered by this act, shall be considered as a single period of disability. The inability to work for a period less than 15 consecutive days shall not be considered as a period of disability. Otherwise, successive periods of disability shall be considered as separate periods of disability.

(3) The retirement board shall have authority at any time to have any employee claiming disability examined by a physician chosen by the board to determine if the employee is disabled and the extent of the disability. 1983

#### 9a-10. Amount of benefit payments - Physician's care required - Reductions in benefit payments.

(1) The monthly income disability benefit shall be two-thirds of the regular monthly salary paid as of the last day of the actual service. Payments shall not be made under the fund established in this act for any period of disability unless the employee is under the regular care and treatment of a physician.

(2) The monthly disability income benefit otherwise provided under the fund shall be reduced by any amount received by or due the employee

time during which the employee is entitled to receive the monthly disability benefit:

(a) Social security, including all benefits received by the employee, the employee's spouse, and the employee's dependent children. In the event social security benefits are increased to compensate for a change in the consumer price index, the monthly disability income benefit shall not be further reduced, but shall only be offset by benefits determined at the level in effect at the time benefits commence.

(b) Workmen's compensation.

(c) Armed services, retirement or disability programs.

(d) Civil service retirement or disability programs.

(e) Disability benefits under any group insurance plan providing disability income benefits for which contributions or payroll deductions are made by the employer.

(f) Any retirement or disability program for which the employee is eligible, including, but not limited to, programs provided by the United States government, state government, or by any department or subdivision thereof.

(3) Any amounts received by or payable to the employee from one or more of the sources listed in subsection (2) shall be considered as amounts received by the employee whether or not the amounts were actually received by the employee.

(4) In order to be eligible for benefits under this act the employee shall first apply for all disability benefits from governmental entities listed in subsection (2) to which the employee is entitled. The employee shall also first apply at the earliest eligible age for all retirement benefits to which the employee is or may be entitled. If the employee fails to apply, the board may make application on the employee's behalf. The board may treat as income any amount the employee is entitled to receive but does not receive because application for benefits is not made by the employee. The board may reduce the monthly disability accordingly. 1983

#### 9a-11. Psychopathic disability.

The fund established under this act does not provide monthly disability benefits for disability that is primarily due to psychopathology. In the place of monthly disability benefits for psychopathology, the following benefits are provided:

(1) Up to two years of disability benefits based on the usual disability provisions.

(2) During the period of disability not to exceed two years, payment by the board of up to \$10,000 for psychiatric expenses, including rehabilitation expenses approved by the board's consultants.

(3) If the employee is institutionalized, payment by the board of disability benefits according to contractual provisions for a period not to exceed five years. 1983

#### 9a-12. Disabilities not covered.

The fund does not cover any loss resulting from the following:

(1) Self-inflicted injury.

(2) War or any act of war, or suffering while in military or naval services of any country at war.

(3) Alcoholism.

(4) Drug addiction. 1983

#### 9a-13. Termination of disability payments - Calculation of disabled employee's retirement

The Insurance Department shall biennially audit all funds and programs authorized under this chapter and report its findings to the governor and the Legislature. 1987

## Chapter 9. Utah Public Employees' Disability Act.

Part 1. General Provisions  
Part 2. The System and Fund  
Part 3. Contributions  
Part 4. Benefits

### Part 1. General Provisions

49-9-101. Short title.  
49-9-102. Purpose.  
49-9-103. Definitions.

#### 49-9-101. Short title.

This chapter is known as the "Utah Public Employees' Disability Act." 1987

#### 49-9-102. Purpose.

The purpose of this chapter is to provide long-term disability benefits for employees of employers participating in any system administered by the board except employees covered under the Firefighters' Retirement Act, or employees covered under the Public Safety Retirement Act who are covered under a long-term disability program offered by a political subdivision which is substantially equivalent to the program offered by the state under this chapter. The program shall be administered by the executive officer of the board through the retirement office, under the policies and rules promulgated by the board. 1987

#### 49-9-103. Definitions.

(1) "Educational institution" means a political subdivision or an instrumentality of a political subdivision, an instrumentality of the state, or any combination of these entities, which is primarily engaged in educational activities or the administration or servicing of educational activities. The term includes, but is not limited to, the State Board of Education and any instrumentality of the State Board of Education, institutions of higher education and their branches, school districts, and vocational and technical schools.

(2) "Employee" means any employee of an employer who participates in any system administered by the board, except those employees exempt from coverage under Section 49-9-102.

(3) "Elimination period" means the five months at the beginning of each continuous period of total disability for which no benefit will be paid and commences with the date of disability.

(4) "Maximum benefit period" means the maximum period of time the monthly disability income benefit will be paid for any continuous period of total disability.

(5) "Physician" means a legally qualified physician.

(6) "Rehabilitative employment" means any board-approved occupation or employment for wage or profit, for which the employee is reasonably qualified by education, training, or experience, in which the employee engages while unable to perform his occupation as a result of injury or illness.

(7) "Total disability" means the complete inability, due to injury or illness, to engage in the employee's regular occupation during the elimination

period and the first 24 months of disability benefits. Thereafter, "total disability" means the complete inability to engage in any gainful occupation which is reasonable, considering the employee's education, training, and experience. "Total disability" exists only if during any period of "total disability" the employee is under the regular care of a physician other than the employee.

(8) "Date of disability" means the date on which a period of continuous disability commences, and may not commence on or before the last day of actual work. 1987

### Part 2. The System and Fund

49-9-201. Creation of program.  
49-9-202. Creation of trust fund.  
49-9-203. Eligibility for membership in the program.

#### 49-9-201. Creation of program.

There is created for employees of employers participating in any system administered by the board, unless otherwise exempted under this chapter, the "Public Employees' Long Term Disability Program." 1987

#### 49-9-202. Creation of trust fund.

There is created the "Public Employees' Disability Trust Fund" for the purpose of paying the benefits and costs of administering this program. The fund shall consist of all money paid into it in accordance with this chapter, whether in the form of cash, securities, or other assets, and of all money received from any other source. Custody, management, and investment of the fund shall be governed by Chapter 1, Title 49. 1987

#### 49-9-203. Eligibility for membership in the program.

All employers participating in any system administered by the board may cover their employees under this chapter, except employees covered under the Firefighters' Retirement Act. Nothing in this chapter requires any political subdivision or educational institution to be covered by this chapter. 1987

### Part 3. Contributions

49-9-301. Contributions to fund program - Adjustment of retirement contribution rate.  
49-9-302. Rates established on basis of agency experience - Limitations - Annual report to governor and Legislature.

#### 49-9-301. Contributions to fund program

Adjustment of retirement contribution rate.

During each legislative session, the board shall certify to the Legislature the percentage of employer contributions required to fund the Public Employees' Disability Trust Fund. Upon the board's recommendation, the Legislature shall adjust retirement contribution rates to maintain adequate funding for the disability trust fund. 1987

#### 49-9-302. Rates established on basis of agency experience - Limitations - Annual report to governor and Legislature.

The board shall establish the contribution rate based on the experience of the various public agencies and political subdivisions participating in the program, which rate may not exceed 1% of salaries and wages and shall report annually to the governor and the Legislature the current contribution rates assessed to the public agencies and political subdivisions. 1987